Advisory Opinion #151

Parties: Roger Cranney and Brigham City

Issued: December 19, 2014

TOPIC CATEGORIES:

Impact Fees

"Development Activity" consists of two parts: New construction, installation, or a change in land use; and an increased demand on public facilities. It is not the extent, but the existence of increased demand due to new construction that allows an impact fee. The extent of the demand may be a factor in the amount of the fee, but as long as there is increased demand due to new construction or a change in land use, a local government may charge an impact fee.

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ADVISORY OPINION

Advisory Opinion Requested by:	Roger Cranney
Local Government Entity:	Brigham City
Property Owner:	Roger Cranney
Type of Property:	Commercial
Date of this Advisory Opinion:	December 19, 2014
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

May a City charge impact fees when an upgrade from single phase to triple phase power on an existing building?

Summary of Advisory Opinion

An impact fee is authorized for new development activity, or when new construction results in additional demand on public facilities. Even if the construction activity is limited to improvements on existing structures or land uses, an impact fee may be charged if there is additional demand on public services. The extent of the demand may be a factor in the amount of the fees, but is not relevant in deciding whether fees may be charged.

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 Roger Cranney on October 30, 2014. A copy of that request was sent via certified mail to Mary Kaye Christensen, City Recorder of Brigham City, at 29 North Main, Brigham City, Utah. According to the return receipt, the City received the Request on November 4, 2014.

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 Roger Cranney, received by the Office of the Property Rights Ombudsman on October 30, 2014.
2. Response from Brigham City, submitted by Kirk M. Morgan, Attorney for the City, received December 5, 2014.

Background

Roger Cranney owns two commercial buildings located at approximately 475 East 1000 South in Brigham City. In the summer of 2014, the City granted Mr. Cranney a conditional use permit to manufacture furniture in one of the buildings.[1] In order to begin manufacturing, the electrical power to the building needed to be upgraded from single phase to triple phase.[2] Mr. Cranney undertook the upgrade to provide power to equipment that had been installed in the buildings.[3] He contracted with and paid for City workers to complete the installation of new equipment.

The City charges an "Electrical Impact Fee" on new development activities. Based on information provided by the City, the present impact fee is $147 per residential unit and $46.69 per kilowatt-hour for commercial and industrial uses. The City determined that the capacity of the three-phase equipment installed for Mr. Cranney's building was 270 kilowatts.[4] This capacity is greater than needed for the new equipment, and is also roughly four times the capacity of the single-phase power that was replaced. It appears that the City based its impact fee on the increased capacity of the new three-phase equipment. Upon completion of the work, the City charged him an impact fee for power facilities, along with the cost of the installation and other

[1] Mr. Cranney purchased the buildings, which already had some equipment installed.
[2] Triple phase (or 3-phase) power is an alternating current derived from three conductors with the same frequency and voltage, but which are "phased" differently, rather than being completely in sync. The three phases offset the "peaks and valleys" of a single AC current, providing a more steady current. The three-phase system is more costly, but is required for Mr. Cranney's manufacturing equipment. The City's municipal power system is able to provide 3-phase power.
[3] Minutes of the Brigham City Impact Fee Review Committee, September 15, 2014. Evidently, some of the equipment had originally been installed by a previous owner, who was unable to begin operations. Mr. Cranney also installed equipment which requires triple phase power.
[4] *Id*., Impact Fee Review Committee at line 125.

building permit fees.[5] The City credited Mr. Cranney for a portion of the electrical capacity, evidently reflecting the capacity of the single-phase equipment that was removed.[6]

Mr. Cranney paid the fee under protest, but requested a review which was submitted to the City's Impact Fee Review Committee.[7] Mr. Cranney argues that installing new equipment in the building is not a new development activity, and so the City cannot charge impact fees for the power upgrade. He also objected to the amount of the fee, stating that his equipment will use less power with the three-phase equipment than what was used by the single-phase.[8] The Committee ultimately determined that the new equipment in Mr. Cranney's building was a "change of use," and that the City could charge an impact fee for the increased capacity.

According to the City, decisions of the Impact Fee Review Committee may be appealed to the Brigham City Council within 30 days.[9] The City notes that Mr. Cranney did not file a written appeal of the Review Committee's decision within 30 days, and so has forfeited any right to any further appeal of the impact fee. Mr. Cranney states that he was told by the City Clerk that the appeal time would be extended.[10] The City denies that an extension was granted.

Analysis

I. The Power Upgrade is Development Activity, and So the City May Charge Impact Fees.

Because the change from single-phase to three-phase power is development activity, the City may charge power impact fees. The power change required installation of new equipment to the existing building, plus it created additional demand on the City's power system. Therefore, it qualifies as a development activity, particularly because it required a conditional use permit. "'Development activity' means any construction or expansion of a building, structure, or use, any change in use of a building or structure, or any changes in the use of land that creates additional demand and need for public facilities." BRIGHAM CITY CODE, § 32.01.010(D).[11] Development activity thus requires two things: Some sort of construction or installation (or a change in use), and additional demand on public facilities.

[5] The total power impact fee was $3,366.33.
[6] *Id.*, Impact Fee Review Committee at line 201. The credit was based on the size of the circuit breaker that was being replaced. *See also* Brigham City Building Permit Application Number 140813002 (Roger Cranney), June 9, 2014.
[7] The City Code establishes an "Impact Fee Adjustment Committee," which was evidently the entity that considered Mr. Cranney's request. BRIGHAM CITY CODE, § 32.01.070(G). Decisions of that committee may be appealed to the City Council. *Id*, § 32.01.070(K).
[8] Impact Fee Review Committee, lines 61-63. The City disputes that the manufacturing facility will use less power.
[9] Response letter from Kirk M. Morgan, dated December 5, 2014 at 5 (citing BRIGHAM CITY CODE, § 32-01.090).
[10] From a telephone conversation between Roger Cranney and the Office of the Property Rights Ombudsman. (*See also* Response letter from Kirk M. Morgan at 4. Mr. Cranney admits that he does not have a written statement from the City concerning an extension of the appeal period.
[11] This definition mirrors the definition found in Utah's Impact Fees Act. *See* UTAH CODE ANN. § 11-36a-102(3).

This two-fold approach was stressed by the Utah Supreme Court in *Washington County Water Conservancy District v. Keystone Conversions, LLC*.[12] In that case, a local district imposed an "availability fee" on a developer who was installing a secondary water system in anticipation of developing a new subdivision.[13] Development approval from a local government would be needed before homes could be constructed. The developer contended that the availability fee was actually an impact fee which had not been properly enacted.[14] The Supreme Court held that constructing the new system alone was not "development activity" within the meaning of the Impact Fees Act.[15] Installing the water delivery equipment prior to subdivision approval and securing future water rights did not create any new demand on the district's water facilities. Thus, the fee was not an impact fee.

The activity and approvals sought by Mr. Cranney require additional demand on the City's electrical service. Although the building already exists, the upgrade to the three-phase power results in additional demand, even if that additional demand is for one manufacturing concern. The extent of the demand does not dictate whether an impact fee may be charged, only the existence of a demand.[16] In short, the two-fold requirements of "development activity" have been met: New equipment for the upgraded power supply was installed, and the installation resulted in additional demand on the City's electrical power facilities.

In addition, Mr. Cranney was required to obtain development approval from the City. According to the materials submitted for this Opinion, he not only had to get a building permit (for installation of the power equipment), but he also needed a conditional use permit for the project.[17] These two approvals support the conclusion that the installation of the new power equipment constituted "development activity," and so the City could charge an impact fee.[18]

II. It is Impossible for This Opinion to Determine Whether the Impact Fees Were Reasonable.

Very little information concerning how the power impact fees were calculated was submitted for this Opinion, so it is not possible to determine if the fees were reasonable. The City did not provide its capital facilities plan or its impact fee analysis. Mr. Cranney also failed to provide any analysis of the fees, other than arguing that his actual consumption of electrical power would be

[12] 2004 UT 84, 103 P.3d 686.
[13] *Id.*, 2004 UT 84, ¶ 1, 103 P.3d at 687. The availability fee evidently was to ensure that sufficient water was available to provide the requested service. The district specifically stated that it did not grant development approval.
[14] *Id.*, 2004 UT 84, ¶ 9, 103 P.3d at 689.
[15] *Id.*, 2004 UT 84, ¶¶ 23-24, 103 P.3d at 692-93.
[16] Before the Impact Fee Review Committee, Mr. Cranney argued that impact fees should be applied to "large" developments, not small businesses like his. However, any new expansion creates some impact. The costs of the impact should be shared equitably by all new development, large or small. *See Home Builders Ass'n v. American Fork*, 1999 UT 7, ¶ 14, 973 P.2d 425, 428-29. The extent of demand may be a factor in the *amount* of the fees, but is not relevant in deciding whether fees should be charged.
[17] The exact nature of the conditional use permit was not explained.
[18] The necessity of a building permit and a conditional use permit support a conclusion that the changes to the building were more than simply bringing in new machinery. The power upgrade was the development activity, not the installation of new machines.

essentially unchanged with the new three-phase equipment.[19] The City provided a fee schedule, and a series of tables entitled "Development Impact Fee Calculation Report," which purportedly show costs per acre for water, sewer, storm drainage, and municipal power impacts. The City did not show how these costs were calculated, nor did it show how it converted a cost per acre to a power impact fee based on kilowatt-hours.[20]

Without the supporting information, it is simply impossible for this Opinion to determine if the City's power impact fees are reasonable. If the City followed the procedures of the Impact Fees Act, then the fees adopted are presumed to be valid.[21] "[T]he ultimate legal test is whether the impact fees relate to the cost of the benefits conferred on those paying the fees." *Tooele Associates, LP v. Tooele City*, 2011 UT 4, ¶ 23, 247 P.3d 371, 377.

Conclusion

Installing the equipment and upgrading to the three-phase power constituted "development activity," and so the City could charge impact fees. Development activity consists of some type of construction or installation and an increased demand on public facilities. In this matter, new power equipment was installed, which increased the capacity of Mr. Cranney's building. The increased capacity caused additional demand on the City's power supply facilities, and so an impact fee was authorized. It is not the extent of the demand that justifies impact fees, but the existence of additional demand.

Since no information was submitted relating to how the impact fee was calculated, this Opinion cannot determine whether the fees were reasonable. If a fee is calculated following the procedures and analysis of the Impact Fees Act, it is presumed to be valid.

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

[19] Before the Impact Fee Review Committee, Mr. Cranney claimed that since the three-phase power was more efficient, the manufacturing facility would use *less* electricity than it had using the single-phase power. His primary contention, however, was that upgrading the power was not development activity.
[20] As stated above, it appears that the City reduced the impact fees to reflect the impact attributable to the single-phase connection which was replaced.
[21] *See Home Builders Ass'n v. North Logan*, 1999 UT 63, ¶ 9, 983 P.2d 561, 564 (fees presumed to be constitutional if based on proper analysis).

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 friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in Utah Code § 13-43-206, 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.

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:

Mary Kate Christensen, City Recorder
Brigham City
20 North Main
Brigham City, Utah 84302

On this _____ Day of December, 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