Advisory Opinion #138

This Advisory Opinion reconsiders Advisory Opinion #132 and supersedes it in part as set forth in this Opinion.

Parties: Gordon L. Miner and the City of Lehi

Issued: March 25, 2014

Reconsidered Opinion – Original Opinion #132, Issued on October 25, 2013

TOPIC CATEGORIES:

Impact Fees Act
Interpretation of Ordinances

The Impact Fee Act requires certain information to be identified. Statutory terms should be accorded their plain meaning. Interpreting the word *identify* to mean *analyze* or *prove* strains the meaning of the word. Its plain meaning is synonymous with *indicate* or *show*.

In this case, the City of Lehi's 2007 Capital Facilities Study and its 2008 Impact Fee Analysis were minimally compliant with the effective provisions of the Impact Fee Act because they identify the required information.

The Office of the Property Rights Ombudsman
Utah Department of Commerce
PO Box 146702
160 E. 300 South, 2nd Floor
Salt Lake City, Utah 84114

(801) 530-6391
1-877-882-4662
Fax: (801) 530-6338
www.propertyrights.utah.gov
propertyrights@utah.gov

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION (RECONSIDERED)

Advisory Opinion Requested by:	Gordon L. Miner
Local Government Entity:	City of Lehi
Date of Original Advisory Opinion:	October 25, 2013
Date of this Reconsideration:	March 25, 2014
Reconsidered Opinion Authored By:	Brent N. Bateman Office of the Property Rights Ombudsman

Issues

Is Lehi City's Impact Fee illegal on its face because the documents fail to comply with certain sections of the Impact Fee Act?

Summary of Advisory Opinion

The Lehi City 2007 Capital Facilities Study and the 2008 Impact Fee Analysis were minimally compliant with the effective provisions of the Impact Fee Act. The Act at that time required that certain information be identified, and the documents identify that information.

The Lehi impact fee documents lack some meaningful analysis and information. Nevertheless, in accordance with the rules of statutory construction, the term identify should be accorded its plain meaning. Interpreting the word *identify* to mean *analyze* or *prove* strains the meaning of the word. Identification is all that the statute at the time required. Documents that identify the information are minimally compliant with the statute.

Review

On October 22, 2013, this Office issued an Advisory Opinion in the matter of Gordon Miner versus the City of Lehi regarding impact fees. On November 6, 2013, Gordon Miner formally requested that certain portions of the October 22 Advisory Opinion be reexamined and reconsidered. It is this Office's policy to accept and consider such requests when received. This Reconsidered Advisory Opinion is issued in response to that request.

This Reconsidered Advisory Opinion does not supersede or replace the October 22 Advisory Opinion, except with regard to the specific questions addressed herein. The October 22 Advisory Opinion remains in full force and effect as the opinion of this Office, except as supplemented by this document. To the extent the October 22 Advisory Opinion conflicts with matters addressed in this document, this document controls.

Evidence

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

1. October 22, 2013 Advisory Opinion issued by this Office.
2. Request for Reconsideration from Gordon Miner, received by email transmission on November 6, 2013.
3. December 2007 *Capital Facilities Study*, received December 10, 2013 from Lehi City.
4. Letter from Gordon Miner dated January 13, 2014, captioned Request for Reconsideration – Addendum.
5. Letter dated February 19, 2014 from Lehi City responding to Mr. Miner's Request.

Background

In 2012, Gordon L. Miner received a building permit to construct a new home in eastern Lehi. The City required Mr. Miner to pay impact fees in order to obtain final approval for the new home. Mr. Miner objects to the City's impact fees, and requested an Advisory Opinion to evaluate their legality. On October 22, 2013, this Office issued an Advisory Opinion in response to Mr. Miner's request. In summary, that Advisory Opinion concluded that Mr. Miner was generally unable to provide arguments and evidence sufficient to meet his burden to prove that the charged fees were excessive and illegal.

On November 6, 2013, Mr. Miner submitted a request to reconsider that Advisory Opinion. Specifically, Mr. Miner requested that this Office consider three questions regarding Lehi's 2007 Capital Facilities Study:

> The entire Capital Facilities Study December 2007 is illegal on its face because it fails to: (1) identify demands placed upon the existing public facilities by new development activity, (2) justify the proposed means (sizing) by which the City will meet those demands, (3) establish the current level of service, to serve as a basis to achieve an equitable allocation to the costs borne in the past and to be borne in the future, in comparison to the benefits already received and yet to be received.

In support, Mr. Miner argued that the December 2007 Capital Facilities Study provided no methodology to support its calculations. Because no methodology was provided in the Plan, it was impossible for Mr. Miner to refute the calculations.

Mr. Miner submitted further documentation dated January 13, 2014, in a letter titled *Request for Reconsideration – Addendum*. Therein he generally expanded on and rephrased his arguments to align more closely with the language of the Impact Fee Act. Specifically, Mr. Miner argued that the 2007 Capital Facilities Study fails to (1) "identify demands placed upon existing public facilities by new development activity;" and (2) "identify the proposed means by which the local political subdivision will meet those demands." Mr. Miner further argues that the March 2008 Impact Fee Analysis fails to (1) "identify the anticipated impact on or consumption of any existing capacity of a public facility by the anticipated development activity;" and (2) "identify the anticipated impact on system improvements required by the anticipated development activity to maintain the established level of service for each public facility." Mr. Miner argues that these failures to comply with the Impact Fee Act render the impact fees invalid.

The City of Lehi responded to Mr. Miner's arguments in a letter dated February 18, 2014, wherein the City argued that its documents complied with the act because the documents identify the requested information.

Analysis

I. The Meaning of the Word *Identify*

In his request for reconsideration, Mr. Miner challenges whether or not the Lehi impact fee documents contain certain information required by the Impact Fee Act. The Act's language requires that this information be "identified." Thus, if the documents *identify* that information, the documents comply with these provisions of the Act. The meaning of the term *identify* is therefore a threshold question to this challenge.

Statutory interpretation always begins with the plain language.

> When interpreting statutes, our primary objective . . . is to give effect to the legislature's intent. To discern legislative intent, we look first to the statute's plain language. In doing so, we presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning.

Selman v. Box Elder County, 2011 UT 18, ¶ 18, 251 P.3d 804, 807 (quotations and alterations omitted).

Mr. Miner argues that the term *Identify* as used in Impact Fee Act should mean to "show something to be true by determining the facts." In support of this interpretation, he cites the "Oxford Dictionary" which he indicates defines the word *Identify* as "To establish or indicate what something is." He then further indicates that the term *Establish* in the Oxford Dictionary

means “to show something to be true or certain by determining the facts.” Thus he would replace the word identify in the statute with the phrase “show the true (insert noun) by determining the facts.”

Thus Mr. Miner’s interpretation essentially applies the definition of the word *establish* to the word *identify*, synonymizing the word *identify* with *analyze* or *prove*. This strains the meaning of the term *identify*, which more closely synonymizes with *indicate* or *show*. When interpreting statutes, the plain meaning must be given effect. Thus, we reject the argument that the term *identify* in the statute means that the City must *analyze*, *prove* and *justify*. If the legislature had intended to require some analysis or even some explanation or a certain level of detail, we trust that they would have said so. We assume that the legislature selected the word *identify* advisedly, so to comply with the statute, the City must *identify* the required information.

II. The 2007 Capital Facilities Study

a. The Capital Facilities Study Sufficiently Identifies Demands upon Existing Facilities.

Mr. Miner argues that the 2007 Capital Facilities Study is invalid because it fails to “identify demands placed upon existing public facilities by new development activity” as required by the Impact Fee Act. In 2012, at the time Lehi City imposed impact fees upon Mr. Miner, the Utah Impact Fee Act required that “An impact fee facilities plan shall identify: demands placed upon existing public facilities by new development activity.” UTAH CODE § 11-36a-302(1) (2012).[1] This requirement also existed in the Impact Fee Act in December 2007, when the 2007 Capital Facilities Study was prepared and adopted by Lehi City: “The plan shall identify: demands placed upon existing public facilities by new development activity.” UTAH CODE § 11-36-201(2)(c)(i) (2007). Thus, Lehi City’s 2007 Capital Facilities Study must identify demands placed upon existing public facilities by new development activity.

Lehi City’s 2007 Capital Facilities Study does not impress. It does not appear to have been prepared with much concern for demonstrating compliance with the Impact Fees Act. Granted, at the time the Lehi study was prepared, the Utah Impact Fee Act was arguably a disorganized mess. Nevertheless, in the experience of this Office many Capital Facilities Plans adopted during that period aligned much more closely with the Impact Fee Act’s language and intent than Lehi’s 2007 Capital Facilities Study.[2] In the opinion of this Office, the 2007 Lehi Capital Facilities Study’s narrative is thin, and much of the data provided is unexplained and difficult to interpret.

[1] UTAH CODE § 11-36a-302 was amended during the 2013 legislative session, and currently requires that in Impact Fee Facilities Plan identify an existing level of service, and establish a proposed level of service that will exist after construction of the facilities, as well as identify how the proposed level of service will be met.

[2] To provide a simple example, the 2007 Impact Fee Act specifically required the City to prepare two documents, one titled *Capital Facilities Plan* and another titled *Impact Fee Study*. The document upon which Lehi City’s impact fees are based is confusingly titled *Capital Facilities Study* despite the instruction in the statute to title it *Capital Facilities Plan*.

Nevertheless, the Impact Fee Act requires that the Capital Facilities Plan "identify demands placed upon existing public facilities by new development activity." Although minimal, the 2007 Capital Facilities Study does so. Generally in the appendices, by map and by table, and somewhat mentioned in the narrative, the study identifies the City's existing systems, and identifies the additional systems that will be necessary to accommodate the anticipated growth. In doing so, the Study identifies the demands placed upon existing facilities by new development activity, minimally complying with the statute.

b. The Lehi Capital Facilities Study Sufficiently Identifies the Proposed Means.

Mr. Miner further argues that the 2007 Capital Facilities Study is invalid because it fails to "identify the proposed means by which the local political subdivision will meet those demands" as required by the Impact Fee Act. In 2012, the Utah Impact Fee Act required that "An impact fee facilities plan shall identify: the proposed means by which the local political subdivision will meet those demands." UTAH CODE § 11-36a-302(1)(b) (2012). This requirement also existed in the Impact Fee Act in December 2007: "The plan shall identify: the proposed means by which the local political subdivision will meet those demands." UTAH CODE § 11-36-201(2)(c)(ii).

As explained above, the statutory language requires that the Capital Facilities Plan simply *identify* the means rather than *justify* the means. Reading the term *identify* to mean the same as *justify* strains the meaning of the word *identify* and violates the requirement that statutes be interpreted according to their plain language. Minimal compliance with the statute requires that the means to meet demands are identified.

The 2007 Capital Facilities Study does sufficiently identify the proposed means to meet the demands of future development. The appendices contain in multiple locations maps and data that show in detail the proposed facilities to be constructed to meet the demands of future development. Here the Study adequately identifies the proposed means, as the statute requires. Thus, Lehi City's 2007 Capital Facilities Study is minimally compliant with the Impact Fee Act.

III. The March 2008 Impact Fee Analysis

a. The Impact Fee Analysis Sufficiently Identifies Impacts On or Consumption of Existing Capacity and impacts to Maintain the Level of Service.

Mr. Miner argues that the Impact Fee Analysis, Lehi City, March 2008, is likewise deficient in that it violates UTAH CODE § 11-36a-304, which requires that an Impact Fee Analysis "(a) identify the anticipated impact on or consumption of any existing capacity of a public facility by the anticipated development activity," and "(b) identify the anticipated impact on system

improvements required by the anticipated development activity to maintain the established level of service for each public facility." Again, Mr. Miner attempts to strain the meaning of the word identify, and his interpretation is rejected in favor of the plain meaning of the word.

The 2008 Impact Fee Analysis in multiple locations identifies both the impacts on existing capacities and the impacts on system improvements to maintain the levels of service.[3] Existing capacities and levels of service for different facilities are identified throughout the Analysis, such as on pages 21, 27, 32 *etc*. Thus, the Analysis complies with this section of the Act.[4]

Conclusion

Based on the plain meaning rule of statutory construction, where the statute requires that certain information be identified, indicating that information minimally complies. Although justifying and analyzing the information may be characteristics of a better document, we will assume that the legislature intentionally selected the term identify. Lehi City's impact fee documents generally provide those identifications.

Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

[3] In contrast to the 2007 Capital Facilities Study, the 2008 Impact Fee Analysis makes some effort to show compliance with the Impact Fee Act. It contains multiple citations to the act, and in multiple locations it provides information and identifies it as fulfilling a requirement in the Impact Fee Act.

[4] Again, this Opinion simply finds that the impacts have been identified. It does not reach whether or not those impacts are correct or accurate. This is not a conclusion that the Lehi Impact Fees are proper and correct and beyond legal challenge. Only that the information required by the Impact Fee Act has been identified.

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 March, 2014, 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