

# Advisory Opinion # 155

Parties: City of Herriman

Issued: April 14, 2015

## TOPIC CATEGORIES:

### Impact Fees

Herriman City has requested early review of its Parks, Trails, and Recreation Impact Fee. This impact fee substantially complies with the Utah Impact Fees Act.

Herriman's "investment per thousand" method is a valid measure of level of service. The City's Plan adequately identifies capacity to accommodate future growth and the demands new growth will inflict on level of service.

The City meets the Act's requirements of identifying how to meet future growth demands by indicating, although not specifying, that it will spend impact fees on improvements as opportunities arise.

As the Impact Fee is implemented and funds collected, further review for compliance with the Act may be necessary.

#### DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



The Office of the Property Rights Ombudsman  
Utah Department of Commerce  
PO Box 146702  
160 E. 300 South, 2<sup>nd</sup> Floor  
Salt Lake City, Utah 84114

(801) 530-6391  
1-877-882-4662  
Fax: (801) 530-6338  
[www.propertyrights.utah.gov](http://www.propertyrights.utah.gov)  
[propertyrights@utah.gov](mailto:propertyrights@utah.gov)



GARY R. HERBERT  
*Governor*

SPENCER J. COX  
*Lieutenant Governor*

# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

FRANCINE A. GIANI  
*Executive Director*

BRENT N. BATEMAN  
*Lead Attorney, Office of the Property Rights Ombudsman*

### ADVISORY OPINION

Advisory Opinion Requested by: City of Herriman

Local Government Entity: City of Herriman

Scope of Advisory Opinion: Parks, Trails, and Recreation Impact Fee  
Early Review

Date of this Advisory Opinion: April 14, 2015

Opinion Authored By: Brent N. Bateman  
Office of the Property Rights Ombudsman

### Issues

Early review of Herriman City's Draft Parks, Trails, and Recreation Impact Fees.

### Summary of Advisory Opinion

Herriman City's impact fees substantially comply with the Impact Fees Act with respect to matters currently capable of review. Future review for compliance with the Impact Fee Act will be needed as the City imposes, collects, and spends impact fee funds

### Review

A Request for an Advisory Opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE § 13-43-205. An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at

the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A Request for an Advisory Opinion was received from John N. Brems, Herriman City Attorney, on November 25, 2014. As a courtesy, a copy of that request was sent to Mr. Ross K. Ford, Executive Director of the Utah Home Builders Association on December 3, 2014. No submissions were received by any third party.

## **Evidence**

The following documents and information with relevance to the issue involved in this Advisory Opinion were reviewed prior to its completion:

1. *Herriman City Draft Impact Fee Facilities Plan: Parks, Trails, and Recreation*, dated November 2014 and prepared by Zion's Bank Public Finance;
2. *Herriman City Draft Impact Fee Analysis: Parks, Trails, and Recreation*, dated November 2014 and prepared by Zion's Bank Public Finance; and
3. *Herriman City Draft Ordinance Reaffirming the Adoption of the Impact Fee Facilities Plan and Impact Fee Analysis for Parks, Trails, and Recreation*.
4. *Revised Herriman City Draft Impact Fee Facilities Plan: Parks, Trails, and Recreation (redline)*, dated March 2015 and prepared by Zion's Bank Public Finance;
5. *Revised Herriman City Draft Impact Fee Analysis: Parks, Trails, and Recreation (redline)*, dated February 2015 and prepared by Zion's Bank Public Finance.

## **Introduction: Early Review of Impact Fees**

By necessity, early review of impact fees is limited. The Utah Impact Fee act contains extensive requirements covering all aspects of an impact fee system. However, many of those statutory provisions are active only upon collection or expenditure of the fees. Early review of an impact fee occurs prior to the collection or expenditure of any funds. Thus, many statutory requirements, such as the requirement to segregate the funds in a separate ledger account or refund unspent fees within six years, cannot be reviewed early. They have not occurred.

Early review of an impact fee is a review of the documents and procedures that establish the fee, and their compliance with the requirements of the Impact Fee Act. Accordingly, no party should assume that this Advisory Opinion ends the inquiry into the legality of the fees. In time, as the fees are collected and expended, all involved parties should take continual care to ensure that the impact fee complies with the Impact Fee Act.

Likewise, interested parties should note that an early review of an impact fee by the Property Rights Ombudsman is limited to a *legal* review. No attempt is made to review the fee's accounting and engineering conclusions (beyond a cursory check for obvious errors and legal compliance). The Ombudsman's office has neither the capacity nor expertise to verify whether an impact fee meets the standards of practice for those professions. In addition, all impact fees

are based upon certain data and future projections, such as projected new growth in an area or projected costs of needed facilities. The legal review undertaken here cannot verify the facts nor guarantee the accuracy of the projections. This Opinion will examine the documents provided only within the legal framework of the Impact Fee Act.

Subject to those limitations, this Office has made every attempt to accurately and thoroughly apply the Impact Fee Act to the materials and facts provided. Where questions arise regarding the conclusions in this Advisory Opinion or the accuracy of the fees in general, whether reviewed herein or unreviewed, the parties are encouraged to make further inquiries.

## **Analysis**

The Utah Impact Fees Act is found in Title 11, Chapter 36a of the Utah Code (“Act”). In accordance with UTAH CODE § 13-43-205(1), Herriman City has requested a review of its Parks, Trails, and Recreation Impact Fees (“Impact Fees”) by providing a *Draft Impact Fee Facilities Plan: Parks, Trails, and Recreation* (“IFFP”), a *Draft Impact Fee Analysis: Parks, Trails, and Recreation* (“Analysis”), and a draft *Ordinance Reaffirming the Adoption of the Impact Fee Facilities Plan and Impact Fee Analysis for Parks, Trails, and Recreation* (“Ordinance”). In undertaking this analysis, this Advisory Opinion will forego reproduction of some lengthy sections of the Act, which may be readily accessed. Only sections of the Act directly applicable to this review will be discussed.

### **I. Permissible Public Facilities**

It is currently unknown whether the Impact Fees comply with the public facilities provisions of the Act. All Impact Fees must comply with UTAH CODE § 11-36a-201(2). This section dictates that impact fees may be used only for those public facilities defined in UTAH CODE § 11-36a-102. That latter section states that impact fees can apply to “only the following impact fee facilities that have a life expectancy of 10 or more years and are owned or operated by or on behalf of a local political subdivision or private entity:” including for our purposes “(f) parks, recreation facilities, open space, and trails.” UTAH CODE § 11-36a-102(16).

Thus, in order to comply with this section of the Act, Herriman City's impact fees must be expended on (1) parks, recreation facilities, open space, and trails, (2) with a 10 year life expectancy, and (3) owned or operated by or on behalf of Herriman City.

Normally, an impact fee facilities plan will list the specific facilities upon which it intends to spend the impact fees. Herriman City does not do so. Instead, the IFFP states that impact fee revenue will be spent on “land or park improvements — as best meets the need of the City at the time and as opportunities arise.” Until such facilities are actually selected for purchase and/or improvement, it is impossible to verify whether those facilities meet the Act’s three-pronged public facilities test. Compliance or noncompliance with this section of the Act can only be determined once the facilities are selected. Thus, it is unknown whether Herriman City’s impact fees comply with this requirement in the Act. The requirement to specify public facilities is further discussed below.

## II. The Impact Fee Facilities Plan

In order to establish a legal Impact Fee, Herriman City must prepare and adopt an impact fee facilities plan that complies with the Impact Fee Act. UTAH CODE § 11-36a-302 lists several items and calculations that must be included within an IFFP. The relevant requirements can generally be summarized into two categories: (i) Level of Service, and (ii) Revenue Source.

### A. *Level of Service*

The Act defines “level of service” as “the defined performance standard or unit of demand for each capital component of a public facility within a service area.” UTAH CODE § 11-36a-102(11). UTAH CODE § 11-36a-302(1) requires an IFFP to:

- (i) identify the existing level of service;
- (ii) establish a proposed level of service;
- (iii) identify any excess capacity to accommodate future growth at the proposed level of service;
- (iv) identify demands placed upon existing public facilities by new development activity at the proposed level of service; and
- (v) identify the means by which the political subdivision or private entity will meet those growth demands.

To restate, the Impact Fee Facilities plan must calculate the level at which the current parks, trails, and recreation facilities serve the public. Also, the City must calculate the level of service that it needs to accommodate projected growth, and explain how it is going to get there. The Act prohibits using Impact fees to raise the level of service on existing development. Impact fees are only to be used to provide new growth with the facilities necessary to achieve the City’s level of service.

The Act does not dictate how the level of service calculation is to be done. Herriman City has elected to calculate its existing Parks, Trails, and Recreation level of service using an “investments per thousand” method. The City has estimated the dollar value of existing park facilities, including both property and improvements, and expressed that number per 1000 city residents. This method, one of several that could be chosen, defines a performance standard/unit of demand for parks and recreation facilities, as required by the Act. Thus, “investment per thousand” is a valid method to measure level of service.

Using the *investment per thousand* method, Herriman City also establishes a proposed level of service, as required by the Act. This proposed level of service exceeds the existing level of service by some measure. Nevertheless, Herriman City bases its final Impact Fee on the *existing* level of service rather than the proposed level of service. In other words, Herriman is only charging new growth an impact fee sufficient to bring new growth up to the current level of service. This is perfectly permissible and may be preferable—it results in a lower fee.

UTAH CODE § 11-36a-302(1)(a)(iii) requires the City to “identify any excess capacity to accommodate future growth at the proposed level of service.” In the IFFP, Herriman City indicates that there is no excess capacity in its existing parks, recreation and trails facilities, with the exception of the equestrian center. Herriman supports this conclusion by providing a comparison with the level of service of other communities in Utah, and the results of community surveys. Most prominently, the City includes as an appendix to its IFFP a letter from its expert, a landscape planner who drafted the City’s parks master plan. This expert concludes that, after a review and analysis of relevant data, Herriman City has no excess capacity in its parks and trails system. This showing sufficiently identifies excess capacity to accommodate future growth.

Finally, the Impact fee act requires Herriman City to identify the demands the new growth will inflict upon its parks and recreation level of service, and how those demands will be met. Herriman City adequately identifies the demands for new growth by demonstrating that, without adding new facilities, the level of service will decline as anticipated population increases.

UTAH CODE § 11-36a-302(1)(a)(v) requires Herriman to identify the means by which it will meet those growth demands. As stated above, this would typically be done by specifying public facilities that the City plans to construct and spend impact fees on. Herriman, however, does not provide a list of specific facilities. Instead, Herriman states that “fees collected will be used for capital improvements — land or park improvements — as best meets the needs of the city at the time and as opportunities arise.” In other words, the City intends to collect impact fee money without any knowledge of what it will be spent on. The city only states a vague plan to spend it as the need and opportunities arise.

This approach is not preferred. Moreover, UTAH CODE § 11-36a-602 states that

- A local political subdivision may expend impact fees only for a system improvement:
- (a) identified in the impact fee facilities plan; and
  - (b) for the specific public facility type for which the fee was collected.

Thus the Act requires that collected fees be expended upon a system improvement that has been identified in the IFFP.

Nevertheless, we do not believe that this section of the IFFP violates the Act. The word “identify” is key. In both UTAH CODE § 11-36a-602 and in UTAH CODE § 11-36a-302(1)(a)(v), the City is required to *identify* the improvements it plans to use impact fees on. A narrow view of this word would equate to “specify” — which would make necessary the specific identification of the proposed facilities. However, the plain meaning of the word “identify” is to “establish or indicate.” Although specificity may be preferable, and in many cases may be necessary, we feel that a narrow view of the word “identify” would lead to an inefficient result in some instances. Better city planning and better located and improved parks can sometimes be obtained by following Herriman’s intended method. The requirements in the Act are met because Herriman *indicates* that it will spend impact fees on “capital improvements — land or park improvements — as best meets the needs of the city at the time and as opportunities arise.” As stated above, this

approach will require that the proposed facilities be reviewed for compliance with the act at the time they are purchased rather than at the establishment of the fee. Specificity will be necessary at some point. The funds cannot be spent without specifying what the funds will be spent on, and determining that those funds satisfy the Act's three-pronged public facilities test. But it is not necessary in this case to read "identify" in the Act to require specificity in this early stage. We find, therefore, that the Act does not prohibit Herriman's approach.

### *B. Revenue Source Calculation*

The Impact Fee Act also requires a City to "generally consider all revenue sources to finance the impacts on system improvements." UTAH CODE § 11-36a-302(2). This means that if the necessary system improvements can be paid by means besides impact fees, those means should be included in the calculation. Herriman City appears to have done this to a sufficient degree to comply with the Act.

Herriman anticipates that land for trails will be acquired by other means, "through easements and grants," and will not need to be purchased. Accordingly, Herriman does not include the cost of trail lands in its impact fee calculation. The City then indicates that it does not anticipate any further revenue sources, except that donations of system improvements by a developer will be used to credit impact fees to the benefit of the developer. Nothing has been provided that calls these conclusions by the City into question. Although the IFFP's consideration of these revenue sources is brief and very cursory (not a "thorough discussion"), it appears to comply with the requirements in the Act to consider all revenue sources.

Accordingly, Herriman City's Impact Fee Facilities Plan generally complies with the Impact Fee Act.

## **III. The Impact Fee Analysis**

A City creating an impact fee must also prepare an Impact Fee Analysis. Therein, the data and information from the IFFP and projections about future demand from development determine the maximum fee that can be imposed. UTAH CODE § 11-36a-304 requires that an Impact Fee Analysis

- (a) identify the anticipated impact on or consumption of any existing capacity of a public facility by the anticipated development activity;
- (b) identify the anticipated impact on system improvements required by the anticipated development activity to maintain the established level of service for each public facility;
- (c) subject to Subsection (2), demonstrate how the anticipated impacts described in Subsections (1)(a) and (b) are reasonably related to the anticipated development activity;
- (d) estimate the proportionate share of:
  - (i) the costs for existing capacity that will be recouped; and

- (ii) the costs of impacts on system improvements that are reasonably related to the new development activity; and
- (e) based on the requirements of this chapter, identify how the impact fee was calculated.

Herriman City bases its Analysis on its projected growth calculations. Herriman explains that those growth calculations were obtained using historical growth data, with consideration of land acreage within the City anticipated to be developed. Although the data and associated explanations only provide general estimates, they provide a sufficient foundation for a reasonable identification of anticipated growth.

Using those calculations, Herriman City identifies the impact upon the demand expected by this new growth, by showing that if new growth continues and no further facilities are established, the level of service will decline. Herriman City then identifies how it will maintain the current level of service in the face of anticipated growth by showing the amounts that must be invested in order to maintain the present “investment per thousand” level of service. Assuming the accuracy of the growth projections, nothing could be found in these calculations that violate the Impact Fee Act.

The crux of an impact fee analysis is the proportionate share calculation. This is where the amounts needed to maintain the level of service is apportioned to each new unit of growth. Herriman does this by calculating the number of standard units (derived from the population projections) that are anticipated to enter the City within the next ten years. The Analysis then divides the total funds needed within the next ten years by the total number of new citizens anticipated to arrive in Herriman during the next ten years. This results in a per capita proportionate share calculation. Ten years is an acceptable projection length.

The analysis then converts the per capita proportionate share calculation into a per unit calculation by multiplying the per capita number by the number of capitas in a standard unit. The City uses different multipliers for single family households and multi-family households to account for different average household sizes. The result is the proportional share per unit, and the impact fee. The calculation used appears to comply with the requirements of the Act.

#### **IV. The Impact Fee Enactment**

Finally, the Impact Fee Act requires adoption of an impact fee enactment. The provisions required in the Act to appear in the enactment are verifiable by checklist – they are either in the enactment or they are not. Herriman City’s proposed enactment contains each of the required provisions in UTAH CODE § 11-36a-401. Herriman establishes its service area as the entire city in Section 7. The enactment contains in Section 5 a very light, but nonetheless legally adequate schedule of impact fees. Also in section 5, Herriman indicates its intent to charge parks and recreation impact fees on residential development, indicates the fee for both single family and multi-family development, and adopts by reference the formulas to calculate the fee set forth in the Impact Fee Analysis.



Herriman's enactment also contains in Section 6 a required provision authorizing it to adjust the standard impact fee in appropriate circumstances or based upon studies or data submitted by the developer. Likewise, the enactment in section 6.3 requires Herriman City to credit a developer for any dedication of land for, improvement to, or new construction of, any system improvements, as the statute requires. Accordingly, the Enactment is compliant with the Act.

### **Conclusion**

Herriman City's impact fees substantially comply with the Impact Fees Act. Nevertheless, Herriman's stated intent to "spend as opportunity arises" on permissible capital facilities, although compliant with the Act at present, will require further review at such time that facilities are identified and impact fees spent.

Brent N. Bateman, Lead Attorney  
Office of the Property Rights Ombudsman

**NOTE:**

**This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.**

**While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.**

**An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.**

**Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.**

**The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in Utah Code § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.**

## MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Jackie Nostrom, City Recorder  
City of Herriman  
13011 S. Pioneer Street  
Herriman, Utah 84096

On this \_\_\_\_\_ Day of April, 2015, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

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Office of the Property Rights Ombudsman