Advisory Opinion #132

This Advisory Opinion has been reconsidered and superseded in part by Advisory Opinion #138 after the applicant submitted additional information.

Parties: Gordon L. Miner and the City of Lehi

Issued: October 22, 2013

TOPIC CATEGORIES:

Impact Fees Act

Impact fees are presumed valid when properly adopted. A party challenging an impact fee has the burden to prove that the impact fee fails to comply with the law. A municipality may revise its impact fees based upon a developer's submissions of studies and data.

In this case, while the applicant raises many questions about the validity of the City of Lehi's impact fees, he has not met his burden of proof to prevail on his argument that the fees violate the law. The developer's submissions do not require Lehi to revise its fees in this matter.

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ADVISORY OPINION

Advisory Opinion Requested by:	Gordon L. Miner
Local Government Entity:	City of Lehi
Applicant for the Land Use Approval:	Gordon L. Miner
Type of Property:	Residence
Date of this Advisory Opinion:	October 22, 2013
Opinion Authored By:	Brent N. Bateman Office of the Property Rights Ombudsman

Issues

Do a city's impact fees impose an equitable share of the capital costs of public infrastructure on new development?

Summary of Advisory Opinion

Impact fees when properly adopted are presumed valid. A party challenging the impact fee has the burden to prove that the fee fails to comply with the law. Although Mr. Miner has raised many questions related to Lehi City's impact fees, his submissions and arguments are generally insufficient to meet his burden of proof.

The Impact Fee Act permits a developer to submit studies and data to a local political subdivision that may cause the local political subdivision to revise its impact fee, and permit revision of its fee in unusual circumstances. The City should accept and consider such studies and data when submitted. The statutory language, however, does not obligate the local political subdivision to revise its fee based upon the developers' studies and data. The Act simply requires the City to authorize revision of its fee based upon studies and data submitted or unusual circumstances. Whether or not the fee should actually be revised depends upon the applicable law regarding the calculation of impact fees, and the discretion of the local political subdivision.

Review

A request for an advisory opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE § 13-43-205. 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 Gordon L. Miner on October 30, 2012. A copy of that request was sent via certified mail to Connie J. Ashton, City Recorder for the City of Lehi at 155 North 100 East, Lehi, Utah 84043. The return receipt was signed and delivered on October 31, 2012, indicating it had been received by the City.

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, with attachments, submitted by Gordon L. Miner, received by the Office of the Property Rights Ombudsman, October 30, 2012.
2. Lehi City's *Fire/EMS, Police, Parks & Recreation, Culinary Water, Secondary Water, Storm Drain, Sewer, and Transportation Impact Fee Analysis*, March 2008, submitted by Mr. Miner with margin comments on November 1, 2012.
3. Page 19 of *Lehi City Power Department's 2007 Capital Facilities Plan*¸ submitted by Mr. Miner with margin comments on November 13, 2012.
4. Page 47 of *Lehi City Power Dept. 2007 Impact Fee Study*¸ submitted by Mr. Miner with margin comments on November 13, 2012.
5. Additional material submitted by Mr. Miner via email, December 13, 2012.
6. Maps showing City utility services, submitted by Mr. Miner on December 19, 2012.
7. Additional material submitted by Mr. Miner via email, December 21, 2012.
8. Additional material submitted by Mr. Miner via email, February 1, 2013.
9. "Impact Fee Challenge," submitted by Mr. Miner on May 14, 2013 in response to a request to Mr. Miner dated February 20, 2013 by the Office of the Property Rights Ombudsman to that he consolidate and restate his issues and arguments.
10. Lehi *City's Fire/EMS, Police, Parks & Recreation Capital Facilities Plan,* March 2008, obtained independently by the Office of the Property Rights Ombudsman.

Background

In 2012, Gordon L. Miner received a building permit to construct a new home in eastern Lehi. The City provides various services to residents of Lehi, including roads, culinary water, secondary (or irrigation) water, stormwater drainage, police, fire, and parks. The City also has an electrical utility service.[1] The City required Mr. Miner to pay impact fees in order to obtain final approval for the new home.[2] Mr. Miner objects to the City's impact fees, and requested this Advisory Opinion to evaluate their legality.[3]

Through multiple submissions received at various times over several months, Mr. Miner made many comments and raised multiple issues that, he argues, show that Lehi's impact fees are not correct. After reviewing the various submissions and notes, Lehi City objected to the submissions, stating that Mr. Miner's arguments were unclear and therefore sufficient responses could not be provided. Upon careful review, this Office agreed with Lehi City, and requested that Mr. Miner consolidate and reformat his Advisory Opinion request and resubmit it. Mr. Miner did so in May 2013.

Thereafter, this Office requested that Lehi City provide a response to Mr. Miner's request and arguments. Lehi City did not provide a response. Mr. Miner requested that this Office issue the Advisory Opinion despite Lehi City's failure to respond.

Analysis

I. Mr. Miner's Submissions Are Generally Insufficient to Meet His Burden of Proof and Overcome the Presumption that the Impact Fees Are Valid.

A. Impact Fees Which Are Properly Adopted Are Presumed Valid.

Impact fees are one-time charges imposed as conditions of development approval which are meant to offset or mitigate the impact the new development would have on public facilities. *See* UTAH CODE § 11-36a-102(8)(a). Cities and counties may charge impact fees authorized by the Impact Fees Act. *Id.*, § 11-36a-201.

An impact fee adopted in accordance with the procedures and requirements of the Impact Fees Act is presumed to be valid. "[A] presumption of constitutionality attaches to the legislative decisions of municipalities when they establish impact fees." *Home Builders Association of Utah v. City of North Logan*, 1999 UT 63, ¶ 9, 983 P.2d 561, 564 (*citing Banberry Development Corp. v. South Jordan City*, 631 P.2d 899, 904 (Utah 1981)). That presumption, however, may be

[1] Sewer and wastewater services are provided by the Timpanogos Special Services District. Mr. Miner also requested an Advisory Opinion reviewing the District's impact fees, which has been prepared separately.
[2] The impact fees were for roads, water, power (electricity), fire department, police department, storm drains, and parks. The City also collected the sewer impact fee for the Timpanogos Special Services District.
[3] It is believed that Mr. Miner paid the fees "under protest," and has completed his home.

rebutted if the impact fees "require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred." *Id.*

If a developer challenges the reasonableness of an impact fee, the local political subdivision imposing the fee "must first disclose the basis of its calculations . . .." *North Logan*, 1999 UT 63, ¶ 8, 983 P.2d at 563 (citations and alterations omitted). When that information is disclosed, "[t]he burden then falls upon the challenger to show [that the fee fails] to comply with the constitutional standard of reasonableness." *Id.* 1999 UT 63, ¶ 8, 983 P.2d at 563-64.

Lehi City disclosed the basis of its impact fee calculations by providing copies of the *Fire/EMS, Police, Parks & Recreation, Culinary Water, Secondary Water, Storm Drain, Sewer, and Transportation Impact Fee Analysis* prepared by Lewis Young Robertson & Burningham, Inc. in 2008, as well as the *Lehi City Power Dept. 2007 Impact Fee Study* prepared by Comlink Land Services. It appears that those analyses were the basis of the City impact fees charged to Mr. Miner. Thus they are entitled to a presumption of constitutionality, and Mr. Miner has the burden of proof to show that the fees fail to comply with the Act.

B. Mr. Miner's Submissions Fail to Meet His Burden Generally

In order to meet his burden of proof, a challenger to an impact fee must articulate why the fees are unreasonable or how proper application of the law would have resulted in a different fee. *See North Logan*, 1999 UT 63, ¶ 13, 983 P.2d at 565. To varying degrees, Mr. Miner has failed to do so in each discrete challenge he makes to Lehi's impact fees.

Mr. Miner indeed raises a few issues that, if properly articulated and supported, could show his entitlement to a partial refund of his impact fees. However, a disjointed and indirect approach to argument, a tendency to assume that the reader understands his meaning, and most of all the failure to provide relevant evidence to support his claims falls well short of the minimum showing necessary to prove his claim in each case.[4]

A successful challenge of an impact fee results in the adjustment of the fee to the amount the fee would have been had it been correctly calculated. UTAH CODE § 11-36a-701(3)(c). To meet his burden, a challenger must offer "evidence that a reasonable fee would have been less than [the

[4] To illustrate, one of Mr. Miner's best articulated claims concerns the City's inclusion of "1000 South" and "2100 North" as future facilities to be constructed using impact fees. Mr. Miner states:

> "These two streets are already built and Lehi City did not build them. UDOT built them using federal money. Therefore, Lehi City . . . are using impact fees to recoup costs for these two streets that they did not incur. Therefore, the City must remove these two streets from my impact fee calculation and refund the difference to me."

Mr. Miner probably comes as close with this argument in meeting his burden than in any of the many issues he raises. Nevertheless, Mr. Miner produces no factual evidence to back his claim that UDOT built those streets using federal money, or that UDOT and not Lehi City (or some joint endeavor by UDOT and Lehi City) built the streets at no cost to Lehi City. Moreover, even if these facts were established, Mr. Miner provides no evidence to show how these facts would affect the overall impact fee, or that he is entitled to a refund (and in what amount). It is not clear that those funds could not legally be used on another street named in the study in accordance with the Impact Fee Act and the CFP. This is one brief illustration of the issues that abound throughout Mr. Miner's request.

fee charged] let alone evidence showing that the lower impact fee actually charged was unreasonable." *North Logan*, 1999 UT 63, ¶ 19, 983 P.2d at 566. The failure to do so leaves a decision maker without a basis to make a decision. The decision maker is simply left to either obtain this supporting evidence itself and build the case on a party's behalf, or assume that these facts are true as portrayed and decide on that basis. This Office must issue an opinion in accordance with the existing law and the evidence before it. It would be a conflict of interest for this Office to both make a party's case for him, as well as decide in a fair and impartial manner whether that case prevails.[5]

II. Mr. Miner May Request Revision of His Fee, And Lehi City May, but Is Not Obligated To, Revise His Fee.

A. Mr. Miner May Submit Studies and Data to Request Revision of His Fee

In additions to his many challenges to the actual impact fee, Mr. Miner asks the following question: "Once the appropriate and legal unit (per-acre) fee is determined for secondary water, do I have the right to submit an independent impact fee analysis based on actual proposed irrigated acreage?" Mr. Miner believes that he has been denied that right.

The Impact Fee Act, UTAH CODE § 11-36a-402(1) provides as follows:

> (1) A local political subdivision or private entity shall ensure . . . an impact fee enactment contains:
>
> . . . .
>
> (c) a provision authorizing the local political subdivision or private entity, as the case may be, to adjust the standard impact fee at the time the fee is charged to:
>
> (i) respond to:
>
> (A) unusual circumstances in specific cases; or
>
> . . . .
>
> (ii) ensure that the impact fees are imposed fairly; and
>
> (d) 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.

[5] This Office frequently receives Advisory Opinion requests from private parties without attorneys, and gives full credit to the efforts taken to articulate a claim, even when done inexpertly. In some cases, however, proceeding without benefit of counsel can cause difficulties for all parties involved. Mr. Miner is an experienced and accomplished engineer and clearly of very high intellect. Nevertheless, as this matter proceeded, this Office found itself unable to proceed with Mr. Miner's Advisory Opinion on the original submissions, and requested that Mr. Miner rearticulate his arguments and resubmit his claim, along with providing some advice on how to reform the arguments. Mr. Miner did so, which significantly improved the understanding the bases for his objections and allegations. Nevertheless, impact fees carry a difficult burden, and analyzing the law and facts can be tenuous. Mr. Miner still was unable to adequately articulate his claims and meet that burden.

This provision requires that a city include in its Impact Fee enactment provisions enabling the city to adjust the fee under certain circumstances. A fee may be adjusted to respond to unusual circumstances or to ensure that they are imposed fairly. A fee may also be adjusted for a particular development based upon the studies and data submitted by the developer.

This statute does not expressly give a developer a right to submit studies and data that support adjustment of the impact fee. Nevertheless, the requirement that the impact fee enactment include language permitting adjustment of the fee on that basis indicates that a developer is permitted to submit such information to the City as part of a request to adjust his fee. It also follows that the city must accept and consider such studies and data.

B. Whether Or Not The Fee Is Revised Depends On the Established Law, the Information Provided, and the Discretion of the City

It is important to note, however, that UTAH CODE § 11-36a-402(1) does not *require* that a local jurisdiction adjust its fee once it receives such information, studies, or data. This statute requires the City to include certain provisions in its enactment. Those provisions, once included in the enactment, *authorize* the local jurisdiction to adjust the fee.

Whether or not the fee is adjusted based upon the submitted information, studies, or data, depends upon the nature of the information provided. If the information provided shows that the impact fee being charged to that particular developer would violate the existing law, then the City of course is required adjust its fee to come into compliance with the law.[6] However, when the information provided simply provides data or explains circumstances that would show that adjustment of the fee may be equitable, wise, or fair, the decision of whether to adjust the fee must rest to some degree on the discretion of the City. There may be many reasons why a City would or would not adjust its impact fee charged to a particular developer. This statute authorizes them to do so, but does not require them to do so. Thus, the City has discretion in these cases to adjust the fee. They would do so, presumably after considering all relevant factors, and upon reaching a determination an adjustment is warranted.

C. Mr. Miner's Stated Circumstance Does Not Obligate the City To Adjust His Fee

Mr. Miner argues that he submitted to the City evidence of an unusual circumstance, and that the City must reduce his impact fee based upon that information. Specifically, Mr. Miner states that his house was built on an approximately 1.3 acre lot. The Lehi City pressurized irrigation impact fee is calculated according to lot size – the larger the lot, the larger the fee – and so Mr. Miner's pressurized irrigation impact fee was calculated for the full 1.3 acres. Mr. Miner's unusual circumstance is that his plot plan shows only 1/3 an acre being developed, with the remaining acre of his lot remaining undeveloped. Mr. Miner indicates his intention is to not use pressurized irrigation on the remaining acre of his lot. In addition, Mr. Miner points out that the pressurized

[6] Although submission of studies or data from a developer could be very helpful in determining whether the Impact Fee being charged to that developer is excessive or illegal, the submission of studies or data by the developer is not a prerequisite for adjusting the fee. If the fee is found to be illegal or excessive as applied, the fee must be adjusted to come into compliance with the law whether or not the developer has submitted studies or data.

irrigation service line is built to irrigate only a 1/3 acre lot and is not big enough to irrigate the entire lot. Accordingly, Mr. Miner feels that he should be charged pressurized impact fees for only 1/3 acre and not for the full 1.33 acre lot.

If the City's pressurized irrigation impact fee calculation is based upon lot size, then the City is entitled to charge impact fees based upon the size of Mr. Miner's lot. Nothing can be found to show such a method of calculation illegal. Moreover, the information and circumstances provided by Mr. Miner do not render it illegal. Mr. Miner's current intentions and capabilities aside, any number of circumstances could change in the future regarding Mr. Miner's lot that may impact the pressurized irrigation system. The lot is 1.33 acres. Thus, no reason can be found to require Lehi City to adjust its impact fee.

The information and special circumstances provided by Mr. Miner, however, are important and valid considerations. They are within the scope of circumstances that may motivate a City to adjust its impact fees. Mr. Miner is entitled to provide that information and request an adjustment of his fees. Lehi City should accept that information and consider adjustment of the fees. However, Lehi City is not obligated to adjust its impact fees based upon that information. They are justified in determining that the lot-size method of calculating the impact fee should apply in this instance.

Conclusion

A challenger to impact fees must articulate why the impact fees are illegal and how proper application of the impact fee act would result in the imposition of a new fee. This can be a heavy burden to meet, because impact fees and the law governing them can be complicated. Nevertheless, this burden must be met in order to mount a successful challenge in order to give a decision maker a basis on which to decide. Mr. Miner has not met that burden.

Mr. Miner is entitled to submit studies and data to a Lehi City that may show justification to adjust his impact fee. Lehi City is obligated to receive and consider that information. However, unless that information shows that the impact fee is excessive or illegal as applied to Mr. Miner, Lehi city is under no obligation to adjust the fee. Adjustment is within the discretion of the City.

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.

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 mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in Utah Code § 13-43-206, are also designed to encourage resolution of disputes. 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. No party has a right to receive attorney's fees under the Ombudsman Act. Thus, the attorney fees provisions, like the entire Advisory Opinion process, should be viewed as a tool to avoid litigation rather than a litigation strategy.

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:

Connie J. Ashton, City Recorder
Lehi City
153 N. 100 East
Lehi, Utah 84043

On this _____ Day of October, 2013, 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