Advisory Opinion #72

Parties: Joseph H. Florence and Central Weber Sewer Improvement District

Issued: June 30, 2009

TOPIC CATEGORIES:

A: Impact Fees
D: Exactions on Development

The Applicant carries the burden to show that the impact fees as enacted or as applied are unfair or illegal. The Developer has not met that burden.

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

JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Joseph H. Florence
Local Government Entity:	Central Weber Sewer Improvement District
Applicant for the Land Use Approval:	Rafter H LLC
Project:	Commercial Restaurant Development
Date of this Advisory Opinion:	July 30, 2009
Opinion Authored By:	Brent N. Bateman, Lead Attorney, Office of the Property Rights Ombudsman

Issues

Has the Central Weber Sewer Improvement District properly enacted sanitary sewer impact fees and applied them to the developer?

Summary of Advisory Opinion

The Applicant carries the burden to show that the impact fees as enacted or as applied are unfair or illegal. The Developer has not met that burden. The Developer has simply requested that this Office examine the legality of the impact fees in every respect without showing any basis for his belief that the impact fee is illegal.

Nevertheless, a review of the documents provided fails to reveal any respect to which the Central Weber Sewer Improvement District sanitary sewer impact fees have been improperly enacted or applied.

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. The 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.

The request for this Advisory Opinion was received on August 1, 2008 from Joseph H. Florence, Managing Partner of Rafter H, LLC. A letter with the request attached was sent via certified mail, return receipt requested, to Lance L. Wood, District General Manager, 2618 W Pioneer Road, Ogden, Utah 84404. Mr. Wood's name was listed on the State's Governmental Immunity Database as the contact person for the District. On November 17, 2008, Mr. Florence sent an additional letter outlining his primary points of concern. The District has not submitted any written materials in response to Mr. Florence's submissions, but has instead referred to the previous letter sent from Lance L. Wood to Mr. Florence dated July 22, 2008, and included as an attachment to the Advisory Opinion request.

Evidence

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

1. Request for an Advisory Opinion dated July 28, 2008 with the Office of the Property Rights Ombudsman by Joseph H. Florence, with attachments.
2. Letter from Joseph H. Florence dated November 17, 2008, with attachments.
3. *Central Weber Sewer Improvement District Impact Fee Analysis*, dated May 2007, prepared by Wasatch Civil Consulting Engineering.

Background

Rafter H LLC is the owner and developer ("Developer") of the Hinckley Commons Project ("Development" or "Project") in South Ogden City. The Project is located at 5600 South Harrison Boulevard. As part of the project, the Developer proposed to build at 4559 square foot restaurant. In order to obtain a building permit for the restaurant, the City has required developer to pay a sanitary sewer impact fee imposed by the Central Weber Sewer Improvement District ("District") of $13,998. The Developer paid the impact fee under protest.

The District provides sanitary sewer service for a large area in Central Weber County, including South Ogden City, Ogden, Riverdale, Harrisville, and several other communities. The District was created in 1953, and is a quasi-governmental improvement district under Utah law.

The District indicates that its current sewer treatment plant is at full capacity, and that it will need to construct additional treatment facilities in order to accommodate projected growth within its boundaries. The District also indicates that much of its collection and conveyance network, while not presently at capacity, will exceed capacity under projected growth estimates within the next few years. The District's Capital Facilities Plan ("CFP") establishes an intention to construct a parallel sewer treatment facility and collection facilities in order to accommodate future growth. The CFP apportions 40% of the total cost of needed improvements to new growth. The District's Impact Fee Analysis calculates the total impact fee for each equivalent residential unit ("ERU") to be $2,333.

The Developer requested that this Office provide an Advisory Opinion of the sanitary sewer impact fee. The Developer did not articulate any basis on which to challenge the fee. Rather, the Developer requested that this Office Advisory Opinion examine the impact fees because they "seem to be unreasonable."

Analysis

I. The Developer Has The Burden To Show That The Impact Fee Is Unreasonable Or Illegal.

The Developer has requested that this Advisory Opinion examine whether the District's sanitary sewer impact fee is generally compliant with the intent of the law. Essentially, the Developer indicates its belief that the impact fee is excessive, and challenges it on that basis alone, without articulating how the impact fee in its enactment or its application violates the law. The Developer simply leaves it to this office to review the impact fee, and to seek out any way in which the impact fees may violate the law, thus providing a basis to relieve the Developer from the obligation to pay the excessive charges.

This is simply not the correct approach for challenging impact fees. A challenge to impact fees cannot be based upon the premise that the impact fees are illegal just because they seem high. Such a *res ipsa loquitur* challenge to the impact fee has been expressly rejected by the Utah Supreme Court. In *Home Builders Ass'n v. City of N. Logan*, 1999 UT 63, the Court rejected a challenge to a road impact fee because the plaintiff "fail[ed] to articulate why [the City's] fees are unreasonable or how proper application of *Banberry* would have resulted in a different fee." *Id*. at ¶ 13. According to the Court, once a party imposing the impact fee discloses the basis of its impact fee calculations, the burden to show that why the fees are illegal lies upon the challenger.

The Developer has not done that here. At best, the Developer has expressed some concerns regarding the fees. However, none of the concerns articulate a basis showing that the impact fees are illegal in either enactment or application. Rather the Developer has requested that this Office review the entire impact fee scheme to determine compliance with state law. The burden rather rests upon the Developer to make its own case.

Nevertheless, in an effort to assist the parties to this dispute, as well as parties seeking Advisory Opinions from this Office regarding impact fees in the future, this Office has reviewed the District's sanitary sewer impact fee. This is done in the hope that it will assist the parties to understand impact fees, articulate and discuss issues regarding impact fees, and resolve impact fee disputes before they escalate.

II. Was the District's Sanitary Sewer Impact Fee Legally Adopted?

An impact fee is "payment of money imposed upon new development activity as a condition of development approval to mitigate the impact of the new development on public facilities." UTAH CODE § 11-36-102(8)(a). In other words, it is a one-time charge, imposed by the owner of a public facility (such as a road, sewer, or park) upon new development. The purpose of an impact fee is to collect from the new development the costs of establishing or expanding those public system facilities necessitated by that new development. Impact fees differ from taxes, connection or hookup fees, special assessments, application fees, and other kinds of fees. Impact fees are only those fees governed by the Impact Fees Act, UTAH CODE § 11-36-101 *et seq*. (the "Act"). They must comply with the provisions of that Act.

The first question in reviewing an impact fee examines whether an impact fee has been legally and properly adopted under the Impact Fee Act. This inquiry can involve a line-by-line review of the Act. However, questions regarding proper enactment of an impact fee can generally be distilled down into five questions:

(1) Did the Impact fee enactment comply with the formalities required by the Act?
(2) Does the Capital Facilities Plan and the Impact Fee Analysis include the required information and analysis?
(3) Are the planned improvements system improvements permitted under the Impact Fees Act?
(4) Do the planned improvements raise the level of service above the presently existing level of service, and/or are the impact fees simply to be used for operation and maintenance of existing facilities?
(5) Does the analysis properly calculate the impact fee, including permitted costs while offsetting costs with other alternate sources of payment and means of meeting demand?

The District's full sanitary sewer Capital Facilities Plan ("CFP") has not been provided, and is reported by the District as being about 18 inches thick. The District's Impact Fee Analysis has been provided, which contains a passable summary of the CFP. A review of the Summary CFP along with the Impact Fee analysis did not reveal any respect to which the Impact Fee as adopted violated any of the questions posed above or the Impact Fee Act.

The summary CFP establishes the need for upgrades to system improvements, and provides details about improvements planned to meet the demands of new growth. The summary CFP also

calculates that cost of the needed facilities, and allocates a portion of those costs to new future expected flows. The CFP summary concludes that approximately 40% of the cost of upgrades is attributable to future flows. The Impact Fee Analysis takes the costs shown in the CFP attributable to new growth, and calculates the cost per ERU. The Analysis then calculates offsets for property and other taxes previously paid. The final impact fee per ERU is $2,333. Nothing in those calculations was found to violate the provisions of the Impact Fees Act.

In the correspondence provided, the Developer expresses concern that his impact fee assessment is so much more that the impact fees paid by similar uses in the past. According to the Impact Fee Analysis, the District's previous calculations of impact fees have used the same formula (although have been somewhat lower). However, the District's Board of Trustees have elected in the past to not charge the full justifiable amount for impact fees, instead electing to charge only $300 per ERU. This is permissible under the Act. Accordingly, some properties that have developed in the area have paid this smaller impact fee approved by the board, even though a higher fee was justified. According to the CFP, the Board of Trustees recently decided to abandon this practice, and charge the full fee justified by the CFP. Nothing could be found in the Impact Fee Act that makes this practice illegal. Accordingly, it appears that the District's sanitary sewer impact fee has been properly and legally adopted.

II. Was the District's Sewer Impact Fee Properly and Legally Applied?

The next inquiry into the propriety of impact fees concerns whether the Impact Fee was properly applied to the Developer. This inquiry examines the following questions:

(1) Is the Developer creating an impact that the planned facilities will address?
(2) Is the total burden imposed upon the developer by the impact fee roughly equivalent to the impact of the development on the City?
(3) Is the developer contributing benefits to the City that offset the burdens of the development?

Impact fees may only be collected from development activity that creates a burden that the impact fee is intended to address. Developer plans to construct a restaurant where no development previously existed. That restaurant will certainly place an additional burden upon the District's sewer system. Accordingly, it appears that the Developer's project will have an impact on the system. The planned facilities appear designed to permit the system to handle that increased burden. Therefore, they can be said to address the impact that the Project creates.

Impact fees are a form of development exaction, and must comply with the exaction law. *Salt Lake County v. Bd. of Educ.*, 808 P.2d 1056, 1058 (Utah 1991). UTAH CODE § 10-9a-508 authorizes cities to impose exactions on new development, within established limits:

> (1) A municipality may impose an exaction or exactions on development proposed in a land use application 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 Utah Supreme Court recently honed the "rough proportionality" rule in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, 196 P.3d 601 ("*B.A.M. II*"). The court explained that rough proportionality analysis "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 approach 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. The court also noted that "exact equality between the factors is unnecessary" *Id.*, 2008 UT 74, ¶ 12, n.4, 196 P.3d at 604, n.4 (*quoting Dolan*, 512 U.S. at 391). Thus, in order to be valid, the cost of an exaction must be roughly equivalent to the cost that a local government would incur to address (or "assuage") the impact attributable to a new development.

In the Impact Fee context, this burden upon the Developer is easily calculated. It is simply the amount of money that the Developer is required to pay in impact fees. In the present case, the District has required that the Developer pay $13,998.00, which represents the impact fee of $2,333.00 multiplied by 6 ERUs for a restaurant. In order for this Impact Fee to pass the exaction test, this fee must be roughly equivalent to the cost to the District to assuage the impact of the Developer's project.

The District reports that its current sanitary sewer treatment facility is at capacity, and its current conveyance network has capacity but will run out under projected growth. Any growth within the District boundaries will necessitate facilities to handle that capacity. The District has determined that new development will contribute approximately 40% of the flows to the new facilities. Accordingly, the District's impact fees are calculated so that new development will pay 40% of the cost of constructing those facilities. The Developer will pay its proportionate share according to the number of ERU's represented by its restaurant. This analysis suffices as the kind of "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 392. Without further contrary

evidence, it appears that the District's sanitary sewer impact fee has been properly applied to the Developer.

Conclusion

Nothing has been found in the review of the District's sanitary sewer impact fee indicates that the fee has been improperly enacted or illegally applied to the Developer.

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.

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:

Lance L. Wood
District General Manager
2618 W Pioneer Road
Ogden, Utah 84404

On this 30th day of July, 2009, 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