Advisory Opinion # 157

Parties: Southern Utah Homebuilder's Association and Dixie Power

Issued: April 30, 2015

TOPIC CATEGORIES:

Impact Fees

The Impact Fees Act does not apply to charges imposed by a public utility. Local government bodies and private water suppliers are the only entities subject to the Act, and a utility company, even a cooperative, is not required to comply. Public utilities are governed and regulated by the Public Service Commission, and any fees or rules imposed by a utility must be just and reasonable.

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ADVISORY OPINION

Advisory Opinion Requested by:	Southern Utah Home Builders
Local Entity:	Dixie Power
Property Owner:	Various Owners and Developers
Type of Property:	New Property Development
Date of this Advisory Opinion:	April 30, 2015
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

Is Dixie Power charging an impact fee within the meaning of the Impact Fees Act?

Is Dixie Power required to comply with the Impact Fees Act?

If a local government requires new development to receive electrical service from Dixie Power, or if Dixie Power is the only provider of electrical service, do the fees charged become subject to the Impact Fees Act and provisions of the Land Use, Development, and Management Act?

May Dixie Power require installation of equipment and facilities that will serve more than one development?

May Dixie Power require that all new electrical equipment and facilities be installed by Dixie Power employees?

Summary of Advisory Opinion

The Impact Fees Act does not apply to charges imposed by a public utility company. Only local governments and private water companies are subject to the Act, and there is no justification to extend the statute to include private utility companies within the Act's jurisdiction. Therefore, a utility is not obligated to comply with the Act's requirements, including preparing a capital facilities plan and an impact fee study. In like manner, a public utility is not obligated to conduct

a "rough proportionality" analysis, because its fees and equipment requirements are not exactions. A public utility does not grant development approval, and it does not require dedication of private property for public purposes.

Public utilities are governed and regulated by the Public Service Commission, and any fees or rules imposed must be just and reasonable. The Public Service Commission has jurisdiction to review a utility's charges and other regulations to determine if they are just and reasonable, including Dixie Power's requirement that only its employees may install electrical equipment.

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 Jonathon W. Call, on behalf of the Southern Utah Home Builders Association, on March 4, 2015. A copy of that request was sent via certified mail to the Dixie Power at 145 West Brigham Road, St. George, Utah. According to the return receipt, Dixie Power received the Request on March 6, 2015.

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 Jonathon W. Call, on behalf of the Southern Utah Home Builders Association, received by the Office of the Property Rights Ombudsman on March 4, 2015
2. Response from David Crabtree, counsel for the Dixie Power (Deseret Power), received on March 20, 2015.
3. Revised Request submitted by Jonathon W. Call, received April 1, 2015.

Background

The Southern Utah Home Builders Association ("Association") represents members of the professional building industry throughout Southern Utah.[1] The Association is concerned about charges imposed by the Dixie Power Company, a rural electric cooperative providing power service to areas of Iron and Washington Counties, as well as communities in the northwest corner of Arizona. Specifically, the Association questions whether Dixie Power should comply with the requirements of the Impact Fees Act, including preparation of a capital facilities plan, an impact fee analysis, and notice to interested entities.[2] In addition, the Association contends that Dixie Power requires installation of more electrical equipment than is needed to serve new development; and that the power company's demand that all equipment be installed by its employees is unreasonable.

Dixie Power was formed in the 1970s, through the merger of three smaller electric cooperatives in Southwest Utah and Northwest Arizona. The cooperatives were originally established in the 1940s, under the Rural Electrification Act, a program administered by the United States Department of Agriculture. Dixie Power is privately owned and financned, and, like all private utilities, is regulated by the Utah Public Service Commission.

The power company states that its charges, which it refers to as "impact fees" are charged to any property receiving new electrical service, not just new development. Dixie Power states that such fees are not impact fees within the meaning of the Impact Fees Act, but are charges routinely assessed by power companies to offset the costs of additional equipment needed to serve new customers. The company also states that its fees have been approved by the Public Service Commission, as provided in the Utah Code.[3] Dixie Power disputes that its charges are impact fees, and notes that it is not a political body or a private water company, and does not grant approval for development projects.

Analysis

I. Dixie Power is Not Obligated to Comply With the Impact Fees Act.

A. Dixie Power is Neither a Local Political Subdivision Nor a Private Water Supplier

Dixie Power is not a local political subdivision, a local district, a special service district, or a private water supplier, and so is not subject to the requirements of the Impact Fees Act. The Utah Legislature enacted the Impact Fees Act to govern development impact fees charged by local entities.[4] The Act only applies to "local political subdivisions" and "private entities."[5] A "local

[1] The Association represents builders in Kane, San Juan, and Washington Counties. Its membership includes builders, installers, and financial professionals. *See* Southern Utah Home Builders Association Website, www.suhba.com.

[2] The Association argues that Dixie Power (and other utility companies) should be subject to the Impact Fees Act, because the fees are being imposed on new development.

[3] Dixie Power cites § 54-7-12 of the Utah Code, which requires approval for any type of rate increase, which includes rates, tolls, and "any other charge generally applicable to a public utility's rate tariffs." UTAH CODE ANN. § 54-7-12(1)(a)(i)(E).

[4] The Impact Fees Act is found in §§ 11-36a-101 to -705 of the Utah Code.

[5] "A local political subdivision and private entity may establish impact fees only for those public facilities defined in Section 11-36a-102." UTAH CODE ANN. § 11-36a-201(2).

political subdivision" is defined as "a county, municipality, a local district under Title 17B, Limited Purpose Local Government Entities – Local Districts, or a special service district under Title 17D, Chapter 1, Special Service District Act." UTAH CODE ANN. § 11-36a-102(12)(a).[6] Dixie Power is clearly not a county or a municipality.

Local districts provide local services, and are created by voters residing in the area to be served, after hearings and studies conducted by local government legislative bodies.[7] Although a local district is authorized to provide several types of municipal-type services, electrical service is not one of them.[8] Dixie Power was not created through the process established in Title 17B, and it provides electrical service to its customers.[9]

Along the same lines, Dixie Power is also not a special service district created by local governments to provide municipal services.[10] Like local districts, a special service district is not authorized to provide electrical service.[11] Since Dixie Power provides electrical service, and was not created through the process established under Title 17D, it cannot be a special service district.

Finally, a "private entity" is defined as a privately owned entity that provides water service. *See id.*, § 11-36a-102(13). Dixie Power does not provide water service, and so cannot be considered a "private entity" under the definition of the Impact Fees Act. Since Dixie Power is not a county, city, local district, special service district, or a private entity providing water services, it is not required to comply with the provisions of the Impact Fees Act.[12]

B. Dixie Power is Not Charging Impact Fees Within the Meaning of the Impact Fees Act.

Dixie Power is also not subject to the Impact Fees Act, even though it refers to its charges as "impact fees," because its charges are not impact fees within the meaning of the Act. The obligations of the Impact Fees Act arise because an entity subject to that Act imposes a fee that meets the definition of an "impact fee." It is the nature of the fee, not its title, which subjects it to the Act.[13]

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[6] School districts are expressly exempted from the definition of "local political subdivision." *Id.*, § 11-36a-102(12)(b).
[7] *See id.*, §§ 17B-1-203, 17B-1-210.
[8] *Id.*, § 17B-1-202(1). A local district may acquire and maintain a right-of-way for an electrical transmission line, and may also provide funding to relocate overhead lines to underground facilities, but it may not provide electrical service.
[9] Dixie Power is a cooperative owned by its subscribers, who select a board of directors. *See* Dixie Power Website, www.dixiepower.com.
[10] *See* UTAH CODE ANN. § 17D-1-208 (Special service district created by legislative body of city or county, after hearings and studies).
[11] *Id.*, § 17D-1-201. Special service districts may be created to provide street lighting, but not electrical service.
[12] Cities with municipal power companies may charge impact fees, which are governed by the Impact Fees Act. *See id.*, § 11-36a-102(16) ("public facilities" include municipal power facilities).
[13] "A fee that meets the definition of impact fee under Section 11-36a-102 is an impact fee subject to this chapter [Chapter 11-36a], regardless of what term the local political subdivision or private entity uses to refer to the fee." UTAH CODE ANN. § 11-36a-204(1).

The fee charged by Dixie Power does not meet the definition of an impact fee, because it is not charged as a condition of development approval. "'Impact fee' means a payment of money imposed upon new development activity ***as a condition of approval*** to mitigate the impact of the new development on public infrastructure." UTAH CODE ANN. § 11-36a-102(8)(a)(emphasis added). Dixie Power's fees are a payment of money, and, according to the company, are intended offset the cost of installing additional equipment needed as the number of customers increases. However, the fees are not required as a condition of development approval, and so are outside of the Impact Fees Act.

An analogous situation was considered by the Utah Supreme Court in *Washington County Water Conservancy District v. Keystone Conversions, LLC* ("*Keystone*").[14] In that case, the court concluded that a "water availability fee" charged by a water conservancy district was not an impact fee subject to the requirements of the Impact Fees Act. The court explained that the district's authorization that was granted with payment of the availability fee did not constitute "development approval," and so the fee was not an "impact fee."[15]

> Although a developer would need the Water District's written approval if he or she desires to connect to the Water District's system, a developer does not require the Water District's approval in order to build on its own property. Consequently, any approval given by the Water District does not actually "authorize the commencement of development activity."

Keystone, 2004 UT 84, ¶ 26, 103 P.3d at 693. Like the availability fee in *Keystone*, the charges required by Dixie Power are not imposed as a condition of development approval, and hence, are not subject to the Impact Fees Act.[16]

C. *Dixie Power is Not Subject to the Impact Fees Act Because Connection to Their Services is Required for a New Development*

Dixie Power's fees do not become impact fees simply because connection to electrical service is necessary for a new development. The language of the Impact Fees Act cannot be interpreted to include private companies providing necessary utility services to new development. The Act, like all statutes, must be interpreted to carry out the Legislature's intent.

> When interpreting statutes, [the] primary objective is to give effect to the legislature's intent. To discern legislative intent, . . . look first to the statute's

[14] 2004 UT 84; 103 P.3d 686.
[15] *Id.*, 2004 UT 84, ¶ 25; 103 P.3d at 693. The water availability fee was charged by the Washington County Water Conservancy District when an applicant requested permission to install a secondary water system served by the Water District. The authorization provided only approval that a water system could be installed (which would receive service from the Water District), and was not approval for any development. *See id.*, 2004 UT 84, ¶¶ 5-6, 103 P.3d at 688-89.
[16] "Development approval" means approval from a local government to begin construction or other development activity, authorization from public water supplier to deliver water, or authorization from a sewer authority. UTAH CODE ANN. § 11-36a-102(4).

> plain language. In doing so, . . . presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning.

Howard Selman, Inc. v. Box Elder County, 2011 UT 18, ¶18, 251 P.3d 804, 807 (citations and alterations from original omitted). In addition, "omissions in statutory language should be taken note of and given effect." *Biddle v. Washington Terrace*, 1999 UT 110, ¶ 14, 993 P.2d 875, 879 (citation omitted).

The plain language of the Impact Fees Act indicates that the Utah Legislature did not intend to subject private entities involved in development approval to the Act's requirements. As has already been discussed, only local political subdivisions and private water suppliers are subject to the Act.[17] Furthermore, an "impact fee" is a fee charged as a condition of development approval. Both of these provisions indicate the intent to limit the Act's requirements to the identified entities. If the Legislature had wished to regulate the fees charged by private utility companies as impact fees, it would have included such language in the Act.[18] In the absence of statutory authority, there is no justification to expand the Impact Fees Act to include private utility companies, even if those companies are critical to new development approval.[19]

To conclude, Dixie Power is not an entity which is subject to the Impact Fees Act, and its fees are not "impact fees" within the meaning of that Act. It is not required to comply with the notice provisions of the Act, and it is not required to prepare a capital facilities plan or an impact fee study. Concerns about such charges should be addressed to the utility itself, or through the Public Service Commission.

II. Dixie Power's Fees and Equipment Requirements are not Exactions.

Following a similar analysis, Dixie Power's fees and equipment requirements are not development exactions subject to rough proportionality analysis, because Dixie Power is not a government agency, and it does not grant development approval. "Exactions are conditions imposed by government entities on developers for the issuance of a building permit or subdivision plat approval." *B.A.M. Development, LLC v. Salt Lake County* ("*BAM I"*), 2006 UT 2, ¶ 34, 128 P.3d 1161, 1169. Cash payments may be exactions, along with installation of public

[17] The very specific definition of "private entity" in the Impact Fees Act indicates the Legislature's intent to exclude other private utilities from the Act's jurisdiction. *See* UTAH CODE ANN. § 11-36a-102(13)

[18] *See e.g. Kennecott Copper Corp. v. Anderson*, 30 Utah 2d 102, 514 P.2d 217 (1973). In *Kennecott Copper*, the Utah Supreme Court concluded that the language of the Utah Worker's Compensation Act did not impose a time limit on medical expenses arising from an industrial injury. The language did limit wage compensation to no more than six years, but did not include medical expenses in that limitation. The Court held that since medical expenses were not expressly included in the statute, the intent of the language was to impose no limit on medical expenses. Following a similar approach, since utility companies were not named as being subject to the Impact Fees Act, the Legislature's intent was to exclude them from the Act.

[19] Another factor supporting this conclusion is a policy that private companies should not be subjected to the extensive requirements and potential liabilities of the Impact Fees Act without thorough consideration by the Legislature.

infrastructure.[20] Local governments may impose exactions as a requirement of development approval, provided the exactions satisfy "rough proportionality" analysis.[21]

For the same reasons that it is not subject to the Impact Fees Act, Dixie Power is not required to comply with rough proportionality analysis. It is not a government agency, and its does not grant approval of a development project. Even though rough proportionality is required to enforce rights guaranteed by the State and Federal Constitutions, the cases governing exactions clearly indicate that rough proportionality analysis is required only when a government agency imposes an exaction.[22] It has already been discussed that Dixie Power's fees are not imposed as a condition of approval, and are therefore not exactions subject to rough proportionality analysis.

In like manner, Dixie Power is not obligated to apply the rough proportionality test to the amount of equipment it requires from new development. The Home Builders Association objects that its members are required to install equipment capable of serving more properties than that which is being developed. Essentially, the Home Builders Association argues that each developer should only be required to install the equipment necessary for a development, and that any excess capacity or equipment should be Dixie Power's responsibility.

Construction of public infrastructure may be an exaction, which would be subject to rough proportionality analysis. As has already been discussed, however, Dixie Power is not a governmental agency, it does not grant development approval. Furthermore, the required equipment is not public infrastructure, and the builders are not expected to donate it for a public use. The Utah Supreme Court noted that an exaction "typically require[s] the permanent surrender of private property ***for a public use***." *BAM I*, 2006 UT 2, ¶ 34, 128 P.3d at 1169 (emphasis added). Thus, since the required equipment is not being donated for a public use, the requirement is not subject to rough proportionality analysis.

III. Dixie Power's Regulations Concerning Installation of Equipment are Not Governed by the Land Use, Development, and Management Act (LUDMA).

Because Dixie Power is not a local government entity, its rules concerning installation of equipment are not land use decisions governed by the Land Use, Development, and Management Act ("LUDMA"). Conditions imposed by land use authorities must comply with LUDMA. A

[20] *See B.A.M. I,* 2006 UT 2, ¶ 34, 128 P.3d at 1169 (*quoting Salt Lake County v. Granite School Dist.*, 808 P.2d 1056, 1058 (Utah 1991)). Impact fees are also a type of exaction. *Id.*

[21] *See* UTAH CODE ANN. § 10-9a-508 and 17-27a-507. An exaction is valid if 1) there is an "essential link" between the exaction and a governmental interest; and 2) the exaction is roughly proportionate, both in nature and extent to the impact of the development. Rough proportionality analysis is required not only by the Utah Code, but also by the State and Federal Constitutions. *See B.A.M. I* 2006 UT 2, ¶ 31, 128 P.3d at 1168.

[22] Rough proportionality is required to protect the rights found in the "Takings Clauses" of the Federal (U.S. CONST. amend. V) and the Utah Constitutions (UTAH CONST. Art. I, § 22). The *B.A.M. Development* case explicitly defines an exaction as "imposed by government entities." *B.A.M. I,* 2006 UT 2, ¶ 34, 128 P.3d at 1169. In a subsequent opinion concerning the same matter, the Utah Supreme Court stated that exactions are "government-mandated contributions." *B.A.M. Development, LLC v. Salt Lake County (BAM III)*, 2012 UT 26, ¶ 16, 282 P.3d 41, 45. In addition, the United States Supreme Court also strongly indicated that rough proportionality analysis is required when exactions are imposed by government entities. *See Koontz v. St. Johns River Water Management Dist.*, 133 S.Ct. 2586, 2603 (2013).

"land use authority is a person, board, commission, agency, or body, including the local legislative body, designated by the local legislative body to act upon a land use application." UTAH CODE ANN. § 10-9a-103(23). As a public utility, Dixie Power is not authorized to act upon a land use application, and so it is not a land use authority. Thus, its rule that installation must be carried out by its employees is not governed by LUDMA. That rule should be acceptable, provided it is reasonable under the circumstances.

IV. Dixie Power's Requirements, Regulations, and Fees Must be Just and Reasonable

Even though Dixie Power is not subject to the Impact Fees Act, LUDMAN, or rough proportionality analysis, it is still under the jurisdiction of the Public Service Commission (PSC).[23] The Utah Code requires that a utility's fees and regulations be "just and reasonable:

> All charges made, demanded or received by any public utility . . . shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received . . . is hereby prohibited and declared unlawful. . . . All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable. The scope of definition "just and reasonable" may include, but shall not be limited to, the cost of providing service . . . the economic impact of charges . . . and on the well-being of the state of Utah; methods of reducing wide periodic variations in demand of such products, commodities or services, and means of encouraging conservation of resources and energy.

UTAH CODE ANN. § 54-3-1. The PSC is authorized to review a utility's fees and regulations, and determine whether the fees or regulations are just and reasonable.[24] This review includes not only the fees, but Dixie Power's rule that only its employees may install its equipment.

The importance of public utility service for new development cannot be overstated. Commercial, industrial, and residential land uses would not be possible without utility services provided by companies and entities regulated by the PSC. This does not mean, however, that new development is at the mercy of utility providers. The statutory provision cited above requires that a utility's fees and regulations be just and reasonable. Any person may seek review of a utility's charges or rules through the PSC.

It is not within the purview of the Office of the Property Rights Ombudsman to review a public utility's charges or regulations. As Dixie Power explains, it is not a governmental entity, but is regulated by the PSC as a public utility. The PSC reviews and approves any charges and regulations imposed by a public utility, including Dixie Power's fees and rules. It is presumed that Dixie Power has obtained the necessary approvals for its operations from the PSC, and if so, its fees should be entitled to a presumption of validity. Any disputes regarding the amount of

[23] *See* UTAH CODE ANN. § 54-4-1 (Public Service Commission has jurisdiction and authority to regulation every public utility within Utah). Dixie Power's service area extends into Arizona, and that service may be subject to regulation by Arizona's authorities.
[24] *See id.*, §§ 54-7-1 to -30 (Authority of Public Service Commission to conduct hearings, issue orders, and penalize violations).

utility charges or rules imposed by a utility should be brought to the PSC, following the process found in Title 54 of the Utah Code.

Conclusion

Public utility companies are not governmental agencies, and so are not governed by land use statutes and the Impact Fees Act.[25] The Impact Fees Act applies only to local political subdivisions and private water suppliers. Utility companies are not subject to the Act, even if they designate their required charges "impact fees." Moreover, a public utility does not grant development approval, and so cannot charge an impact fee, within the meaning of the Act. There is no statutory authorization to extend the Impact Fees Act to include private utility companies, even when they provide service to new development.

Similarly, public utilities also do not require exactions, because they are not government agencies, do not grant development approval, and do not require donation of property for public infrastructure. Thus, they are not obligated to comply with rough proportionality analysis. Along the same lines, public utilities are not subject to LUDMA, and are not required to comply with its provisions.

Public utilities are regulated by the Public Service Commission, and fees and regulations may be reviewed by that body. Utah's laws require that both fees and rules imposed by a public utility be "just and reasonable." Any person may request that the Public Service Commission review a utility's charges or regulations.

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

[25] Utilities provided by governmental agencies are regulated by land use laws and the Impact Fees Act.

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:

Dixie Power
145 W. Brigham Road
St. George, Utah 84790

Southern Utah Home Builders Association
2303 N. Coral Canyon Blvd., # 200
Washington, Utah 84780

On this _____ Day of April, 2015, 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