Advisory Opinion 265

Parties: WDG Washington, LLC, Millcreek Partners LLC and
Washington City, Washington County Water Conservancy District

Issued: March 22, 2023

TOPIC CATEGORY:

Impact Fees Act

We make the following conclusions on each of the eight questions raised:

1. Habitat Conservation Impact Fee: Until and unless the City provides some sort of individualized determination that the impact fee is roughly proportionate to the impact on the City to providing the services under the Habitat Conservation Plan and related take permit, the Habitat Conservation Impact fee is unlawfully imposed.
2. Wastewater Treatment Facility and Wastewater Impact Fees: Calculating wastewater impact fees based on estimated maximum hourly domestic sewage flow, as calculated in the Impact Fee Facilities Plan rather than average daily flow projected by the Developer, is not prohibited by the Impact Fee Act.
3. Streets/Roadways: The City and the Developer agree that apartments generally generate fewer trips and less of an impact on the roadway system than single-family homes do. Accordingly, the City charges a lower impact fee for apartments than for single-family homes.
4. Parks & Recreation: The City is not required by the Impact Fees Act to reduce the parks and recreation impact fee assessed because the Developer is providing private recreation facilities as part of the apartment development.
5. Water use standard used: It is lawful for the Water District to use the standard established by the Division of Drinking Water as the level of service standard even though it was established sixty years ago.
6. Funds not required for project: While there remains some gray area as to the actual status of the Lake Powell Pipeline, and the Developer may later request a refund, the water impact fee meets the requirements of the Impact Fees Act and appears lawful.
7. Smaller units require less water than larger units: The Water District's practice of assessing one (reduced) water impact fee for all apartments without further adjustment for the number of bedrooms is lawful.
8. Reasonably estimated: We do not separately find that Developer's statutory or constitutional rights have been violated in connection to impact fees charged by the City and Water District.

The Developer has raised several valid concerns regarding the way the City and the Water District assess impact fees. If we were being asked "is this impact fee fair," or "is this impact fee ideal" we might come to different, more nuanced conclusions. The City and the Water District may decide to reassess the impact fees assessed accordingly.

SPENCER J. COX
Governor

DEIDRE M. HENDERSON
Lieutenant Governor

UTAH DEPARTMENT OF COMMERCE
Office of the Property Rights Ombudsman

MARGARET W. BUSSE
Executive Director

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Division Director, Office of the Property Rights Ombudsman

ADVISORY OPINION

Advisory Opinion Requested By:	WDG Washington, LLC & Millcreek Partners LLC
Local Government Entity:	Washington City and Washington County Water Conservancy District
Scope of Advisory Opinion:	Impact Fee Challenge
Date of this Advisory Opinion:	March 22, 2023
Opinion Authored By:	Marcie M. Jones, Attorney Office of the Property Rights Ombudsman

ISSUE

Are the impact fees established by Washington City and Washington County Water Conservancy District and exacted against the Bluff View Commons apartment project legal?

SUMMARY OF ADVISORY OPINION

We make the following conclusions on each of the eight questions raised:

1. Habitat Conservation Impact Fee: Until and unless the City provides some sort of individualized determination that the impact fee is roughly proportionate to the impact on the City to providing the services under the Habitat Conservation Plan and related take permit, the Habitat Conservation Impact fee is unlawfully imposed.

2. Wastewater Treatment Facility and Wastewater Impact Fees: Calculating wastewater impact fees based on estimated maximum hourly domestic sewage flow, as calculated in the Impact Fee Facilities Plan rather than average daily flow projected by the Developer, is not prohibited by the Impact Fee Act.

3. Streets/Roadways: The City and the Developer agree that apartments generally generate fewer trips and less of an impact on the roadway system than single-family homes do. Accordingly, the City charges a lower impact fee for apartments than for single-family homes.

4. Parks & Recreation: The City is not required by the Impact Fees Act to reduce the parks and recreation impact fee assessed because the Developer is providing private recreation facilities as part of the apartment development.

5. Water use standard used: It is lawful for the Water District to use the standard established by the Division of Drinking Water as the level of service standard even though it was established sixty years ago.

6. Funds not required for project: While there remains some gray area as to the actual status of the Lake Powell Pipeline, and the Developer may later request a refund, the water impact fee meets the requirements of the Impact Fees Act and appears lawful.

7. Smaller units require less water than larger units: The Water District's practice of assessing one (reduced) water impact fee for all apartments without further adjustment for the number of bedrooms is lawful.

8. Reasonably estimated: We do not separately find that Developer's statutory or constitutional rights have been violated in connection to impact fees charged by the City and Water District.

The Developer has raised several valid concerns regarding the way the City and the Water District assess impact fees. If we were being asked "is this impact fee fair," or "is this impact fee ideal" we might come to different, more nuanced conclusions. The City and the Water District may decide to reassess the impact fees assessed accordingly.

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 this 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 Amy Dolce, attorney for WDG Washington, LLC & Millcreek Partners LLC (the property owners) on July 6, 2022. A copy of that request was sent via certified mail to Tera Pentz, City Recorder, Washington City, 111 North 100 East, Washington, Utah 84780.

EVIDENCE

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

1. Request for Advisory Opinion submitted by Amy Dolce, on behalf of WDG Washington, LLC and Millcreek Partners, LLC, on July 6, 2022.

2. Supplemental information clarifying request for the advisory opinion, by Amy Dolce, on behalf of WDG Washington, LLC and Millcreek Partners, LLC, on July 14, 2022

3. Letter from Robert C. Keller on behalf of the Washington County Water Conservancy District, on August 10, 2022.

4. Letter from Amy Dolce, on behalf of WDG Washington, LLC and Millcreek Partners, LLC on August 24, 2022.

5. Letter from Robert C. Keller, on behalf of Washington City, on September 8, 2022.

6. Letter from Robert C. Keller, on behalf of the Washington County Water Conservancy District, on September 12, 2022.

7. Letter from Amy Dolce, on behalf of WDG Washington, LLC and Millcreek Partners, LLC on September 28, 2022 responding to Washington City.

8. Letter from Amy Dolce, on behalf of WDG Washington, LLC and Millcreek Partners, LLC on September 28, 2022 responding to Washington County Water Conservancy District.

9. Letter from Robert C. Keller, on behalf of Washington City, on October 7, 2022.

10. Letter from Robert C. Keller, on behalf of Washington County Conservancy District, on October 21, 2022.

BACKGROUND

Washington City is a fast-growing municipality in southern Utah ("City") and Washington County Water Conservancy District ("Water District") is a political subdivision of the state, organized as a service district to provide culinary and secondary water to users within Washington County. Both City and Water District exact impact fees for new development within their boundaries.

WDG Washington, LLC and Millcreek Partners LLC (together, "Developer") own land within City and Water District boundaries and in 2020 began development of an apartment project. As a condition of approval for building permits, Developer paid impact fees to City and Water District in connection with each of six apartment buildings begun over the course of 2021 as approvals were sought and fees assessed and required.

Developer asserts the impact fees assessed and collected violate the Impact Fees Act as well as the Utah and U.S. Constitutions in multiple aspects and has requested this Advisory Opinion to address the following eight issues:

Impact Fees paid to City

1. Habitat Conservation Impact Fee: Are the impact fees which are calculated on the percentage cost of improvements and not the impact of the development on the affected infrastructure legal?

2. Wastewater Treatment Facility and Wastewater Impact Fees: For the impact fees which are calculated on the basis of estimated peak usage (gallons per day), is such estimated

use reasonable? Developer has an average of 73.06 gpd in a similar project and would like to understand the underlying basis.

3. Streets/Roadways: Are the impact fees assessed based on the relative extent to which the development activity will contribute to the cost of existing public facilities and system improvements in the future, and how is this calculation determined?

4. Parks & Recreation: Should the Property Owner be afforded a credit against impact fees because its development and surrounding facilities will involve private improvements or facilities that will offset the demand for system improvements inside and outside of the development?

Impact Fees paid to Water District

5. Water use standard used: Water District uses the standard adopted by the Division of Drinking Water at 800 gpd/ERU as established by R309-510-7. Is this standard, which was developed more than 60 years ago and does not consider current standard water conservation practices reasonable? Developer achieves 73 gpd on a similar residential project.

6. Funds not required for project: Is it legal for the water impact fees to fund projects not required by Property Owner's development?

7. Smaller units require less water than larger units: Must one-bedroom units be charged a lesser water impact fee than two-bedroom or three-bedroom units.

8. Reasonably estimated: Developer questions whether all impact fees are reasonably estimated.

Accordingly, the Developer has submitted a Request for an Advisory Opinion from the Property Rights Ombudsman to determine whether the impact fees imposed upon them by the City and the Water District are consistent with state law.

ANALYSIS

I. Legal Analysis to determine whether an impact fee is legal

All impact fees assessed in Utah must follow the requirements detailed in the Utah Impact Fees Act[1] (the "Impact Fees Act") which authorizes political subdivisions to create and impose certain impact fees on new development. The Impact Fees Act details purposes for which impact fees may be collected, the procedure for their passage including notice and hearing requirements, as well as steps for creating impact fee facilities plan, how impact fees are to be calculated, how proceeds may be spent, how refunds are handled, and how impact fees may be challenged.

While the Impact Fees Act articulates specific statutory rights and responsibilities, it also ensures the developer's constitutional rights are protected. Because impact fees are a condition on development approval that require a developer to give private property in the form of monetary fees to the government, they implicate constitutionally protected rights. In particular, the Takings

[1] Chapter 11-36a of the UTAH CODE.

Clause of the U.S. Constitution and Article I Section 22 of the Utah Constitution both protect private property from governmental taking without just compensation.[2] An impact fee violates constitutional protections when it requires a property owner to pay for impacts beyond its own. Impact fees may offset the costs to the government to provide services to the development, and no more.[3]

The U.S. and Utah Supreme Courts have articulated a clear legal test to determine whether an impact fee goes too far – impact fees are legal only if they are "roughly proportionate in nature and extent" to the public burdens that the development will impose on governments.[4] Furthermore, the *nature* aspect of the rough proportionality test "focuses on the relationship between the anticipated impact and the imposed exaction" and the *extent* aspect of the rough proportionality test "compares the government's cost of alleviating the development's impact on the infrastructure with the cost [to developer] of the exaction."[5] The Utah Supreme Court also clarifies that "no precise mathematical calculation is required" but the government must "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[6]

To account for the rough proportionality and "individualized determination" required by the U.S. Constitution, the Impact Fees Act requires that impact fees include both an (1) Impact Fee Facilities Plan, and (2) Impact Fee Analysis.

The Impact Fee Facilities Plan ("IFFP") requires that the local political subdivision "determine the public facilities required to serve development resulting from new development activity."[7] The IFFP must identify the existing level of service, the proposed level of service, excess capacity, identify demands by new development activity, and means by which the demands will be met.[8] In short, the IFFP requires the local political subdivision to calculate the cost of providing public facilities to new development.

Additionally, the local political subdivision must conduct an Impact Fee Analysis ("IFA") which identifies the anticipated impact of anticipated development activity and estimates the proportionate share of the impact on existing capacity and needed system improvements.[9] In

[2] The "Takings Clause" in the Fifth Amendment to the U.S. Constitution reads, in relevant part, "nor shall private property be taken for public use, without just compensation." Likewise, Utah Constitution Article I, Section 22 states "private property shall not be taken or damaged for public use without just compensation."
[3] *Banberry Development Corporation v. South Jordan City,* 631 P.2d 899, 903 (Utah 1981).
[4] Note that technically, the two constitutions are different documents from different governments with different wording and different authority and could be interpreted completely separately. The Utah Supreme Court has chosen to piggy-back the analysis of the Utah Taking's Clause onto that of the U.S. Supreme Court and analyzes the two in unison, using the same standard, and treating them as if they were essentially one. We follow that example. Therefore, we are left with a single articulated standard for understanding and applying both Takings Clauses – an impact fee must be roughly proportional in nature and extent with a duty to the government to make some sort of individualized determination that the impact fee is related in both nature and extent to the impact of the development.
[5] *B.A.M. Dev., L.L.C. v. Salt Lake County*, 2012 UT 26.
[6] *Id.*
[7] Utah Code 11-36a-301.
[8] *Id.*
[9] Utah Code 11-36a-304.

short, the IFA requires the local political subdivision to calculate the specific impact or proportionate share new development will have on public facilities.

Therefore, the Impact Fees Act both creates new law by specifically delegating authority to political subdivisions and giving statutory parameters for impact fee enactment, but also codifies the existing constitutional tests protecting rights against takings without just compensation, as clarified by both the U.S. and Utah Supreme Courts. If the requirements in the Impact Fees Act are followed, and specifically by including the IFFPs and IFAs, an impact fee should meet the requirements of both Utah statutory law as well as the protections provided by the U.S. and Utah Constitutions Takings Clauses.

Note that statutes cannot limit constitutional rights. The constitutional protections detailed in Supreme Court cases can be summarized and included in the Impact Fees Act for clarity and ease of use, but they do not replace or limit the rights guaranteed by the constitution.

Further note that legislative decisions approving impact fees carry "the presumption of constitutionality".[10] Therefore, once the city has "disclosed the basis of its calculations"[11] as now specifically required by the Impact Fees Act, the impact fee is presumed in accordance with the constitution and the burden is on the developer to establish that their constitutional rights have, in fact, been violated.[12]

Additionally, note that the impact "is estimated at the time the demand is made" only.[13] The constitutional analysis does not look at how impact fees are later spent, or whether additional impact fees may later rightfully be due. Also, impact fees are estimates only. Requesting an impact fee to be calculated on actual costs, which are calculated after the money is spent, similarly falls outside of the constitutional analysis.[14]

Ultimately, to be legal, the impact fee must conform to the requirements of the Impact Fees Act. If the impact fee ordinance was passed in accordance with the Impact Fees Act, and includes the basis for its calculations (as required in the IFFP and IFA), the burden is on the developer, or other protesting party, to prove the calculated impact fee is unlawful as applied to the specific development proposal.

Note that because of the way the Impact Fees Act is written and how the courts have evaluated such appeals, the Developer has a heavy burden of establishing their rights have been violated.[15] Great deference is given entities enacting impact fees as long as proper procedures were followed. Furthermore, we are asked to evaluate whether these impact fees are legal, not whether they are the least expensive way to provide services, nor whether they are ideal from a policy standpoint.

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[10] *Banberry Development Corp. v. South Jordan City*, 631 P.2d 899 (Utah 1981).
[11] *Id.*
[12] *See* Banberry Development Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981) and Alpine Homes, Inc. v. City of W. Jordan*,* 2017 UT 45.
[13] *Alpine Homes, Inc. v. City of W. Jordan,* 2017 UT 45, ¶ 28.
[14] *Alpine Homes, Inc. v. City of W. Jordan,* 2017 UT 45.
[15] For instance, legislative decisions approving impact fees carry "the presumption of constitutionality", once the city has "disclosed the basis of its calculations" the impact fee is presumed in accordance with the constitution and the burden is on the developer to establish their constitutional rights have been violated.

II. Legal Analysis of questions raised

We will now apply the legal standard to the facts on each of the eight questions raised.

<u>Question 1 - Habitat Conservation Impact Fee charged by the City</u>: Are the impact fees which are calculated on the percentage cost of improvements and not the average impact of the development on the affected infrastructure legal?

Washington County is one of the nation's fastest growing counties and also home to the highest density of Mojave desert tortoises. The Mojave desert tortoise was listed as Threatened by the United States in 1990. Shortly thereafter, to allow for continued real estate development while complying with the requirements of the Endangered Species Act, Washington County applied to the U.S. Fish and Wildlife Service for an Incidental Take Permit.[16]

According to the record, beginning in 1993, the City agreed to "support the 1996 Mojave Desert Tortoise Incidental Take Permit issued to Washington County by the U.S. Fish and wildlife Service. . ."[17] Pursuant to that agreement, the City agreed to participate in the funding mechanism for that Permit and associated plan by collecting a fee of two tenths of one percent (0.2%) of estimated construction cost associated with each building permit issued by the City.[18] The record does not specify how this percentage was decided upon, nor the how construction costs relate to habitat conservation.

Developer argues that calculating the Habitat Conservation Impact Fee as a percentage of the cost of the improvement is illegal. Developer notes that disturbing one acre of tortoise habitat has the same impact (and should pay the same impact fee) whether the estimated construction cost of the work to be performed under the permit is $100 or $100,000,000. Therefore, the Developer questions whether calculating the Habitat Conservation Impact Fee as percentage of the cost of improvement is "roughly proportionate" to the impact of the development.

To refute these arguments, the City notes that the Impact Fees Act includes a separate section devoted to offsetting environmental impacts in particular titled Environmental mitigation impact fees.[19] The express language of that section starts "*notwithstanding the requirements and prohibitions of [the Impact Fees Act]*, a local political subdivision may impose and assess an impact fee for environmental mitigation [goes on to establish requirements]" (emphasis added).[20] Notably, the requirements listed in this one section of the Impact Fees Act do not require the same IFFP and IFA required for all other impact fees. Remember that the IFFP and IFA ensure that an impact fee is roughly proportionate in nature and extent to the impact of the development, and therefore, does not run afoul of the developer's constitutional rights protected by the Takings Clauses.

However, even if the Impact Fees Act carves out environmental impacts from the requirement to provide an IFFP and IFA, the U.S. and Utah Constitutions still clearly require that all impact fees be roughly proportional in nature and extent to the public burden that the development will impose on government.[21] Including the IFFP and IFA is one way to ensure constitutional protections are

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[16] Habitat Conservation Plan, Washington County, Utah dated December 1995.
[17] Washington City response received September 15, 2022 quoting Interlocal Agreement.
[18] *Id.*
[19] UTAH CODE § Section 11-36a-205.
[20] UTAH CODE § 11-36a-205 Environmental mitigation impact fees.
[21] Because the interpretation is not necessary for the legal outcome of this question, we decline to opine on whether the language "*notwithstanding the requirements and prohibitions of [the Impact Fees Act]*,"

met. If the IFFP and IFA are not provided, the City still bears the burden to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[22]

The City has not provided an individualized calculation in the record. It is not clear from the record how the funding mechanism for that Habitat Conservation Impact Fee was determined. Collecting a fee of two tenths of one percent (0.2%) of estimated construction cost associated with each building permit issued by the City is straight forward and easy to calculate, and apparently used county-wide, but the required "individualized calculation" have not been provided. The City must disclose how construction costs relate to habitat conservation or otherwise determine that the impact fee relates in nature and extent to the impact of the proposed development.

The method of calculating the Habitat Conservation Impact Fee may produce results that pass the rough proportionality test. The Habitat Conservation Plan is a wholistic approach intended to meet the requirements imposed by U.S. Fish and Wildlife Services. Without the Conservation Plan, and the impact fees funding it, development in this area could be prevented all together. The proportionate share of creating, passing, and implementing the Conservation Plan by the government may be much more than the Habitat Conservation Impact Fee. It may be that those who invest the most stand to gain the most and therefore may be charged the most.

Alternatively, this method may also produce disproportionate results. Requiring impact fees on a sliding scale based on the cost of new construction is not intuitively proportionate. However, note that the fees for environmental conservation do not need to be proportionate across various developments (i.e., developments with lesser impact need not pay smaller impact fees than developments with a greater impact). It is required only that each impact fee be less than the proportionate share of the impact of that particular development.

In this instance, the City has not disclosed the basis of its calculation or otherwise established that the development in question has an impact equal or greater than the Habitat Conservation Impact Fee imposed. Thus, in the absence of the Habitat Conservation Impact Fee IFFP or IFA, the City must otherwise make "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[23] Without that determination, the City does not benefit from the presumption that this particular impact fee is constitutional.

Conclusion: Until and unless the City provides some sort of individualized determination that the impact fee is roughly proportionate to the impact on the City to providing the services under the Habitat Conservation Plan and related take permit, the Habitat Conservation Impact fee is unlawfully imposed.

<u>Question 2 - Wastewater Treatment Facility and Wastewater Impact Fees</u>: For the impact fees which are calculated on the basis of estimated use (gallons per day), is such estimated use reasonable? (Developer has an average of 73.06 gpd in a similar project, so would like to understand the underlying basis.)

conclusively means Environmental mitigation impact fees need not comply with other non-contradictory aspects of the Impact Fees Act at this time.

[22] *Id.*

[23] *Dolan v. City of Tigard*, 512 U.S 374 (1994).

The City has adopted a wastewater impact fee based on an estimated use in gallons per day for each Equivalent Residential Unit (ERU). Developer questions whether using this estimation is reasonable where Developer has actual usage data for similarly situated residential units, and after the development was complete, actual data illustrating the actual average impact for this specific development.

The wastewater impact fee calculated by Sunrise Engineering in the Wastewater Capital Improvements Plan, which also calculates an appropriate impact fee, estimates ERU overall at 427.3gpd on average with indoor use calculated at 221.6gpd[24]. Developer claims actual average usage of only a fraction of that amount at approximately ERU of 73gpd.

The Developer questions two aspects of the wastewater impact fee: (1) is the City required to rely on data provided by the Developer from a comparable development and later, usage by the actual development in question or can they use the City's own estimate from the Impact Fee Facilities Plan, and also, (2) may the City calculate wastewater impact fees on the estimated *maximum* rather than the estimated *average* daily flow.

As discussed, the purpose of the IFFP and IFA, required by the Impact Fees Act, is to provide for the individualized determination that the resulting fee will be roughly proportionate to the development impact of the particular fee payor. The wastewater impact fee appears consistent with the requirements of the Impact Fees Act. The wastewater impact fee covers an eligible public facility. The wastewater impact fee was evidently established properly with an adequate IFFP and IFA and properly noticed and enacted.

While a properly enacted fee meets an initial threshold of constitutionality, note that the Impact Fees Act includes a requirement that adjustments must be permitted based upon studies and data submitted by the developer. Specifically, UTAH CODE § 11-36a-402(1)(d) includes a requirement that all impact fees enactments include "a provision governing calculation of the amount of the impact fee to be imposed on a particular development that permits adjustment of the amount of the impact fee based upon studies and data submitted by the developer." The City's impact fee ordinance contains such a provision,[25] and the burden of whether an adjustment for this developer is warranted pursuant to the City's application of its ordinance then falls to the developer by providing the requisite studies and data. Developer maintains that it provided evidence that similar developments required significantly less sewer capacity, and later, provided evidence that actual usage at the development was less than the impact fee imposed.

The City claims they have not received details needed to support the Developer's assertion that the development will/does use less water than the Wastewater Capital Improvement Plan estimates. In other words, the City claims that the Developer did not sufficiently established that an adjustment was warranted. The City must consider evidence presented by a developer, but is not required to adjust the fee as long as there is sufficient evidence to support the conclusion that the fee imposed is generally proportionate to the impact. Based on the information presented, it is lawful for the City to use their estimates established in the IFFP and IFA.

[24] Washington City Culinary Water Master Plan 2017.
[25] WASHINGTON CITY CODE § 8-6D.

Conclusion: Calculating wastewater impact fees based on estimated maximum hourly domestic sewage flow, as calculated in the Impact Fee Facilities Plan rather than average daily flow projected by the Developer, is not prohibited by the Impact Fee Act.

<u>Question 3 - Streets/Roadways</u>: Are the impact fees assessed based on the relative extent to which the development activity will contribute to the cost of existing public facilities and system improvements in the future, and how is this calculation determined?

The Developer questions whether apartment developments, such as the buildings in question, have been assessed based on the relative extent to which the development will contribute to the cost of existing and planned public facilities. The Developer maintains that impact fees for apartments should be less than single family homes because in general, fewer people live in the relatively smaller apartments, and therefore generate fewer trips and have less of an impact on the roadway system.

It appears the City's impact fee scheme aligns with Developer's positions. The City charges roadway impact fees of $1,959 for each apartment and $3,159 for each single-family residence. This is based on the results of an impact fee study conducted by an engineering company using the ITE Trip Generation Manual to evaluate impact of various developments.

Because there is no further contention that the City's provided calculations violate the act, we assume this point is resolved without the need for our further opinion.

Conclusion: The City and the Developer agree that apartments generally generate fewer trips and less of an impact on the roadway system than single-family homes do. Accordingly, the City charges a lower impact fee for apartments than for single-family homes and appears to be lawful.

<u>Question 4 - Parks & Recreation</u>: Should the Property Owner be afforded a credit against impact fees because its development and surrounding facilities will involve private improvements or facilities that will offset the demand for system improvements inside and outside of the development?

The Developer will be including several private recreation amenities as part of the apartment project including four pickleball courts, a pool with a lazy river, barbeque areas, two playgrounds, large grassy areas, and community gardens. The Developer seeks a credit against the assessed parks and recreation impact fees because the private improvements will offset demand for public facilities.

The Impact Fees Act requires that the Impact Fee Analysis include an offset for *system improvements* installed by the Developer as part of the project.[26] System improvements are existing or future facilities that are identified in the impact fee analysis that are "intended to provide services to service areas within the community at large" and "do not include project improvements."[27]

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[26] UTAH CODE § 11-36a-304(2) reads "In analyzing whether or not the proportionate share of the costs of public facilities are reasonably related to the new development activity, the local political subdivision or private entity, as the case may be, shall identify, if applicable . . . (f) the extent to which the development activity is entitled to a credit against the impact fees because the development activity will dedicate system improvements or public facilities that will offset demand for system improvements, inside or outside the proposed development. . . ."

[27] *See* UTAH CODE § 11-36a-102(22).

In this case, the recreation facilities provided as part of the development will apparently remain private, and as such, would not qualify as system improvements which would offset impact fees under state law. Nor does the City's impact fee ordinance contain anything that would suggest that credits or adjustments would be more widely available for the creation of non-public facilities.

The City created and provided a park and recreation IFFP and IFA when approving the impact fee scheme, and has thus provided an individualized determination that the that the required dedication is related both in nature and extent to the impact of the proposed development."[28] Furthermore, because legislative decisions approving impact fees carry "the presumption of constitutionality", once the city has "disclosed the basis of its calculations" [29] included in the IFFP and IFA, the impact fee is presumed in accordance with the constitution and the burden is on the developer to establish their constitutional rights have in fact been violated.[30]

While it may be wholly appropriate for the City to reduce its impact fee in consideration of the private amenities provided by Developer in this case, nothing in the law requires the City to do so since the facilities are not public.

Conclusion: The City is not required by the Impact Fees Act to reduce the parks and recreation impact fee assessed because the Developer is providing private recreation facilities as part of the apartment development.

We will now discuss the challenges to impact fees paid to the Water District

Question 5 - Water use standard used: Water District uses the standard adopted by the Utah State Division of Drinking Water at 800 gpd/ERU as established by R309-510-7. Is this standard, that was developed more than 60 years ago, and does not consider current standard water conservation practices such as [piping water canals], reasonable? Developer achieves 73 gpd on a similar residential project.

The Developer next questions whether the standard imposed by the Utah Division of Drinking Water on the Water District may also be used as the level of service for the water impact fee.

The Utah Division of Drinking Water imposes minimum standards that all public water systems must meet. These standards are detailed in the Utah Administrative Code at R309-510-7. These rules specify that water providers must provide for the peak day demand and the average yearly demand at levels at 800 gallons per day for each equivalent residential connection.[31] These standards were established nearly sixty years ago. The Water District has used these as the level of service standards in the relevant Impact Fee Facilities Plan and Impact Fee Analysis, and assessed the Developer accordingly.

The Developer maintains that their development is expected to use much less water than required by the Division of Drinking Water. The estimated usage comes from a similar development, and

[28] *Dolan v. City of Tigard*, 512 U.S 374 (1994).
[29] *Banberry Development Corp. v. South Jordan City*, 631 P.2d 899 (Utah 1981).
[30] See Banberry Development Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981) and Alpine Homes, Inc. v. City of W. Jordan, 2017 UT 45.
[31] That standard also requires 0.89 acre-feet per year for each ERU for both indoor and outdoor use to meet the average yearly demand. Because this portion of the standard was not argued by the Developer, and complicates the discussion without changing the result, it will not be discussed in the analysis.

later confirmed by actual usage within the developed community of approximately 73 gpd on average per day. This estimate is less than 10% of the state standard.

The Developer further maintains that the "relevant time to determine whether an impact fee was appropriate is at the time that it is imposed on the property owner. The state standards were adopted roughly sixty years ago before recent conservation efforts, such as piping canals"[32] and water conscious appliances and other practices became common.

The Developer also maintains that the Water District's general manager acknowledged that water usage in Washington County has decreased by more than 30% since 2000 in a presentation given as part of a Wallace Stegner Green Bag presentation.[33] He goes on to say that actual residential usage in Washington County is significantly less than 159 gpcd per ERU connection.

The Developer therefore argues that the Water District cannot legally assess impact fees based on a level of service of 800 gpcd at peak demand, as established roughly sixty years ago, when actual data by the Water District indicates actual average residential usage is 159 gpcd and the development requires only an estimated average 73 gpcd.

Note however, for clarity, that the 800 gpcd required by the Division of Drinking Water is set to meet or exceed *peak* expected demand, while the estimates put forward by both the Water District's general manager and the Developer put forth are apparently *average* gpcd. These different rates are admittedly measuring different things. Without a direct comparison, it is difficult to determine intuitively whether the water impact fee is excessive. One would expect the peak demand to be higher than average demand.

Accordingly, we analyze whether the Water District violates the state Impact Fees Act by using the standard required of it by the Utah Division of Drinking Water as the level of service for the impact fee. The Developer maintains that because the water impact fee is based on the level of service required by the Division of Drinking Water which, the Developer argues, is not "roughly proportionate" or "reasonably related" to "the service demands" of the actual development, it violates the Impact Fees Act.

In response, the Water District argues that the water impact fee conforms to the Impact Fees Act. As required by the Act, the Water District prepared an impact fee facilities plan (IFFP) in connection with establishing the water impact fee.[34] The IFFP must "identify the existing level of service" and "establish a proposed level of service."[35] The Act defines "level of service" as "the defined performance standard or unit of demand for each capital component of a public facility within a service area."[36] Level of service is therefore a critical part of any impact fee enactment.

The IFFP uses the standards promulgated by the Division of Drinking Water as the level of service standard because "[t]he Utah State Division of Drinking Water has established rules that all public water systems must comply with to determine how much water the system must be able to provide."

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[32] Submission dated September 28, 2022.
[33] Submission dated September 28, 2022 quoting presentation by Zach Renstrom, the District's General Manager.
[34] UTAH CODE § 11-36a-301(1).
[35] UTAH CODE § 11-36a-302(1).
[36] UTAH CODE § 11-36a-102(12).

While there are many provisions regarding the level of service within the Impact Fees Act[37], there is nothing in the Act that dictates specifically how a level of service is established. For instance, there is no requirement that the level of service be the minimum necessary or the lowest cost to meet the actual demand. Similarly, nothing in the Act suggests that the Water District should not adopt the Division of Drinking Water standard as their level of service. Indeed, if the Water District is required to build infrastructure and facilities in accordance with the Division of Drinking Water level of service standards, "the impact on the Water District, after all, could hardly be more precisely measure than by an assessment of the infrastructure and facilities is required to build as a result of new development."[38]

For this impact fee, the Water District provided the information required by the IFFP and IFA when approving the impact fee and has thus provided an individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[39] The limited information available providing actual *average* usage does not overcome the individualized determination used using *peak* demand.

That said, the Developer raises valid concerns. It is not clear why the Division of Drinking Water has not updated the standards it imposes on water providers in over half a century, particularly given recent and effective efforts to conserve water. Generally speaking, the older the numbers, the higher the likelihood the numbers will not be reflective of actual impact. Much has changed in the past few decades. It may be wholly appropriate for the City to push back on the Division of Drinking Water standards. However, nothing in the law requires the City to do so.

Conclusion: It is lawful for the Water District to use the standard established by the Division of Drinking Water as the level of service standard even though it was established sixty years ago.

Question 6 - Funds not required for project: Is it legal for the water impact fee to fund projects not required by Property Owner's development?

Developer maintains that a majority of the capital improvements proposed to be paid for with the water impact fees are for the Lake Powell Pipeline which the Water District is allegedly not currently pursuing. Developer points out that the Impact Fees Act requires the Water District to expend impact fees only for system improvements identified in the IFFP and for the specific public facility type for which they were collected. Developer questions whether it is therefore legal to collect impact fees for a project the Water District is not presently pursuing.

In response, the Water District maintains that the Lake Powell Pipeline project remains ongoing with the Water District continuing to expend fees on the project. The Water District expects to receive over 72,000-acre feet from the Lake Powell Pipeline when it is completed within the original planning horizon. The Water District goes on to say the Developers "question the legality and appropriateness of imposing a fee that is based primarily on an extensive project that will never be built" yet "the [Water District] and the State of Utah are both continuing development efforts and still intend to develop that source."[40]

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[37] For instance, the impact fee imposed may not raise the level of service for existing development (UTAH CODE § 11-36a-202(1)) and may exceed the existing level of service if independent of impact fees the means to increase service level of existing demand is proposed (UTAH CODE § 11-36a-302(1)(c)).
[38] *See* Washington Townhomes, LLC v. Washington County Water Conservation District, 2016 UT 43.
[39] *Dolan v. City of Tigard*, 512 U.S 374 (1994).
[40] Submission dated August 10, 2022.

There appears to be a genuine disagreement among the parties as to whether or not Water District is currently pursuing the Lake Powell Pipeline project. The record does not include a definitive answer on this issue.

It does appear, however, that the Lake Powell Pipeline project was actively being planned for when in the IFFP and IFA were approved in 2017. Additionally, the Impact Fees Act does not require that any sort of constant effort be being made towards public facilities for which an impact fee is charged.

Instead, the Impact Fees Act requires that the IFFP and IFA each include certification that each only include the cost of public facilities that are "projected to be incurred or encumbered within six years after the day on which each impact fee is paid."[41] Therefore, the Impact Fees Act requires a check point that when the IFFP and IFA are approved only public facilities to be built/encumbered within six years be included. The IFFP and IFA for the water impact fee were passed in 2017 and there is no evidence in the record to establish the Lake Powell Pipeline project was not appropriately included. The Impact Fees Act also requires that when the impact fee is collected, it will only be collected for public facilities to be built/encumbered within six years of collection. In this case, the water impact fees were collected in 2021 and the Water District maintains the Lake Powell Pipeline project was still anticipated to be constructed within six years. It is not clear from the record when efforts to pursue the Lake Powell Pipeline project allegedly ceased.

The Impact Fees Act includes a provision whereby collected unused fees may be refunded if not used within six years (or longer if an extraordinary and compelling reason is given for why fees should be held for longer).[42] If work on the Lake Powell Pipeline project is indeed not postponed for good reason, but instead has been abandoned, the Developer can request a refund in compliance with Utah Code § 11-36a-603(2)(b) after the six-year period has lapsed.[43]

Once again, the Developer has raised a valid concern about whether they are being assessed an impact feel for a facility that will not be constructed. If the Lake Powell Pipeline project is not moving forward, the Water District should act in good faith accordingly. However, based on the information provided, the Lake Powell Pipeline appears to have been lawfully included at the time the IFFP and IFA were passed and the impact fee was paid. The Developer may request a refund if the funds are not spent as anticipated within six years.

Conclusion: While there remains some gray area as to the actual status of the Lake Powell Pipeline, and the Developer may later request a refund, the water impact fee meets the requirements of the Impact Fees Act and appears lawful.

Question 7 - Smaller units require less water than larger units*:** **Is the Water District legally obligated to charge a lower water impact fee for one-bedroom apartments than two or three-bedroom apartments*?

Developer maintains that in their experience, larger units use more water than smaller units. Developer further maintains that other jurisdictions recognize the lower impact and charge a correspondently lower impact fee. Also, lowering the water impact fee for apartment units, as

[41] UTAH CODE §§ 11-36a-305 and 306.
[42] UTAH CODE § 11-36a-603 Refunds.
[43] Similarly, the Impact Fees Act includes an ability to challenge assessed impact fees, including an ability to challenge whether the fees were spent or encumbered in accordance with the requirements therein.

compared to single family detached homes, is supported by public policy by promoting construction of affordable housing options.

Water District maintains that water requirements for one-bedroom units v. larger units are not reliably different or predictable. As an example, the Water District states that a couple could share a one-bedroom apartment or a family sharing a two-bedroom apartment could use more water than a single person living in a two or three-bedroom apartment. The Water District also maintains that the dynamics are unpredictable and subject to change in the future depending on who moves in or out and residents' future habits. Water District is tasked with providing water which meets changing circumstances over time, also, Water District has adjusted the impact fee charged the Developer based on other reliable factors.

We first look to whether the Impact Fees Act requires that Water District charge a lower impact fee for apartments with fewer bedrooms. The Impact Fees Act requires that the Water District "determine the public facilities required to serve development resulting from new development activities"[44] and also "estimate the proportionate share" of existing capacity and system improvements that are "reasonably related to the new development activity."[45] The record does not suggest that the IFFP and IFA do not adequately demonstrate this.

The Impact Fees Act includes a provision for requesting an adjustment to the impact fee assed to ensure that it is imposed fairly and responds to unusual circumstances in specific cases.[46] In addition, the Water District has incorporated a mechanism for seeking an adjustment by submitting specific data or studies. The Developer has not requested such an adjustment, nor provided studies or data which reliably indicate fewer bedrooms correspond to less water consumption over the life of the project.

Note that the Water District uses the standards established by the Division of Drinking Water for Equivalent Residential Units then made blanket adjustments lowering the water impact fee for all multifamily residences. The Water District does not make further reductions based on the number of bedrooms.

For this impact fee, the Water District provided the information required by the IFFP and IFA when approving the impact fee and has thus provided an individualized determination that the that the required dedication is related both in nature and extent to the impact of the proposed development."[47]

Conclusion: The Water District's practice of assessing one (reduced) water impact fee for all apartments without further adjustment for the number of bedrooms is lawful.

<u>Question 8 - Reasonably estimated</u>: Developer questions whether all impact fees are reasonably estimated.

The Developer next asks broadly if all of the impact fees are reasonably estimated. The Developer asks generally whether their rights have been violated.

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[44] UTAH CODE § 11-36a-301(1).
[45] UTAH CODE § 11+36a-304(1).
[46] UTAH CODE § 11-36a-402(1)(d).
[47] *Dolan v. City of Tigard*, 512 U.S 374 (1994).

The Developer has raised several valid concerns regarding the way the City and the Water District assess impact fees. If we were being asked "is this impact fee fair," or "is this impact fee ideal" we might come to different, more nuanced conclusions. The City and the Water District may decide to reassess their impact fees accordingly.

However, we have been asked whether these impact fees are legal. Because of the way the Impact Fees Act is written, and how the courts have evaluated impact fee and exaction claims, once an IFFP and IFA have been prepared and an impact fee enacted, the Developer has the burden to establish that a specific fee has in fact violated their rights in some way.[48] Great deference is given entities enacting impact fees, as long as proper procedures were followed. As a result, in investigating the questions presented we do not separately find that Developer's statutory or constitutional rights have been violated in connection to impact fees charged by the City and Water District.

Conclusion: We do not separately find that Developer's statutory or constitutional rights have been violated in connection to impact fees charged by the City and Water District.

CONCLUSION

We make the following conclusions on each of the eight questions presented:

1. Habitat Conservation Impact Fee: Until and unless the City provides some sort of individualized determination that the impact fee is roughly proportionate to the impact on the City to providing the services under the Habitat Conservation Plan and related take permit, the Habitat Conservation Impact fee is unlawfully imposed.

2. Wastewater Treatment Facility and Wastewater Impact Fees: Calculating wastewater impact fees based on estimated maximum hourly domestic sewage flow, as calculated in the Impact Fee Facilities Plan rather than average daily flow projected by the Developer is not prohibited by the Impact Fee Act.

3. Streets/Roadways: The City and the Developer agree that apartments generally generate fewer trips and less of an impact on the roadway system than single-family homes do. Accordingly, the City charges a lower impact fee for apartments than for single-family homes, and appears to be lawful.

4. Parks & Recreation: The City is not required by the Impact Fees Act to reduce the parks and recreation impact fee assessed because the Developer is providing private recreation facilities as part of the apartment development.

5. Water use standard used: It is lawful for the Water District to use the standard established by the Division of Drinking Water as the level of service standard even though it was established sixty years ago.

[48] For instance, legislative decisions approving impact fees carry "the presumption of constitutionality", once the city has "disclosed the basis of its calculations" the impact fee is presumed in accordance with the constitution and the burden is on the developer to establish their constitutional rights have been violated.

6. Funds not required for project: While there remains some gray area as to the actual status of the Lake Powell Pipeline, and the Developer may later request a refund, the water impact fee meets the requirements of the Impact Fees Act and appears lawful.

7. Smaller units require less water than larger units: The Water District's practice of assessing one (reduced) water impact fee for all apartments without further adjustment for the number of bedrooms is lawful.

8. Reasonably estimated: We do not separately find that Developer's statutory or constitutional rights have been violated in connection to impact fees charged by the City and Water District.

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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. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

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 and civil penalty provisions, found in § 13-43-206 of the Utah Code, 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.