Advisory Opinion 270

Parties: Yard AF, LLC; American Fork
Issued: June 6, 2023

TOPIC CATEGORIES:

Impact Fees

The City may require an apartment developer to pay an additional nearly $150,000 in additional impact fees that were miscalculated by the city and originally paid over a year ago. The city ordinances require that correct impact fees "in effect" be collected and state law requires the city to comply with their ordinances.

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ADVISORY OPINION

Advisory Opinion Requested By:	Yard AF, LLC
Local Government Entity:	American Fork
Applicant for land Use Approval:	Yard AF, LLC
Type of Property:	Multi-family residential
Date of this Advisory Opinion:	June 6, 2023
Opinion Authored By:	Marcie M. Jones, Attorney Office of the Property Rights Ombudsman

ISSUE

May the city require an apartment developer to pay nearly $150,000 in additional impact fees that were miscalculated by the city and originally paid over a year ago?

SUMMARY OF ADVISORY OPINION

In this case, the impact fee itself has not been disputed. The parties agree that a lower impact fee was understood to be in effect and paid in full when the building permits were first issued. The service district later discovered the impact fee rate had been miscommunicated and is requiring the city to collect the correct impact fee nearly a year later.

The city ordinance requires that correct impact fees “in effect” be collected and state law requires the city to comply with their ordinances. There is nothing in the Impact Fees Act or the Municipal Land Use, Development, and Management Act that prohibits the City from collecting deficiencies in an impact fee assessed and paid nearly one ago.

It is worth considering, for both parties, that the Builder might nonetheless be able to challenge payment of the additional impact fees to the Service District if a court determines that some equitable remedy should apply.

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 Dan Hales (the property owner) on July 1, 2022. A copy of that request was sent via certified mail to Terilyn Lurker, City Recorder, City of American Fork, 51 East Main Street, American Fork, Utah 84003.

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 Brian Bird, Yard AF, LLC on September 1, 2022.

2. Letter from Cherylyn M. Egner, American Fork City Attorney, November 10, 2022.

BACKGROUND

In the fall of 2021, Yard AF, LLC (the "Builder") applied for building permits to American Fork City ("the City") for twelve residential apartment buildings. As is standard procedure, the City calculated and collected impact fees in connection with issuing these building permits.

The City collected sewer impact fees for Timpanogos Special Services District (the "Sewer District") in accordance with what the City understood the rates to be. A few months later, in January of 2022, the City received an impact fee reconciliation notice from the Sewer District. The reconciliation identified a number of deficiencies in the payments from the City to Sewer District for impact fees. The deficiencies arose because of a miscommunication between the City and Sewer District regarding a change in applicable impact fee rates. Specifically, effective February of 2021, the Sewer District fee had been raised from $1,100 per multi-family unit to $1,785.55 per Equivalent Residential Unit regardless of whether the project was single family or multi-family.

Because the City had used the rate of $1,100 per unit, the City had invoiced the Builder incorrectly and the Builder underpaid impact fees in the total amount of $145,918.80. The City notified the Builder in March of 2022 of the miscalculated fee of the initial known deficiency of $48,639.60 and an additional deficiency of $97,279.20 once the City determined the full amount in September of 2022. The City further put the Builder on notice that the City would not issue final inspections and certificates of occupancy until the Builder paid the deficiencies in full.

The Builder notes they have sold the buildings. They point out that the City invoiced the Builder for impact fees and the Builder paid the invoice in full. The Builder questions whether the City may subject property owners to changes in perpetuity.

Accordingly, the Builder has requested this Advisory Opinion from the Property Rights Ombudsman to determine whether the City has the right to demand payment of the nearly $150,000 deficient balance as a condition of providing inspections and certificates of occupancy when the Builder "paid in full" the impact fees the City initially requested almost one year prior.

ANALYSIS

The authority to issue Advisory Opinions is detailed in UTAH CODE § 13-43-205. Advisory Opinions may only determine compliance with the Impact Fees Act as well as certain sections of the Land Use Development and Management Acts. Our authority does not extend to answering equitable or fairness questions. Only the courts may issue relief for an aggrieved party when standard legal remedies are considered inadequate justice for the suffering party.

Accordingly, the focus of this Advisory Opinion is limited to whether the City has complied with the express terms of (1) the Impact Fees Act, and (2) the Municipal Land Use Management Act.

I. Impact Fees Act does not address deficiencies later required to be paid

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 an 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.

As an initial matter, we note that the Builder is not asking whether the adjusted impact fee is legal. The Builder has not questioned, for instance, whether the impact fee was properly passed, or whether it will fund facilities appropriately included in the facilities plan. The Builder is asking whether the impact fee, which was invoiced and paid in full, may be changed nearly a year later, after the Apartments have been sold.

Unfortunately, the Impact Fees Act does not appear to anticipate this scenario and does not address it or dictate a specific outcome. Therefore, the Impact Fees Act does not prohibit a City from seeking impact fee deficiencies even a significant amount of time after originally assessed and paid. In this case, the developer is still seeking certain certificates of occupancy related to the project. As a practical matter, once the certificate of occupancy has been granted, and the Builder no longer has an active land use permit with the City for this project, the opportunity to collect the additional impact fee closes.

The Impact Fees Act outlines the procedure to challenge and/or appeal an impact fee directly to the entity imposing it (i.e., the Service District)[2] that may provide the Builder some relief in this case, as we explain further below.

II. Municipal Land Use, Development, and Management Act requires municipalities to apply the plain language of their ordinances

A building permit is a type of land use application, and is therefore governed by the Municipal Land Use, Development, and Management Act ("LUDMA").[3] A municipality derives the power to zone and regulate property largely from LUDMA, which details many requirements cities must follow when approving and implementing permits. For instance, LUDMA includes a limitation that review fees may not exceed costs incurred, and a requirement that Planning Commissions must

[1] Chapter 11-36a of the UTAH CODE.
[2] *See* UTAH CODE § 11-36a-703. Procedures for challenging an impact fee
[3] Chapter 10-9a of the UTAH CODE.

be in place before a city may enact zoning. Many of the parameters articulated are intended to protect property owners and the rights of land use applicants.

LUDMA outlines what a city may require of those receiving a building permit, including requirements expressed in local ordinances. UTAH CODE § 10-9a-509(1) reads:

> (g) A municipality *may not impose on a holder of an issued land use permit . . . a requirement that is not expressed*:
> (i) in this chapter;
> (ii) on the subdivision plat;
> (iii) in a document on which the land use permit or subdivision plat is based;
> (iv) in the written record evidencing approval of the land use permit or subdivision plat;
> (v) in this chapter; or
> (vi) *in a municipal ordinance*.

(Emphasis added.)

Accordingly, American Fork Municipal Code Chapter 13.29 clearly requires that impact fees currently in effect must be paid as a requirement for receiving a building permit:

> "The *payment of any such impact fees*, as calculated by TSSD and *then currently in effect*, shall be – and *is – deemed a condition of: (A) The issuance of a building permit by the city* of American Fork where connection to the city's sewage collection system is desired or required."[4]

The City ordinance plainly requires the payment of impact fees "then currently in effect." It is extremely unfortunate that the City misunderstood what those fees were, but the ordinance requires the correct, adopted, higher rates be charged.

Furthermore, UTAH CODE § 10-9a-509(2) requires that the City comply with its own ordinances. That section reads "A municipality is bound by the terms and standards of applicable land use regulations and shall comply with the mandatory provisions of those regulations." The City, therefore, does not have the legal leeway to circumvent its ordinance that requires the correct impact fee be charged.

Therefore, payment of impact fees in accordance with the impact fee schedule currently in effect by the Sewer District is properly a condition of building permit approval. There is nothing in LUDMA nor this section of City code to suggest that there is a time limit on when the impact fee must be properly calculated and assessed. Again, as a practical matter, once the certificate of occupancy has been granted, the opportunity to impose the higher impact fee as a condition of land use application approval, as provided in UTAH CODE § 10-9a-509(1) above, closes.

We note that LUDMA generally protects property owners and land use applicants from surprise charges and changes to the rules midstream.[5] LUDMA requires transparency and the ability of an applicant to be able to figure out what is required of them at the outset of the project. However,

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[4] American Fork Municipal Code Chapter 13.29.030.

[5] *See, e.g.,* UTAH CODE § 10-9a-509(1)(g) cited in this Advisory Opinion stating that only those requirements clearly stipulated at the time the application is made may be imposed, similarly UTAH CODE § 10-9a-509(1)(h) stipulating that a certificate of occupancy may not be withheld for failure to comply with a requirement not expressed in the ordinances or the building permit.

there is not a specific requirement that invoices paid cannot later be corrected nearly a year later as a condition of approval of a Certificate of Occupancy.[6]

Nevertheless, outside of these two statutory schemes, courts have inherent "equitable" powers to grant certain relief to parties when fairness demands such a result.[7] Because the Builder relied upon the City imposing the original, lower impact fee, and paid that invoice in full, and has now sold the buildings, a court may find that the higher fee impact fee may not now be assessed because it is not equitable or fair. However, as equitable solutions are prescribed by courts and are not legal remedies, this is not within our authority to consider.[8]

In summary, while we find no legal remedy available in LUDMA, a court could determine whether the Builder may nonetheless be able to challenge the impact fee and receive equitable relief from paying the additional amount of the corrected fee

CONCLUSION

In this case, the impact fee itself has not been disputed. The parties agree that a lower impact fee was understood to be in effect and paid in full when the building permits were first issued. The service district later discovered the impact fee rate had been miscommunicated and is requiring the city to collect the correct impact fee nearly a year later.

The Impact Fees Act and the Municipal Land Use Management Act do not prohibit the city from collecting deficiencies in an impact fee assessed and paid nearly one ago. Furthermore, the city ordinance requires that correct impact fees "in effect" be collected and state law requires the city to comply with its ordinances. We note that as a practical matter, once the certificate of occupancy has been granted, the opportunity to impose the higher impact fee as a condition of land use application approval closes.

The Builder might nonetheless be able to challenge the impact fee to the Service District or pursue equitable remedies available through district court, as applicable.

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

[6] Consider also that a land use authority may not unreasonably withhold a Certificate of Occupancy where an "applicant has met all the requirements essential for the public health, public safety, and general welfare of the occupants. . . " UTAH CODE 10+9A-509(1)(i). Arguably, failure to pay an accurate amount for an impact fee would not be *essential* for public health, safety, and welfare of the occupants and the Certificate of Occupancy may not be withheld for that reason.
[7] *See, Hughes v. Cafferty*, 2004 UT 22, ¶ 21.
[8] The Office of the Property Rights Ombudsman was created by UTAH CODE § 13-43, which outlines the authority and responsibilities.

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.