Advisory Opinion #167

Parties: Salt Lake City, Price Bangerter/Distribution

Issued: April 22, 2016

TOPIC CATEGORIES:

Impact Fees

A city may impose impact fees on new development to help fund new infrastructure attributable to new growth. An impact fee is presumed to be valid unless a challenger can show that an imposed fee is unreasonable and inequitable in that it does not accurately address the specific impacts of the challenger's development on the city's infrastructure.

Although Price has raised several valid concerns that could affect its impact fees, Price has failed to produce evidence sufficient to meet its burden to prove that the roadway impact fees imposed by Salt Lake City on Price's Distribution and Ninigret development projects are unreasonable or inequitable. Price presents several concerns related to the data, studies, and methodologies used by the City to calculate the impact fees, but it fails to present sufficient evidence to show that the assessed impact fees inaccurately offset the specific development impacts of the Ninigret or Distribution Properties. Consequently, Price has not established an entitlement to any reduction in fees.

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

(801) 530-6391
1-877-882-4662
Fax: (801) 530-6338
www.propertyrights.utah.gov
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:	Salt Lake City Corporation
Local Government Entity:	Salt Lake City Corporation
Applicant for Land Use Approval:	Price Bangerter/Distribution
Type of Property:	Industrial/Office
Date of this Advisory Opinion:	April 22, 2016
Opinion Authored By:	Jordan S. Cullimore Office of the Property Rights Ombudsman

ISSUE

Is Price Bangerter/Distribution entitled to a refund or reduction of roadway impact fees imposed by Salt Lake City on Price's Ninigret and Distribution Properties?

SUMMARY OF ADVISORY OPINION

A city may impose impact fees on new development to help fund new infrastructure attributable to new growth. An impact fee is presumed to be valid unless a challenger can show that an imposed fee is unreasonable and inequitable in that it does not accurately address the specific impacts of the challenger's development on the city's infrastructure.

Although Price has raised several valid concerns that could affect its impact fees, Price has failed to produce evidence sufficient to meet its burden to prove that the roadway impact fees imposed by Salt Lake City on Price's Distribution and Ninigret development projects are unreasonable or inequitable. Price presents several concerns related to the data, studies, and methodologies used by the City to calculate the impact fees, but it fails to present sufficient evidence to show that the assessed impact fees inaccurately offset the specific development impacts of the Ninigret or Distribution Properties. Consequently, Price has not established an entitlement to any reduction in fees.

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 Katherine Lewis, Senior City Attorney for Salt Lake City, on September 21, 2015. A copy of that request was sent via certified mail to David J. Castleton, Attorney for Price Bangerter Crossing, LLC, and Price Distribution Drive, LLC (collectively "Price"), 36 South State Street, STE 1400, Salt Lake City, Utah.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for an Advisory Opinion, with attachments, submitted by Katherine Lewis, Senior City Attorney for Salt Lake City, with attachments, on September 21, 2015.
2. Letter submitted by Katherine Lewis, Senior City Attorney for Salt Lake City, received October 27, 2015.
3. Response submitted by David Castleton on behalf of Price Bangerter Crossing, LLC, and Price Distribution Drive, LLC, received November 12, 2015.
4. Reply submitted by Ms. Lewis, received November 27, 2015.
5. *Salt Lake City Impact Fees Facility Plan and Impact Fee Study*, Adopted 2012, prepared by Galena Consulting.

BACKGROUND

On May 15, 2012 Salt Lake City Corporation (the "City") adopted an *Impact Fee Facilities Plan and Impact Fee Study* (IFFP). The document's findings were used to establish a per-square-foot Roadway Impact Fee on new construction of $2.33 for office space and $2.26 for industrial space. These fees were adopted in the Salt Lake City Consolidated Fee Schedule for Impact Fees.

Subsequent to the establishment of the fees, Price Bangerter Crossing, LLC, and Price Distribution Drive, LLC (collectively "Price") submitted building permit applications to construct office/industrial buildings at 3555 West Ninigret Drive ("Ninigret Property"), and 1515 South Distribution Drive ("Distribution Property"), respectively. The Ninigret Property comprised 40,000 square feet of office space and 265,406 square feet of industrial space, and the Distribution Property consisted of 30,000 square feet of office space and 81,484 square feet of industrial space. The City used a square footage formula to calculate roadway impact fees of

$693,017.56 for the Ninigret Property and $254,053.84 for the Distribution Property. Price paid the Ninigret Property impact fee on September 10, 2014 and the Distribution Property fee on July 17, 2015. Between the two properties, Price paid the City a total of $947,071.40 in Roadway Impact Fees.

On September 9, 2015, Price, pursuant to Salt Lake City Code § 18.98.090 and Utah Code § 11-36a-703, filed an appeal challenging the validity of the roadway impact fees imposed on the Ninigret and Distribution Properties. Price, in its appeal, asserts, among other arguments that will be considered below, that the total assessed fees "grossly overestimate the impact to [Salt Lake City], [are] in violation of Utah Code Section 11-36a-202, and [amount] to a confiscation of private property in contravention of constitutional prohibitions."

On October 20, 2015 the Salt Lake City Council passed an ordinance imposing a moratorium on the collection of certain impact fees, including the roadway impact fee, for one year because, according to the City, the City Council "is concerned with whether the City can pay for the projects listed on the [Impact Fee Facilities Plan] which are not fully funded through impact fees."

The City seeks an advisory opinion addressing the merits of Price's challenge to the imposed roadway impact fees.

ANALYSIS

An impact fee is a "payment of money imposed upon new development…to mitigate the impact of the new development on public infrastructure." UTAH CODE § 11-36a-102(8)(a). The Utah Impact Fees Act (the "Act"), found in Chapter 11-36a of the Utah Code, authorizes local governments to impose certain impact fees on new development to help fund new infrastructure attributable to new growth. *See* UTAH CODE § 11-36a-304(d). When a city imposes an impact fee on a development, the Act allows the developer to challenge the reasonableness of the fee. In this matter, Price has challenged the reasonableness of the roadway impact fees imposed by the City on the Ninigret and Distribution properties.

It is important to note at the outset that, no matter the outcome of this challenge, a full refund of the collected roadway impact fees is unlikely. Even if a court were to find an imposed impact fee to be invalid, the Act states that the remedy for an impact fee challenge is a refund of the difference between what the developer paid and the amount the fee should have been if it had been calculated correctly. UTAH CODE § 11-36a-701(3)(c). Since the new development has an impact on city infrastructure, some fee will be appropriate. The question is how much. For reasons articulated below, we conclude that Price is not entitled to a refund of any of the collected roadway impact fees since it has not met its burden to show that the fees are unreasonable or inequitable as applied to the Ninigret or Distribution Properties.

I. The Burden of Proof in an Impact Fee Challenge

An imposed impact fee is presumed to be valid unless a challenger can show that the fee is unreasonable. *Home Builders Ass'n. v. American Fork*, 1997 UT 7, ¶ 4, 973 P.2d 425. The "'equitable share' standard is the…legal standard that municipalities are obligated to meet." *Id.* at

¶ 20. A developer challenging the reasonableness of a fee has the burden of showing that the fee "require[s] newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred." *Banberry v. South Jordan City*, 631 P.2d 899, 903 (Utah 1981). Simply stated, an impact fee is unreasonable if doesn't equitably and correctly offset the cost of a development's impact on city infrastructure. *Id.* at 904.

To show entitlement to relief, the challenger must articulate "an alternative basis for calculating the [fee]," *Home Builders Ass'n of Utah v. North Logan*, 1999 UT 63, ¶ 14, 983 P.2d 561, or demonstrate that "proper application of *Banberry* would have resulted in a different fee." *Id*. at ¶ 13. In other words, the challenger must present sufficient evidence to overcome the presumption that the imposed fee is reasonable by showing that the fee does not accurately address the subject development's impacts, and that an alternative fee is more appropriate.

II. Effect of Salt Lake City's Impact Fee Moratorium

In the present matter, Price argues that roadway impact fees imposed on the Ninigret and Distribution properties are unreasonable in several respects.

Price asserts, foremost, that the City's recent enactment of a one-year moratorium on the collection of impact fees is clear evidence that "the City's IFFP was an unreasonable plan when it was adopted," and that it led to the imposition of an inequitable roadway impact fee on Price. Price supports this argument by citing Councilman Stan Penfold's statements in an October 13, 2015 work session that the City's 2012 IFFP established an unrealistic level of service in light of available funding sources other than impact fees.

Moreover, Price asserts that the moratorium renders the fees imposed on the Ninigret and Distribution Properties unreasonable because it places on Price a disproportionate burden to pay for growth that will occur in the City during the period in which impact fees are not being assessed on new development.

These arguments fail to show that the roadway impact fees imposed on Price are unreasonable or inequitable. First, it is insufficient to state that the impact fee is unreasonable simply because the City has suspended collection of the fee while it reassesses its funding sources and desired level of service. Price attempts to rely on the existence of the moratorium as circumstantial evidence that the fee was incorrectly calculated, but such reliance does not satisfy Price's burden of overcoming the presumed reasonableness of the assessed roadway impact fee as applied to Price's projects. In simply presenting the moratorium as evidence of unreasonableness, Price does not articulate how any portion of the Impact Fee Act has been misapplied, nor does it articulate any alternative method of calculation that would have produced a different fee than the one assessed on the Ninigret or Distribution Properties. Consequently, Price has not met its burden.

Price next claims that suspending the collection of impact fees will cause Price to pay for growth that occurs during the moratorium. The impact fees assessed to Price are valid if they offset the specific impacts created by *Price's* developments on city infrastructure, and will be invalid if Price is required to pay for more than its share. Whether or not the City chooses to charge impact fees to other developers does not factor into the question of whether or not Price is paying for its

own share of the impacts. The City is free to discount or waive impact fees, as long as the balance comes from City funds. Price, in this assertion, presents no specific evidence, other than the existence of the moratorium, that the assessed fees exceed the amount sufficient to mitigate the impact of Price's developments on city infrastructure. *See Banberry,* 631 P.2d at 903.

Since Price, in its arguments regarding the moratorium, presents no evidence that the assessed impact fees compensated the City for more than the actual impact of the Ninigret and Distribution Properties, it must be concluded that the impact of development that occurs during the moratorium will be disproportionately borne by the City as a whole, not by Price. Consequently we conclude that the City's recently enacted one-year moratorium does not constitute evidence sufficient to prove that the impact fees Price paid were unreasonable or inequitable.

III. Impact Fees must satisfy "Rough Proportionality" Exaction Analysis

Municipalities must comply with procedures set forth in the Act when establishing impact fees on development. Additionally, impact fees are a form of development exaction, and each fee imposed on a particular development must comply with exaction law. *Salt Lake County v. Bd. of Educ.*, 808 P.2d 1056, 1058 (Utah 1991). UTAH CODE § 10-9a-508 authorizes local governments to impose exactions on new development, within established limits:

> (1) A municipality may impose…exactions on development…if:
> (a) an essential link exists between a legitimate governmental interest and each exaction; and
> (b) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

The language of this statute was borrowed directly from the analytical framework established to assess exactions by the U.S. Supreme Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987) and *Dolan v. City of Tigard*, 512 U.S 374, 114 S.Ct. 2309 (1994). The analysis derived from these cases is known as the *Nollan/Dolan* "rough proportionality" test. There are two parts to the test: there must be an essential link between a legitimate government interest and the exaction, and there must be "rough proportionality" between the exaction and the development's impact. The Utah Supreme Court further articulated the "rough proportionality" part of the test in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, 196 P.3d 601 ("*B.A.M. II*"). The B.A.M. II Court explained that rough proportionality "has two aspects: first, the exaction and impact must be related in nature; second, they must be related in extent." *B.A.M. II*, 2008 UT 74, ¶ 9, 196 P.3d at 603. The "nature" aspect focuses on the relationship between the purported impact and proposed exaction. The court stated that the analysis should be expressed "in terms of a solution and a problem . . . . [T]he impact is the problem, or the burden which the community will bear because of the development. The exaction should address the problem. If it does, then the nature component has been satisfied." *Id.*, 2008 UT 74, ¶ 10, 196 P.3d at 603-04. The "extent" aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost:

> The most appropriate measure is cost—specifically, the cost of the exaction and the impact to the developer and the municipality, respectively. The impact of the

> development can be measured as the cost to the municipality of assuaging the impact. Likewise, the exaction can be measured as the value of the land to be dedicated by the developer at the time of the exaction.

Id., 2008 UT 74, ¶ 11, 196 P.3d at 604.

Price argues that the roadway impact fees imposed on the Ninigret and Distribution Properties violate exaction law. Accordingly, we will consider the specific impact fees imposed upon Price's properties to determine whether the fees comply with the "rough proportionality" test.

A. Essential Link Between a Legitimate Government Interest and the Exaction

In the present case, the City required Price to pay a roadway impact fee. Requiring a developer to pay an impact fee for construction of roadway facilities necessitated by new growth satisfies the first part of the exaction analysis. Building and maintaining adequate roadways and control of safe traffic flow is a legitimate government interest. UTAH CODE § 10-8-8; *see also Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117. Constructing additional roadway facilities and adding traffic controls are reasonable means to promote that interest. *Id.* Requiring a developer to pay for these facilities promotes the City's legitimate objectives. Consequently, the first prong of the "rough proportionality test" is satisfied.

B. Rough Proportionality between the Fee and the Development Impacts

The second part of the "rough proportionality" test requires that the cost of the exactions, which in this case are the roadway impact fees of $693,017.56 for the Ninigret Property and $254,053.84 for the Distribution Property, must be roughly proportionate, or in other words, equivalent, in nature and extent, to the cost that the City will incur to address (or "assuage") impacts attributable to the respective developments on the City's roadway facilities.

The City has used a cost-per-square-foot formula established by its 2012 IFFP to calculate the fees assessed to the Ninigret and Distribution Properties. Establishing a cost-per-square-foot formula for all industrial and office development is an efficient way of calculating and imposing impact fees on development, but this method assumes that each square foot of industrial and/or office development is alike. While this may generally produce an acceptable result, the method may not take into account unique characteristics, such as location and intensity of a particular development.

Accordingly, a fee calculated with a generally applicable formula is, as indicated previously, presumed valid unless a developer subject to an impact fee can show that the fee, as applied to his particular development, does not accurately address the specific impacts of the development, and therefore should be adjusted. The developer must present evidence in the form of credible studies and accurate data demonstrating that the formula fee imposed on a development does not accurately address the unique impacts of the particular development. See UTAH CODE § 11-36a-402(c)-(d).

The City, in preparing its Capital Facilities Plan and Impact Fee Study, has attempted to calculate a roadway impact fee based upon data that addresses the impact of commercial development

such as the Ninigret and Distribution Properties, on the City's roadway system. Price asserts that the studies and data used by the City are flawed in several respects and that these flaws produced unreasonable and inequitable fees. Accordingly, we will address the flaws asserted by Price.

C. Salt Lake City's Impact Fee Facilities Plan and Impact Fee Study

1. Growth Projections

Price asserts that the City's IFFP relies on flawed growth projections because it improperly assumes 5% equal growth across residential and non-residential sectors. Price asserts that this assumption is improper and it provides a study prepared by Newmark Grubb ACRES to support its position. In advancing its argument, however, Price does not present evidence that the City's projections are based on flawed data, or that the resulting calculations do not accurately address the specific impacts of the Ninigret or Distribution Properties on the City's roadway facilities.

The City used data from the "Wasatch Front Regional Council Transportation Plan, 2011-2040" and the "CB Richard Ellis Real Estate 2010 Year End Report" to determine its growth projections. The City asserts that these studies are "data-based and well-supported analyses of the future needs of the City…." City's Letter dated October 27, 2015. Price does not dispute this assertion, it simply presents another view. Since the law does not "require a rigid, formalistic approach to the decision-making process employed to calculate impact fees," *Home Builders Ass'n v. City of North Logan*, 1999 UT 63 ¶ 12, 983 P.2d 561, the City's chosen growth projections appear appropriate.

Price presents no specific, verifiable evidence that the City's projections do not produce calculations that properly address the impacts of Price's properties. Consequently, asserting that the City's growth projections are improper, without explaining how more correct data would have produced a calculation that more accurately addressed the impacts of the Ninigret or Distribution Properties, does not satisfy Price's burden to show that a different fee should have been assessed.

2. Service Area

Next, Price asserts that the City's IFFP incorrectly assumes that west side roadways benefit only the west side of the City and provide no benefit to the east side of the City. The City contends that the study establishes a city-wide service area[1] for roadway facilities even though the City, prior to the imposition of the moratorium, was only collecting impact fees from west side development.

Since Price does not explain the specific implications of the purported error, we presume that Price believes that if the City established a different service area and assessed fees more broadly, the fees applied to Price's properties would be less. However, Price does not explain how this implication would lead to a different fee, as applied to either the Ninigret or Distribution properties. The question is whether the fees address the specific impacts of the subject

[1] A "service area" is defined in the Act as "a geographic area…in which a public facility, or a defined set of public facilities, provides service within the area."

developments. Since the law does not prescribe how a City should establish a service area, we conclude that the City's chosen method of establishing a city wide service area for its calculations is appropriate.

3. Transportation Facilities

Third, Price asserts that the City's IFFP does not categorize transportation facilities appropriately and that bike lanes will not benefit west side development. Since the law does not define how transportation facilities should be categorized in a facilities plan, we conclude that the methodology used was appropriate. The plan identified proposed facilities, determined what proportion of each of the facilities is attributable to new growth, and calculated a fee accordingly.

4. Trip Generation Rates

Price asserts that the trip generation rates used by the City's IFFP are flawed because, while the plan uses an office trip generation rate of 1.3 trips per 1000 square feet[2], "many offices are currently utilizing up to 8 employees per 1000 square feet." This is the type of concern that could lead to a conclusion that an impact fee, as applied to a specific development, is improper. If a challenger can show that a specific development will produce fewer vehicle trips than that assumed by the imposed impact fee, a court would likely conclude that the impact fee should be adjusted to only offset the actual impact of the development. However, Price provides no data to show that the number used by the City does not accurately address the impacts of either the Ninigret or Distribution Properties. Price simply states that "many" offices currently utilize up to 8 employees per 1000 square feet. Price presents no evidence that either the Ninigret or Distribution properties will produce *less* than 1.3 trips per 1000 square feet of office space and therefore warrant reductions in the applied impact fees.

5. Replacement Values

Price asserts that the City's fee calculation improperly uses present replacement value of existing infrastructure to calculate recoupment costs for the fee, and that present replacement value does not properly account for "the time-price differential inherent in fair comparisons of amounts paid at different times." UTAH CODE § 11-36a-304(2)(h).

If this were true, then Price would be correct to express concern. However, the City explains that the calculation in the impact fee analysis that uses present replacement value was intended to serve only as indirect evidence that the proposed impact fee, which uses *estimated cost of proposed facilities* in its calculation, is not excessive. In other words, the calculation that uses present replacement value of existing facilities does not influence the calculation of the actual impact fee formula used to calculate a specific fee. The impact fee calculation uses estimated cost of new facilities, which is appropriate. It does not appear that the City is even attempting to

[2] Both parties agree that this number comes from the ITE (Institute of Transportation Engineers) Trip Generation Manual.

recoup cost of excess capacity in existing facilities through the impact fee.[3] Consequently, we conclude that the valuation method used to calculate the roadway impact fee is appropriate.

6. Necessity of Proposed Facilities to Maintain a Proposed Level of Service

Price further argues that the City's IFFP does not establish that the roadway impact fees assessed to the industrial area of the City are necessary to maintain a proposed level of service and that the numbers used to calculate the impact fees are erroneous. The plan indicates that the City's existing transportation facilities provide a transportation level of service "C". The plan also identifies proposed facilities planned to continue the current level of service, and indicates what percentage of those facilities is necessitated by new growth.

While it would be beneficial, as Price points out, for the plan to reference a traffic study or other evidence confirming the existing level of service and justifying the need for the proposed facilities, the Act simply requires that the facilities plan "identify" the existing level of service and "establish" a proposed level of service. UTAH CODE § 11-36a-302(1)(a). The City's IFFP satisfies these requirements. However, if Price could produce data or studies showing the proposed facilities would increase the existing level of service using impact fees, then the City would need to recalculate its fees to only account for the portion of the facilities necessary to maintain the current level of service. Price has not provided any data or studies to this effect.

7. Application of UTAH CODE § 11-36a-304(2)

Finally, Price asserts that the City's IFFP does not adequately consider the analysis required by UTAH CODE § 11-36a-304(2), "particularly with respect to the impact fees assessed to the industrial area." The analysis referred to involves the *Banberry* factors. These "*Banberry* factors" include:

(a) the cost of each existing public facility that has excess capacity to serve the anticipated development resulting from the new development activity;
(b) the cost of system improvements for each public facility;
(c) other than impact fees, the manner of financing for each public facility, such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants;
(d) the relative extent to which development activity will contribute to financing the excess capacity of and system improvements for each existing public facility, by such means as user charges, special assessments, or payment from the proceeds of general taxes;
(e) the relative extent to which development activity will contribute to the cost of existing public facilities and system improvements in the future;
(f) the extent to which the development activity is entitled to a credit against impact fees because the development activity will dedicate system improvements or public facilities that will offset the demand for system improvements, inside or outside the proposed development;
(g) extraordinary costs, if any, in servicing the newly developed properties; and
(h) the time-price differential inherent in fair comparisons of amounts paid at different times.

[3] The City only included estimated cost of proposed facilities in its impact fee calculation, so the fee is apparently only intended to offset that cost.

UTAH CODE § 11-36a-304(2)(a)-(h). *See also Banberry,* 631 P.2d at 904.

Beyond this plain assertion, Price gives no explanation regarding how "proper application of *Banberry* would have resulted in a different fee." *Home Builders Ass'n of Utah v. North Logan*, 1999 UT 63, ¶ 13, 983 P.2d 561. Consequently, Price has not met its burden to show that the impact fees assessed to the Ninigret and Distribution Properties do not accurately address the specific impacts of the developments on the City's roadway facilities.

IV. Impact Fee Spending

Price expresses several concerns related to how the City has handled unspent impact fees. These concerns are appropriate. The Act requires the City to follow specific procedures when accounting for and expending impact fees. *See* UTAH CODE § 11-36a-601–602. The Act requires the City to annually produce a report that "identifies impact fee funds by the year in which they were received, the project from which the funds were collected, the impact fee projects for which the funds were budgeted, and the projected schedule for expenditure." UTAH CODE § 11-36a-601(5). Price should be permitted to review these reports in accordance with the Utah Government Records Access and Management Act, s*ee* UTAH CODE Section 63G, Chapter2, to help it assess whether, and to what extent, it may be entitled to a refund at a future date. The City indicates that the required reports have been provided to Price.

The accounting procedures are necessary because the City must "expend or encumber the [impact fees paid by Price] for a permissible use within six years of their receipt." UTAH CODE § 11-36a-602(2)(a). If the City does not expend or encumber the Ninigret Property fee by September 10, 2020, or the Distribution Property fee by July 17, 2021, then the City will be obligated to return any of the unspent funds to Price. The City must comply with reporting requirements to ensure it does not retain the fees longer than permitted. The only instance in which the City may hold the fees for longer than six years is if it can identify, in writing, "an extraordinary and compelling reason why the fees should be held longer than six years." UTAH CODE § 11-36a-602(2)(b). Even then, the City must set "an absolute date by which the fees will be expended." *Id*. Otherwise, the City must return any unspent funds to Price.

V. Industrial Area Impact Fee Assessments

Finally, Price asserts that only industrial area development on the west side of the City is being charged roadway impact fees even though the IFFP identifies projects both within the industrial area and outside of it. This argument is related to the service area issue addressed above. Presumably, Price is concerned that the fees collected from the Ninigret and Distribution Properties will be used to construct projects that will not measurably benefit the properties. This concern is appropriate.

The Court in *Banberry* distinguished between centralized improvements, such as facilities that support water and sewer service, from "dispersed resources" that "may be measurably different in different parts of the municipality" and may disproportionately serve different areas of the City. *Banberry,* 631 P.2d at 905. Regarding fees assessed to construct dispersed resources, the court stated that, while the "benefits derived from the [fee] need not accrue solely to the [development assessed]," the benefits derived from the fee "must be of 'demonstrable benefit' to

the [development].” *Id.* Roadway facilities typically possess more characteristics of a dispersed resource than a centralized one, since vehicle congestion tends to occur in isolated areas within the City, as opposed to city-wide all at once. This is especially true with respect to local roads, as opposed to collector or arterial streets that function as regional connectors.

As stated previously, the City has designated the entire jurisdiction as one service area, which is permitted under the law. However, it is logical to conclude that the larger and more diverse the service area, the more likely it will be that some dispersed resources within the service area will better serve some than others. The City should be careful to ensure that fees assessed on a development to construct dispersed resources such as some roadway facilities are used to construct improvements that “demonstrably benefit” the development assessed.

In this case, Price has not presented any evidence that the City has already expended fees collected from Price on the Ninigret or Distribution Properties in a way that does not “demonstrably benefit” the properties. It is possible that the funds simply have not been spent yet. Moving forward, it will be important for the City to ensure the funds spent on dispersed resources are expended in accordance with this “demonstrable benefit” standard articulated in *Banberry*.

CONCLUSION

Price has failed to produce evidence sufficient to meet its burden to prove that the roadway impact fees imposed by the City on Price’s Ninigret or Distribution Properties are unreasonable or inequitable. Price presents several concerns related to the data, studies, and methodologies used by the City to calculate the impact fees, but it fails to present relevant evidence showing that the assessed impact fees inaccurately offset the specific development impacts of the Ninigret or Distribution Properties on the City’s roadway facilities. Consequently, Price is not entitled to any reduction in the assessed fees.

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:

Cindi Mansell, City Recorder
Salt Lake City
451 So. State Street, RM 415
Salt Lake City, UT 84114-5515

On this _____ Day of _____, 2016, 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.

_____
Office of the Property Rights Ombudsman