Advisory Opinion #225

Parties: Weber School District and Pleasant View City

Issued: June 25, 2020

TOPIC CATEGORY:

Impact Fees Act

School districts are afforded certain privileges under Utah's Impact Fee Act. No impact fees may be assessed against a school district unless the construction of a school directly results in the need for additional improvements to public facility systems. The term "additional system improvements" does not include mere increased use or demand upon existing systems where available excess capacity can accommodate the development; schools may not be assessed impact fees where no additional improvements to existing systems are needed. Because the City has not updated its facilities plan to account for a new school, it has not shown, based on the current plan, that the school district's development activity will directly result in the need for additional system improvements. The assessment of impact to the school district for various public works was therefore unlawful.

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.

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ADVISORY OPINION

Advisory Opinion Requested By: Weber School District

Local Government Entity: Pleasant View City

Applicant for Land Use Approval: Weber School District

Type of Property: Public School

Date of this Advisory Opinion: June 25, 2020

Opinion Authored By: Richard B. Plehn, Attorney
Office of the Property Rights Ombudsman

ISSUE

Were the impact fees that Pleasant View City imposed on Weber School District for the construction of a new elementary school proper under the Utah Impact Fee Act?

SUMMARY OF ADVISORY OPINION

School districts are afforded certain privileges under Utah's Impact Fee Act. No impact fees may be assessed against a school district unless the construction of a school directly results in the need for additional improvements to public facility systems. The term "additional system improvements" does not include mere increased use or demand upon existing systems where available excess capacity can accommodate the development; schools may not be assessed impact fees where no additional improvements to existing systems are needed.

Upon a city learning of construction of a proposed school that was not anticipated by the impact fee facilities plan, and if determined that fees may be appropriate because the construction will directly result in the need for additional system improvements, the city must first amend the plan to identify the public facilities serving the school prior to assessing the fees. Pleasant View City has not updated its facilities plan to account for the new school, and therefore has not shown, based on the current plan, that the school district's development activity will directly result in the need for additional system improvements. As no discernible addition to system improvements

has been necessitated by the new school, the City's assessment of impact fees to the school district for various public works was therefore unlawful.

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 Title 13, Chapter 43, Section 205 of the Utah Code. 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 Heidi J. Alder, Attorney for Weber School District on November 8, 2019. A copy of that request was sent via certified mail to Laurie Hellstrom, Pleasant View City Recorder, 520 West Elberta Dr., Pleasant View, Utah 84114 on April 7, 2020.

Evidence

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

1. Request for an Advisory Opinion, submitted by Heidi J. Alder on behalf of Weber School District, received November 8, 2019.
2. Letter from Michael V. Houtz, of Helgesen, Houtz & Jones, attorneys for Pleasant View City, received April 16, 2020.
3. Letter from Heidi J. Alder on behalf of Weber School District, received April 24, 2020, including attachments.
4. Letter from Michael V. Houtz, received May 8, 2020, including Memorandum from Dana Q. Shuler, City Engineer, to Pleasant View City, dated May 8, 2020.
5. Email from Heidi J. Alder, received May 11, 2020.

Background

Weber School District (WSD) began construction in 2018 on Orchard Springs Elementary School, located in Pleasant View City. The school constitutes new construction on previously raw land. This is the first WSD school built in Pleasant View for many years, the other two operational public schools in the City—Weber High School and Lomond View Elementary—having been built in 1926 and 1959, respectively.[1] As such, this is the first WSD school built in Pleasant View since the State of Utah's enactment of a statutory framework for impact fees.[2]

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[1] WEBER SCHOOL DISTRICT, https://wsd.net (last visited May 6, 2020).

[2] Utah's first impact fee legislation was passed in 1995. *See* David A. Nuffer, *Utah's 1995 Impact Fee Legislation*, 8 Utah Bar J. 12 (1995).

Pleasant View's current Storm Water Impact Fee Facilities Plan and Impact Fee Analysis have been in place since 2008. At that time, the analysis did not anticipate that the WSD's land would be developed as a school. The City is currently working on updating the Storm Water Impact Fee Facilities Plan and Impact Fee Analysis, but no amendment has yet occurred.

Using the existing facilities plan the City assessed WSD impact fees for the construction of Orchard Springs Elementary amounting to approximately $200,000 for various public facilities, including water, sewer, storm sewer, Central Weber storm sewer, and North View Fire Department. No evidence has been provided regarding the necessity of additional construction of any new public facilities or improvements as a direct result of the new school.[3] WSD paid the fees under protest and believes the fees are not allowed by Utah's Impact Fee Act unless the City can show that WSD's development activity directly results in the need to add to existing system improvements. The City disagrees and believes that proportional impact fees are allowed by the Impact Fee Act as WSD's development activity of changing raw land to a new school clearly creates additional demand and impact on current and future system improvements.

WSD filed a request for an Advisory Opinion to determine whether the impact fees assessed to the school district are lawful under Utah's Impact Fee Act.

ANALYSIS

The dispute in this matter centers on the parties' differing interpretations of a single phrase in Utah's Impact Fee Act regarding a restriction on a local political subdivision[4] assessing impact fees against a school unless the development activity "directly results in a need for additional system improvements" for which the fee is imposed.[5]

Weber School District (WSD) believes this to mean that unless the City demonstrates that some actual additional "but-for" improvement to public facilities is directly necessitated by the school's construction, this single provision otherwise prohibits all impact fees to be assessed for the construction of the school. As the impact fee analyses provided by the city predate and do not account for the construction of a school, WSD argues, they do not—and cannot—demonstrate that the school's construction directly results in a need for additional system improvements.

The City disagrees and feels that WSD is reading this provision in isolation, overlooking the statutory context that clearly allows proportionate impact fees to be assessed in this situation where there is a clear impact and increased demand on the City's public systems caused by WSD's turning raw land into a new school.

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[3] Weber School District notes that, at the request of the City, it built a retention pond on its property to hold water when the current storm sewer is backed up for the express purpose of decreasing the school's impact on the City's current system. The District notes, however, that it built this at its own cost to mitigate the school's impact, and alleges that the City has not, to the District's knowledge, made any additions to its own storm water sewer system as a result of the school's construction.

[4] The Impact Fee Act applies to any political subdivision or private entity that may assess impact fees, but inasmuch as this dispute involves a municipality, all subsequent references to the act will simply state "municipality" or "city".

[5] UTAH CODE ANN. § 11-36a-202(2)(a)(iii)(a).

In an attempt to persuade the other to their respective positions, both parties opine as to the legislature's intent in the Impact Fee Act's treatment of school districts. The City does not believe the legislature would have intended to prevent political subdivisions from collecting impact fees from schools given the burden such development adds to existing and future need for system improvements. WSD believes that is exactly what the legislature intended.

Statutory interpretation requires application of the canons of statutory construction. In interpreting a statute, courts begin with an analysis of the plain language of the statute,[6] with the primary goal "to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve."[7] If the plain language of an ordinance is sufficiently clear, the analysis ends there.[8] As will be discussed below, the plain language of the Impact Fee Act, taken in context, is unambiguous, so an exercise of delving into the legislative history on this subject will not be necessary.

I. Utah Law on Impact Fees Intentionally Treats School Districts Differently

When interpreting a statute, courts read the plan language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.[9] By reading Utah's Impact Fee Act as a whole, and in harmony with other related statutes, the statutory context becomes clear that Utah law grants several privileges to schools in the arena of development impact fees.

Utah's Land Use Development and Management Act (LUDMA) provides that a local government may not require a school district to pay any impact fee for an improvement project unless the impact fee is imposed according to Utah's Impact Fee Act.[10] Notably, this prohibition calls out school districts, specifically, as opposed to a general restriction against imposing impact fees against any developer unless done according to the Impact Fee Act.[11] As this prohibition is based solely on the identity of the developer, as opposed to the type of development, it is clearly intended that school districts are to be treated differently than other developers when it comes to impact fees. This provision creates a starting presumption that any impact fees against a school district is illegal unless it falls under an exception explicitly provided by the Impact Fee Act.

Among the considerations made for schools, the Impact Fee Act places restrictions on assessing impact fees for construction of replacement schools,[12] prohibits delaying the construction of a school because of an impact fee dispute,[13] and exempts schools from being assessed impact fees for a park, recreation facility, open space, or trail,[14] or from being required to participate in the

[6] *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30.
[7] *Foutz v. City of South Jordan*, 2004 UT 75, ¶ 11.
[8] *General Construction & Development, Inc. v. Peterson Plumbing Supply*, 2011 UT 1, ¶ 8.
[9] *Hansen v. Eyre*, 2003 UT App 274, ¶ 7.
[10] UTAH CODE ANN. § 10-9a-305(3)(e) (regarding municipalities); *see* also UTAH CODE ANN. § 17-27a-305(3)(e) (providing the same provision in relation to county land use).
[11] Although in practice the effect is the same, as the Impact Fee Act contains a catchall that municipalities must ensure that any imposed impact fee comply with the requirements of the Act. UTAH CODE ANN. § 11-36a-201(1).

[12] UTAH CODE ANN. § 11-36a-202(2)(b)(i).
[13] UTAH CODE ANN. § 11-36a-202(1)(b).
[14] UTAH CODE ANN. § 11-36a-202(2)(a)(ii).

cost of any roadway or sidewalk.[15] Additionally, the Impact Fee Act authorizes local government to completely exempt school districts from impact fee assessments, if it so chooses.[16]

All of these provisions, considered in concert, establish a clear framework to treat school districts and school construction activity different under the law. As a result, there will be instances where school districts, while undoubtedly causing some impact on public facilities, will be exempt from impact fees while another similarly situated private developer would not.

II. Schools May Not be Assessed for Mere Increased Demand on Existing Systems

The disputed provision of the Impact Fee Act provides that a city may not impose an impact fee on a school district unless:

> (A) the development resulting from the school district's or charter school's development activity directly results in a need for additional system improvements for which the impact fee is imposed; and
> (B) the impact fee is calculated to cover only the school district's or charter school's proportionate share of the cost of those additional system improvements.[17]

The parties have analyzed the provision in (A) so as to dispute the meaning of the words *directly* and *additional*, as well as the statutorily defined terms of *development activity* and *system improvements.* Nevertheless, the above language is not ambiguous.

When examining plain language, it is assumed "that each term included in the ordinance was used advisedly,"[18] and some words and phrases may not be plain when read in isolation, but may become so in light of statutory context.[19] Therefore, statutory definitions aid in interpreting statutory provisions so that "all parts thereof [are] relevant and meaningful."[20]

Utah's Impact Fee Act defines *development activity* to mean "any construction or expansion of a building, structure, or use, any change in use of a building or structure, or any changes in the use of land *that creates additional demand and need* for public facilities."[21] It is therefore a given that any construction, as development activity, will create additional demand upon public facilities, and that this provision addresses something beyond a mere increased demand on facilities. Meanwhile, "system improvements" is defined to mean both "existing public facilities that are identified in the impact fee analysis [] and designed to provide services to service areas within the community at large" as well as "future public facilities identified in the impact fee analysis [] that are intended to provide services to service areas within the community at large."[22]

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[15] UTAH CODE ANN. § 11-36a-302(4)(c).
[16] UTAH CODE ANN. § 11-36a-403(1)(a)(i)(C).
[17] UTAH CODE ANN. § 11-36a-202(2)(a)(iii).
[18] *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30.
[19] *Bryner v. Cardon Outreach, LLC*, 2018 UT 52, ¶ 12.
[20] *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996).
[21] UTAH CODE ANN. § 11-36a-102(3)(emphasis added).
[22] UTAH CODE ANN. § 11-36a-102(21).

With the aid of the above statutory definitions, the provision in question is not ambiguous, and could be re-read as follows: "a political subdivision [] may not impose an impact fee [] on a school district or charger school unless [the additional demand and need for public facilities created by the construction of a school] *directly* results in a need for *additional* [present or future] system improvements [identified in the impact fee analysis] for which the impact fee is imposed."

Unlike the statutorily defined terms above, the words *directly* and *additional* are not terms of art and should be afforded their ordinary meanings.[23] The word *directly* indicates that the need for new system improvements must arise as a result of construction of the school "with nothing or no one in between."[24] Improvements that arise indirectly or out of some other local need cannot be the basis for the impact fees to schools. Moreover, the word *additional* indicates that the new infrastructure must be "added, extra, or supplementary to what is already present or available."[25] In other words, a local government may only charge impact fees to schools when the development of the school causes a direct need for new infrastructure above what is currently in place – *i.e.* but for the school was being built, the infrastructure would not be necessary.

III. The School's Need to Pay Fees Must be Reflected in the Impact Fees Facilities Plan

Facially, with all of the special treatment seemingly afforded to schools under the Impact Fee Act, cities appear to be overwhelmingly burdened. After all, schools are often very large developments with clear impacts on public facilities. The Impact Fee Act, therefore, tries to balance the legitimate facility concerns of cities so that cities are not left holding a bill for infrastructure that it would not otherwise be subjected to if not for the school's development activity, so long as the city does its due diligence.

Before imposing an impact fee, a city must prepare an impact fee facilities plan (IFFP) to determine public facilities required to serve new development.[26] The IFFP identifies the existing level of service, establishes a proposed level of service, and identifies any excess capacity to accommodate future growth at the proposed level of service, as well as demands on existing facilities by new development and how the city will meet those growth needs.[27]

Cities are required to include in the IFFP public facilities for which an impact fee may be imposed on a school. If the city becomes aware of the planned location of a school district facility through the planning process that was not anticipated by the IFFP, the city must amend the IFFP to reflect those public facilities, if necessary.[28]

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[23] *Olsen v. Eagle Mt. City*, 2011 UT 10, ¶ 9 (when the words of a statute consist of "common, daily, nontechnical speech," they are construed in accordance with the ordinary meaning such words would have to a reasonable person familiar with the usage and context of the language in question).

[24] *See* definition of "directly", at 2, OXFORD UNIVERSITY PRESS, LEXICO.COM, (2019), available at https://www.lexico.com/definition/directly (last visited May 28, 2020).

[25] *Id.*, definition of "additional," available at https://www.lexico.com/definition/additional (visited May 28, 2020).

[26] UTAH CODE ANN. § 11-36a-301(1).

[27] UTAH CODE ANN. § 11-36a-302(1).

[28] UTAH CODE ANN. § 11-36a-302(4).

This charge to cities to always have the IFFP updated as it relates to schools is necessary to isolate the public facilities serving school development and remove any mystery as to which fees are applicable to the school, considering the Impact Fee Act's privileges for schools to exempt them from paying certain impact fees. Prior to assessing any impact fee against a school district, the city must update its IFFP to account for the school's development to ascertain if new system improvements are required, as school districts may not be assessed fees for mere impact on current systems. The City does not need to update the IFFP if it is clear that the school will not require new improvements, or if the City simply chooses not to charge fees to school districts.

Without first identifying a specific school development in an amended IFFP, any impact fee assessed against a school will not likely pass judicial scrutiny. The law treats any impact fee allowed to be assessed against a school district as an exception to the general rule that no impact fee may be assessed against a school district. Therefore, the burden to prove the validity of fees assessed against a school district falls upon the city. Without an updated IFFP, that burden is not likely to be met, as there will have been no determination of the school's impact as it relates to the capacity of existing systems at the proposed level of service.

Here, the City's IFFP has not been updated since 2008, and the City concedes that the plan did not anticipate the future development of a school. The City mistakenly interprets the statutory mandate to update its facility plan to account for the new school in this circumstance as optional, and misunderstands that it <u>must</u> update its facilities plan to account for the new school if it wishes to impose an impact fee on the school district, exactly for the reason that doing so helps ensure WSD is paying for permissible fees in appropriate amounts.[29]

CONCLUSION

Pleasant View City may not require Weber School District to pay impact fees for a new school unless the construction directly requires system improvements additional to existing facilities. The City's existing facilities plan does not anticipate the school's development and has not been amended to determine whether this would be the case. The City imposed fees on the school district based on the existing facilities plan, and bears the burden of proving those fees were not illegally assessed. As the existing facilities plan did not anticipate the school development it cannot therefore determine whether additional system improvements are necessary, so the City has not met its burden, and the fees were illegally assessed.

Jordan S. Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

[29] The City made a reference in passing that WSD was truly getting a good deal for the fees assessed against it, as the fees were calculated in 2008 dollars based on the existing impact fee analyses, whereas the city *could* exercise the option to update the plan and calculate the applicable fees with 2019 dollars, likely resulting in higher fee amounts for WSD. Amending the IFFP not only ensures that schools are only paying for fees that are applicable to needs directly resulting from construction, but it also would serve to eliminate this problem the city has referenced.

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 § 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:

Laurie Hellstrom, Recorder
City of Pleasant View
520 West Elberta Dr.
Pleasant View, Utah 84414

On June 26, 2020, 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