Advisory Opinion #73

Parties: Waxie Enterprises, Inc and Salt Lake City

Issued: August 31, 2009

TOPIC CATEGORIES:

A: Impact Fees
D: Exactions on Development

There was no evidence suggesting that the City's Impact Fee Study was improper or did not comply with state law. Compliance with the Impact Fee Act confers a presumption of validity on the fees. In order to successfully challenge a properly-enacted impact fee, a property owner must present reasoned studies and analysis showing the actual impact of the development, and what the impact fees should be.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Waxie Enterprises, Inc, by Henry Babb & David Baird
Local Government Entity:	Salt Lake City
Applicant for the Land Use Approval:	Waxie Enterprises, Inc.
Project:	Construction of Warehouse/Office Facility
Date of this Advisory Opinion:	August 31, 2009
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issue

Is a local government's road impact fee roughly equivalent to the burden attributable to a new commercial development?

Summary of Advisory Opinion

Roadway impact fees are authorized by the Impact Fees Act, and are intended to help fund new roads required as new development is built. Impact fees adopted in compliance with the Impact Fees Act are entitled to a presumption of validity and constitutionality. That presumption may be overcome if a developer presents evidence showing that the fee imposes an unfair and disproportionate burden. Because of the presumption of validity allowed to properly enacted impact fees, a challenger must present strong evidence showing that the fee is unfair and inequitable. Waxie has failed to provide such strong evidence, and until they do, the City's roadway impact fee must be considered valid.

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 ANN. § 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 David Baird, on behalf of Waxie Enterprises, Inc. on May 5, 2009. A copy of that request was sent via certified mail to Christine Meeker, City Recorder for Salt Lake City. The return certificate, indicating that the City received the copy of the request, was received by the Office of the Property Rights Ombudsman on May 11, 2009. The City submitted a response to the OPRO, which was received on June 15, 2009. Copies of the City's response were mailed to Mr. Baird and Henry Babb, Vice-President for Operations, at Waxie Enterprises' offices in California. On July 28, 2009, Waxie submitted a reply to the City's response.

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, including attachments, filed May 5, 2009 with the Office of the Property Rights Ombudsman by David Baird, on behalf of Waxie Enterprises, LLC.
2. Response from Salt Lake City, including attachments submitted by Lynn Pace, Deputy City Attorney, received June 15, 2009.
3. Reply from Waxie Enterprises, received July 28, 2009.
4. "General Fund Impact Fees Update," revised draft dated November 17, 2004, prepared by BBC Research & Consulting, submitted by the City on June 15, 2009.
5. Sections from Title 18 of the Salt Lake City Code.

Assumed Facts

For the purposes of this Opinion, it is assumed that the study prepared by BBC Research & Consulting followed the requirements of the Utah Impact Fees Act, and that the representations made therein are accurate and verifiable. It is further assumed that the City followed proper procedures when it adopted its impact fee ordinance.

Background

In September, 2008, Waxie Enterprises, LLC obtained a building permit to construct a new facility in the western part of Salt Lake City. The new facility replaces an existing building located in West Valley City, which Waxie had operated for several years. The new building included 86,881 square feet (14,443 s.f. of office and 72,438 s.f. of industrial or warehouse space).

Long before Waxie submitted its application, the City adopted an ordinance charging various impact fees on new development. One of those is a "roadway impact fee," which imposes a charge to partially fund expansion of the City's arterial streets. Roadway impact fees only apply to new development in the Westside Industrial Area, and are imposed only on retail, office, and industrial development.[1]

The roadway impact fee was evidently based on a study prepared by BBC Research & Consulting. The roadway impact fee was calculated by taking the estimated costs for new arterial roads in the Westside Industrial Area, allocating those costs amongst retail, office, and industrial buildings, and dividing those numbers by the total floor areas projected for each type of building.[2] The study appears to have assigned only a portion of the responsibility to fund new roads to new development. The three types of properties (*i.e.*, retail, office, and industrial) were assigned different weighting factors, reflecting the differing traffic impacts of the property uses. The result was roadway impact fees for retail buildings (currently $7.83/square foot), office buildings ($3.81/s.f.) and industrial buildings ($1.25/s.f.).[3]

The Salt Lake City Code provides for appeals of impact fees. Section 18.98.090 of the City Code provides that an impact fee may be challenged, either through arbitration or in district court. A challenge must be filed within one year after the impact fee is paid. In addition, § 18.98.160 provides for an "independent calculation" of any impact fee, based on data and analysis showing the actual impact of new development, and the cost of that impact.

Waxie paid the required impact fees when it obtained its building permit, including the roadway impact fees.[4] Waxie does not dispute the City's authority to charge impact fees, nor the procedures used to adopt those fees. Waxie maintains only that the roadway impact fee is excessive, and does not accurately reflect the actual number of vehicle trips anticipated for its new facility. They claim that the new facility will generate 26 total trips (21 industrial and 5 office), because the new facility will have 18 employees (one trip per employee per afternoon) and 8 truck trips between 4-6 pm.

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[1] The Westside Industrial Area is located in the largely undeveloped western part of Salt Lake City. The City determined that the Westside Industrial Area is the only part of the City that will need road improvements. The roadway impact fee is not charged for development in other parts of the City. *See* "General Fund Impact Fees Update" at § VI, p. 3. This document was provided by Waxie as part of the materials submitted for this Opinion.

[2] *See* "General Fund Impact Fees Update," § VI. This Opinion does not attempt to fully analyze the impact fee anlaysis.

[3] SALT LAKE CITY CODE, ch. 18.98, app. A.

[4] Waxie paid the other required impact fees, but only challenges the roadway impact fee. The City Code allows payment of an impact fee under protest, so that a fee payer may pursue an appeal. SALT LAKE CITY CODE, § 18.98.090(B).

Waxie only states afternoon trips because the City's impact fee analysis referred to "PM peak period conditions" (*i.e.*, afternoon rush hour) as an "emphasis" which determined the trip generation weighting factors for each building type.[5] Waxie explains its analysis as follows: Using the industrial trip generation factor of .9 trips/1,000 s.f., the new facility should generate 65 trips during each afternoon peak. Since the facility will only have 21 industrial trips per day, or 68% fewer trips, the impact fee attributed to the industrial portion of the building should be reduced by 68% . A similar analysis reduces the number of office trips 84%, and so Waxie requests an 84% reduction in the office portion of the impact fee.[6]

The City maintains that the roadway impact fee was correctly calculated, and was based on reliable estimates of costs, future needs, and the impacts of new development. Waxie filed an appeal to the Salt Lake City Council, as provided in the City's Code, but that appeal has been "on hold" while the parties attempted to negotiate a resolution. The City contends that Waxie has not challenged the correctness of the roadway impact fee, but only requests a refund because it feels the new facility will generate fewer vehicle trips than was used in the analysis. The City notes that Waxie may still request that the roadway impact fee be independently calculated using reliable data.

Analysis

I. The City May Charge Impact Fees to Help Fund New Roads Needed to Accommodate New Development.

The City may charge impact fees on new development. The Utah Impact Fees Act, found in Chapter 11-36 of the Utah Code, authorizes certain types of impact fees to help fund new infrastructure, including roads. Waxie does not question the City's authority to charge the roadway impact fee, and also does not dispute that the City properly enacted the fee as provided in the Impact Fees Act.[7]

Impact Fees are intended to provide partial funding for new infrastructure, based on the need, or impact, caused by new development. The City's roadway impact fee appears to fulfill the need for new arterial roads by first identifying which new roads will be needed, and then allocating a portion of the projected construction costs to new development. This recognizes that existing businesses will also benefit from the new roads, and so a portion of the road's cost should be borne by those businesses, through taxes or other assessments.

The Impact Fees Act requires that fees be justified by analysis using the factors listed in the Act, beginning with a capital facilities plan, which assesses public facilities and determines future needs. From this plan, impact fees can be determined, based on projected growth, the impact

[5] The consultants explained that the data was based on afternoon rush hour because that is "the period of greatest congestion in Salt Lake City." "General Fund Impact Fees Update" at § VI, p. 2.
[6] Waxie paid $46,940 as the impact fee attributed to the office portion of the building, and $90,548 for the industrial portion. Waxie proposes reducing the fees to $7,408 and $29,184 respectively.
[7] The Impact Fees Act outlines the procedures that local governments must follow when enacting impact fees.

attributed to new development, and estimated construction costs for new facilities.[8] According to the information provided for this Opinion, the City developed a capital facilities plan, and based its impact fee upon an analysis of its road needs. For the purposes of this Opinion, therefore, it is presumed that the City's roadway impact fee was validly enacted.

II. An Impact Fee May be Challenged as Excessive or Unreasonable.

A. An Impact Fee is an Exaction, and Must Satisfy "Rough Proportionality" Analysis.

Impact fees are exactions, because they are "contributions to a governmental entity imposed as a condition precedent to approving the developer's project." *B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 4, 128 P.3d 1161, 1164 ("*B.A.M. I*"). All exactions, including impact fees, must satisfy the "rough proportionality" analysis of § 10-9a-508(1). *Id.*, 2006 UT 2, ¶ 46, 128 P.3d at 1171. If an impact fee is adopted using the procedures outlined in the Impact Fees Act, it is presumed to be constitutional. "That presumption, however, may be overcome if fees require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred." *Home Builders Association v. City of North Logan*, 1999 UT 63, ¶ 9, 983 P.2d 561, 564 (citation omitted).

A property owner or developer subject to an impact fee may challenge the fee, as provided in the Impact Fees Act and the Salt Lake City Code. "Any fee payer may pay the impact fee imposed by this chapter under protest in order to obtain a building permit, and thereafter may appeal the validity or amount of such payment to the [city] council." SALT LAKE CITY CODE, § 18.98.090(B).[9] The City is obligated to provide the basis of its impact fee, and then "[t]he burden . . . falls upon the challenger to show failure to comply with the constitutional standard of reasonableness." *Home Builders Ass'n v. North Logan*, 1999 UT 63, ¶ 8, 983 P.2d at 563-64 (citation omitted).

The Utah Supreme Court further explained that the reasonableness standard meant that

> where the fee charged [on new development] exceeds the direct costs incident thereto (as a means of sharing the costs of common facilities), the excess must survive measure against the standard that the total costs fall equitably upon those who are similarly situated and in just proportion to benefits conferred.

Id. (citation omitted).

This language is similar to the "*Nollan/Dolan* rough proportionality" test adopted by both the U.S. Supreme Court and the Utah Supreme Court.[10] That test has also been codified in the Utah Code. At its heart, the rough proportionality test requires that the costs imposed on new development be fair. An exaction is valid if "(1) an essential link exists between a legitimate governmental interest and [the] exaction; and (2) [the] exaction is roughly proportionate, both in

[8] *See* UTAH CODE ANN. §§ 11-36-201 and -202.
[9] *See also* UTAH CODE ANN. § 11-36-401.
[10] *See Dolan v. Tigard*, 512 U.S. 374 (1994); *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, 196 P.3d 601.

nature and extent, to the impact of the proposed development." UTAH CODE ANN. § 10-9a-508(1).

The Utah Supreme Court further 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. 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. Applying that rule to impact fees means that the fee must be roughly equivalent to the costs necessary to offset the impact on system improvements.[11]

B. Applying Rough Proportionality Analysis to Impact Fees.

There is no question that an efficient road system is a legitimate public interest. *See Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117. The Impact Fees Act specifically authorizes fees for roadways. *See* UTAH CODE ANN. § 11-36-102(13) ("Public Facilities" includes roadways). There is thus an essential link between the roadway impact fee and the City's legitimate interest in providing adequate roads. The first aspect of the rough proportionality test is therefore met.

The second aspect analyzes the impact fee for rough proportionality, both in nature and extent. Since the City's roadway impact fee is intended to be based upon the impact that new development will have on the City's road system, the fee is related in nature to the impact. Secondly, the fee must be "roughly proportionate" in extent to the impact caused by the new development. The Utah Supreme Court has defined "roughly proportionate" as meaning

[11] The burdens, or impacts, on system improvements is also a measure of the "benefits conferred" by a local government. Publicly owned capital facilities, like roads, water systems, etc. enhance the value of property, and make productive development possible. Impact fees are intended to help fund system improvements, by assigning a fair portion of the costs based on the increased burden on the system improvements caused by new development. *See* UTAH CODE ANN. § 11-36-102(8)(a) (definition of "impact fee"). Because the impact of a new development is measured by the "benefit conferred," the rough proportionality analysis stated in *B.AM. II* is effectively the same as the reasonableness standard expressed in *Home Builders Ass'n v. North Logan*.

"roughly equivalent." If the costs to the developer roughly equal the expense of assuaging the impact, the exaction (or fee) is valid.

The cost to the developer is the fee itself. Using the formula established by its impact fee study, the City charged Waxie $137,488.00 as a roadway impact fee. The expense to the City, or the benefit provided to the developer, is more difficult to ascertain. The number of vehicle trips is important, but is not the only measure of a development's impact. The Utah Supreme Court identified several factors that a local government should consider when determining the reasonable of an impact fee:

> (i) the cost of existing public facilities;
> (ii) the financing of existing public facilities: user charges, special assessments, etc.
> (iii) the relative contribution of newly developed and other properties to the cost of existing public facilities: user charges, special assessments, or general taxes;
> (iv) the relative future contribution of newly developed and other properties to the cost of existing public facilities;
> (v) any credit to which newly developed properties are entitled for providing common facilities provided by the local government (or a private entity) elsewhere in the service area;
> (vi) any extraordinary costs in servicing newly developed properties; and
> (vii) the time-price differential inherent in fair comparisons of amounts paid at different times.

Banberry v. South Jordan City., 631 P.2d 899, 903-04 (Utah 1981). These factors have been codified as part of the Impact Fees Act, and are critical to the analysis of how "the proportionate share of the costs of public facilities are reasonably related to . . . new development activity." UTAH CODE ANN. § 11-36-201(5)(c).

> The objective of the complicated comparison in *Banberry* is to assure that municipal fees pertaining to newly developed properties do not require them to bear more than their equitable share of the capital costs (in comparison to other properties) in relation to benefits conferred. If properly applied, those seven factors should put [new development] on essentially the same basis as [existing development] with respect to costs borne in the past and to be borne in the future, in comparison with benefits already received and yet to be received.

Lafferty v. Payson City, 642 P.2d 376, 379 (Utah 1982). The *Banberry* factors, however, are not exclusive, and "should not be read as limiting the ability to deal with differing circumstances." *Home Builders Ass'n v. American Fork*, 1999 UT 7, ¶ 6, 973 P.2d 425, 427. A local government should incorporate consideration of these factors into a determination of whether a fee is rougly proportional, both in nature and extent, to the impact created by new development.

The City commissioned impact fee studies that proposed roadway impact fees, based upon the data provided by the City. This Opinion does not attempt a review of that study or the data used to generate the City's impact fees. As explained by the Utah Supreme Court, once the City has provided the basis of its fee (*i.e.*, its Impact Fee Study), the burden shifts to Waxie to demonstrate that the fee is does not satisfy the constitutional standard of reasonableness.[12]

Waxie argues that its impact on the City's roadway system is not roughly equal to the City's impact fee. According to Waxie, it will generate 26 vehicle trips each afternoon, based on the number of employees and truck shipments. However, this evidence is scant at best, and does not appear sufficient to overcome the presumption of validity and constitutionality enjoyed by the City's fee.[13] Waxie provided no traffic study, historical study, or other documentation to show that the 26 afternoon trips are the maximum number of vehicle trips associated with the new facility. Waxie also failed to submit any financial analysis showing how the roadway impact fee compares to the expenses incurred by the City to assuage the impacts caused by the new facility.

The City's impact fee is based on more than simply the number of potential vehicle trips. The benefits of the City's roadway system are more than just convenience for employees. All properties and businesses in the area benefit because the City maintains its arterial roadway system. Waxie's new facility will impact that system. As stated above, the purpose of an impact fee is to place new development and existing development on "essentially the same basis," including costs borne in the past and in the future. It is only fair that Waxie contribute a share of the costs of the arterial road system. Based on the benefit provided, that share is more than simply the number of daily vehicle trips.

Waxie's conclusion that the City's impact fee is based on afternoon vehicle trips only is mistaken. According to the Impact Fee Update Study provided for this Opinion, afternoon trips were used to determine the weighting factors assigned to each building type (retail, office, or industrial). The consultants used afternoon trips for the weighting factors because the highest traffic volumes are in the afternoon. The fee was not based on afternoon vehicle trips, but on the usage, measured by the size of the building, not the number of employees or vehicle trips. The projected traffic usage associated with each type of building was evidently derived using industry standards.

Waxie is in a unique position to request an independent calculation of its impact fee. The City's ordinance provides for independent calculation of an impact fee, provided the fee payer provides sufficient documentation. *See* SALT LAKE CITY CODE, § 18.98.160. Since Waxie has moved from a nearby facility, evidence of the traffic usage from that building can be used as evidence of the estimated traffic usage at the new facility. As has been discussed, however, traffic usage is only part of the information used to determine the impact fee. Future roadway needs, construction costs, financial analysis etc. must also be factored in.

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[12] *See Home Builders Ass'n v. North Logan*, 1999 UT 63, ¶ 8, 983 P.2d 561, 563-64.

[13] *See id.*, 1999 UT 63, ¶ 9, 983 P.2d at 564. It is assumed for the purposes of this Opinion that the City's Roadway Impact Fee was properly enacted, and warranted by a capital facilities plan and impact fee study that followed the Impact Fees Act.

Conclusion

Roadway or transportation impact fees are authorized by the Impact Fees Act, and may be charged to new development as a means of sharing the costs of new roads. As with all impact fees, roadway fees must be fair, and not impose a disproportionate burden upon new development. Impact fees adopted following the procedures and standards of the Impact Fees Act are entitled to a presumption of validity and constitutionality, but that presumption may be overcome if the fees are inequitable or disproportionate to the benefits conferred by the local government.

Impact fees are exactions, and must therefore satisfy the "rough proportionality" analysis codified at § 10-9a-508 of the Utah Code. The "reasonableness" language used in *Home Builders Ass'n v. American Fork* conveys the same meaning as the "rough proportionality" test used by the Utah Code and the *B.A.M. Development* cases. Therefore, any impact fee must satisfy the "rough proportionality" test, although compliance with the Impact Fees Act entitles the fee to a presumption of validity.

A developer may challenge an impact fee as disproportionate. If the local government provides the analysis upon which the fee is based, the burden shifts to the developer to show how the fee is unfair or inequitable. Given the presumption allowed to properly enacted impact fees, a developer must provide strong evidence that the challenged fee imposes an unfair burden.

Waxie's argument that its actual afternoon vehicle trips show a lessened impact than that calculated by the City's impact fee study is unsupported, because the evidence is not sufficient enough to overcome the presumption that the impact fee is valid. The number of trips claimed by Waxie is not supported by documentary or scientific evidence, and does not necessarily reflect the maximum number of trips associated with the facility. Waxie also did not submit any financial analysis comparing the fee to the City's costs to address the impacts attributed to the new facility. The City's fee is not based solely on afternoon vehicle trips, but on traffic usage derived from industry standards, as well as the estimated costs for new arterial roads. Waxie will need to provide more information and analysis showing that the impact fee imposes a disproportionate burden upon their new facility.

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 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:

Christine Meeker, City Recorder
Salt Lake City
451 S. State, Room 415
Salt Lake City, Utah 84111

On this _____ Day of September, 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