Advisory Opinion #163

Party: Toquerville City

Issued: 10/8/2015

TOPIC CATEGORIES:

Impact Fees

Toquerville City has requested early review of its impact fees. The fee does not comply with the Impact Fee Act.

A city must identify the system improvements upon which it intends to spend impact fees in its Impact Fees Facilities Plan. Moreover, a city must identify an existing level of service, and establish a proposed level of service, for each public facility. Level of service is a unit of demand or performance standard, and is not simply an inventory of current facilities.

An impact fee facilities plan and impact fee analysis must show each of the listed statutory elements in order to comply with the Act. Requirements in the act, such as the prohibitions on calculating impact fees using current replacement value or on using impact fees to cure existing deficiencies, must be strictly followed.

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ADVISORY OPINION

Advisory Opinion Requested by:	Toquerville City
Local Government Entity:	Toquerville City
Scope of Advisory Opinion:	Early Review: Draft Water/Streets/Parks & Trails Impact Fee Facility Plan & Analysis
Date of this Advisory Opinion:	October 8, 2015
Opinion Authored By:	Brent N. Bateman Office of the Property Rights Ombudsman

Issues

Early review of Toquerville City's Draft Water/Streets/Parks & Trails Impact Fee Facility Plan & Analysis.

Summary of Advisory Opinion

Toquerville City's Draft *Water/Streets/Parks & Trails Impact Fee Facility Plan & Analysis* does not comply with the Impact Fees Act.

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 Toquerville City July 29, 2015. As a courtesy, a copy of that request was sent to Ross Ford, Executive Director of the Utah Home Builders Association, with a courtesy Copy sent to Mari Smith, Executive Director of the Southern Utah Home Builders Association, on August 5, 2015. No submissions or objections were received by any party.

Evidence

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

1. *Toquerville City's Draft Water/Streets/Parks & Trails Impact Fee Facility Plan & Analysis*, dated May 5, 2015 and prepared by ProValue Engineering, Inc.

Introduction: Early Review of Impact Fees

Toquerville city is located in Washington County, Utah, and has a population of approximately 1,500 persons. Toquerville City has determined a need to update its impact fees, and has worked to prepare impact fee documents appropriate to their City size and future needs. Prior to enactment of the fees, the City has requested that this Office review the City's Draft *Water/Streets/Parks & Trails Impact Fee Facility Plan & Analysis* (containing both Toquerville's Impact Fee Facilities Plan ("IFFP") and Impact Fee Analysis ("IFA")), and opine whether their impact fee documents comply with the Utah Impact Fees Act. We undertake this review in accordance with UTAH CODE § 13-43-205(1)(a)(iii).

Early review of an impact fee is a review of the documents and procedures that establish the fee, and their compliance with the Impact Fees Act. Because the fees have not been collected or expended, this Advisory Opinion does not end the inquiry into the legality of the actual fees. In time, as the fees are implemented, the parties should take continual care to ensure that the impact fees comply with the Impact Fees Act.

Likewise, early review of an impact fee by the Property Rights Ombudsman is limited to a *legal* review for compliance with the Impact Fees Act. No attempt is made to review the fees' accounting and engineering conclusions (beyond a cursory check for obvious errors and legal compliance). The Ombudsman's office has neither the capacity nor expertise to verify whether an impact fee meets the standards of practice for those professions. In addition, all impact fees are based upon certain data and future projections, such as projected new growth in an area or projected costs of needed facilities. The legal review undertaken here cannot verify the facts nor the accuracy of the projections.

Analysis

The Impact Fees Act is found in Title 11, Chapter 36a of the Utah Code ("Act"). Toquerville City's draft *Water/Streets/Parks & Trails Impact Fee Facility Plan & Analysis* does not comply

with the Act. As detailed below, Toquerville City has either omitted or misinterpreted multiple requirements from the Act.[1]

I. A City Must Identify the Public Facilities For Which It Charges Impact Fees

The Act requires that an Impact Fee Facilities Plan identify system improvements upon which impact fees will be spent:

> A local political subdivision may expend impact fees only for a system improvement:
> (a) identified in the impact fee facilities plan; and
> (b) for the specific public facility type for which the fee was collected.

UTAH CODE § 11-36a-602. Thus, if a system improvement is not identified in the IFFP, impact fees cannot be expended thereon. The word "identified" by its plain meaning requires that the IFFP indicate a *particular facility*. The identification must at least be sufficient to determine whether the new public facility is a permissible public facility under the Act.[2] The Act states that impact fees apply to "only the following impact fee facilities that have a life expectancy of 10 or more years and are owned or operated by or on behalf of a local political subdivision or private entity." UTAH CODE § 11-36a-102(16). Facilities must be named and located sufficiently to determine facility type, life span, and ownership. If the impact fees are to be expended on existing facilities, the extent of the excess capacity in those facilities must be identified in order to comply with the Act.

The Toquerville City draft IFFP does not identify the facilities upon which the City intends to spend impact fees. As well as can be assessed, Toquerville City intends to use some impact fees for buy-in to excess capacity in existing facilities, and some for general expansion of its system as growth occurs (i.e., build roads as needed). The City does not identify the specific existing facilities with excess capacity, nor the new facilities required to serve new growth. This method does not sufficiently identify the system improvements as required by the Act. Toquerville City must identify its public facilities, both newly built facilities and existing excess capacity, upon which it intends to expend impact fees.

II. Existing and Future Levels of Service are Based Upon Demand, Not Inventory

The Toquerville City draft Impact Fee documents show a fundamental misunderstanding of the concept of *level of service*. Neither current nor projected levels of service are calculated correctly, and thus do not comply with the Impact Fees Act. Because level of service is a critical component of several required calculations, the failure to properly analyze level of service casts doubt upon many of the calculations provided.

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[1] Admittedly, the documents under review are in draft form, and could yet be revised to comply with the Act. The stage of drafting — how close these documents are to completion and enactment — is unknown. It's noted that the documents seem unfinished in several respects.

[2] Permissible facilities are limited to (a) water rights and water supply, treatment, storage, and distribution facilities; (b) wastewater collection and treatment facilities; (c) storm water, drainage, and flood control facilities; (d) municipal power facilities; (e) roadway facilities; (f) parks, recreation facilities, open space, and trails; (g) public safety facilities; or (h) environmental mitigation.

UTAH CODE § 11-36a-302(1) requires an IFFP to "identify the existing level of service," and to "establish a proposed level of service."[3] The Impact Fees Act defines "level of service" as "the defined performance standard or unit of demand for each capital component of a public facility within a service area." UTAH CODE § 11-36a-102(11). Level of service is not simply an inventory of facilities. It requires consideration of the demand placed by the current population upon those facilities—i.e. how the facilities are used. Performance or demand upon a particular facility may be measured in multiple ways.[4] Level of service can be expressed, for example, as a ratio: acres of park per 1000 residents, or acre feet of water per ERU. Public safety level of service is often measured in average response times. Roads level of service is usually a factor of traffic density, speed, etc., reflecting the level of service standards from AASHTO manuals (with traffic level A being the best and F being the worst). As a performance standard, a level of service of a storm system may be the capability to handle a flow of x/gpm, or a 10 year storm event for a three hour duration. In all cases, level of service requires a showing of performance or demand—how the available facilities are used by the public.

Toquerville City's draft IFFP calculates level of service primarily as a simple inventory of facilities, and does not show performance or demand. Toquerville's draft level of service calculation for roads provides a straightforward illustration. The current level of service is simply shown as 13.93 miles of asphalt roads in the City. This provides an inventory of roads in the city, but it does nothing to show demand; how those roads are used, and more importantly, whether those roads currently have any capacity to absorb future growth. Moreover, the projected level of service is not expressed as miles of road.[5] Rather it is shown as a construction cross section of road, showing width and construction materials. This is an inventory. The Act requires, for both present and proposed levels of service, a showing of performance or demand.

Other level of service calculations in the IFFP suffer similarly. When Toquerville's draft IFFP does make some attempt to tie demand into the level of service calculation, the calculation still results in an inventory of present capacity. The Toquerville City IFFP states when reviewing the Parks & Trails level of service:

> The park system for the City is currently build [sic] to handle 750 residential homes. With the 16.62 acres of park, there are 45 homes per acre of park available in the City. This is the current level of service.

The City expresses its inventory in existing facilities as acres of park (16.62). The City then states (without foundation) that its parks can handle 750 homes. Dividing 750 by 16.62 yields a level of service of 45 homes per acre. But this calculation is based upon the number of homes the parks were built to serve. Demand is a calculation of the number of homes that the city parks DO

[3] The Act requires that the proposed level of service be shown in the IFFP. Contrary to the Act, Toquerville City attempts to show the proposed level of service in the IFA.
[4] The Act does not dictate any particular method for calculating a level of service. Thus, multiple alternative methods of measuring demand are permissible under the Act.
[5] Current and proposed levels of service must both be calculated using the same method. Otherwise, they cannot be compared

serve. Previously, the City stated that based upon water connections there are 495 (or 515 or 520, see below) homes in the City, a far fewer number of homes than the parks were built to handle. Thus the demand for parks in the City, or the current level of service, is 495 homes divided by 16.62 acres of parks, which equals approximately 30 homes per acre of parks. This ratio more accurately reflects the current level of service.[6]

Likewise, the Trail System Infrastructure current level of service is not a level of service calculation at all. The level of service is expressed only as miles of trails. No calculation tying that to population or demand is attempted:

> There are over 24 miles of unimproved trails now in Toquerville City and these are the ones on the City's proposed trails plan. There are many more miles that are not shown on this map. There is currently about 4,000 feet of improved trails in the City.

This level of service calculation considers inventory, not demand. The remaining level of service calculations in Toquerville City's impact fee documents suffer similarly. Both current and proposed levels of service must be expressed in terms of performance or demand.[7] Thus, Toquerville City's impact fees do not comply with the Act.

III. The IFFP and the IFA Must Show All of the Statutorily Required Contents.

In order to establish a legal impact fee, Toquerville City must prepare and adopt both an IFFP and an IFA. Although these documents may be combined into one publication, they are separate documents. The Act requires that both documents include certain considerations and calculations. If each of those items is not shown in its respective document, then the documents do not comply with the Act.

A. The Impact Fee Facilities Plan

UTAH CODE § 11-36a-302 lists several items that must be identified within an IFFP:

> An impact fee facilities plan shall:
> (i) identify the existing level of service;
> (ii) establish a proposed level of service;
> (iii) identify any excess capacity to accommodate future growth at the proposed level of service;

[6] The calculation of 45 homes per acre, based upon the number of homes that the parks were supposedly built to handle, could be used to show excess capacity in parks. New growth could be charged impact fees to buy into that capacity, based upon the actual costs to construct that excess capacity. UTAH CODE § 13-43-202(1)(a)(iii). But that calculation of buy-in impact fees cannot be made unless current and proposed levels of service are correctly calculated.

[7] A proposed level of service may diminish or equal the existing level of service. UTAH CODE § 11-36a-302(1)(b). The proposed level of service may exceed the existing level of service only if means other than impact fees are used. UTAH CODE § 11-36a-302(1)(c).

(iv) identify demands placed upon existing public facilities by new development activity at the proposed level of service; and
(v) identify the means by which the political subdivision or private entity will meet those growth demands.

As discussed above, the Toquerville City impact fee documents attempt to identify the existing and proposed level of service, but incorrectly express those in terms of inventory rather than demand. Moreover, the Toquerville City IFFP does not include the other three required items. In various places, the IFFP mentions that it has excess capacity by showing that its facilities were built to accommodate a greater population than currently exists, but it does not identify the portions of that excess capacity that can accommodate future growth at the proposed level of service. Most importantly, the IFFP fails to include requirement (v), by not identifying how growth demands will be met, using either existing capacity, dedication of facilities, construction of new facilities, etc. The IFFP's primary objective is to "determine the public facilities required to serve development resulting from new development activity." UTAH CODE § 11-36a-301. Toquerville City's IFFP does not do this.

B. The Impact Fee Analysis

An impact fee must also include an Impact Fee Analysis. Therein, the data and information from the IFFP and projections about future demand from development determine the maximum fee that can be imposed. UTAH CODE § 11-36a-304 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;
(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;
(c) subject to Subsection (2), demonstrate how the anticipated impacts described in Subsections (1)(a) and (b) are reasonably related to the anticipated development activity;
(d) estimate the proportionate share of:
(i) the costs for existing capacity that will be recouped; and
(ii) the costs of impacts on system improvements that are reasonably related to the new development activity; and
(e) based on the requirements of this chapter, identify how the impact fee was calculated.

No real attempt can be detected in Toquerville's draft IFA to address most of these issues. Instead, the IFA portion of Toquerville's document attempts to establish a proposed level of service (which should be established in the IFFP), and then sets forth an impact fee based upon the estimated costs to reach that proposed level. This does not address the requirements of the IFA and thus does not comply with the Act. In order to create a legal impact fee, Toquerville City must specifically address each of these statutory requirements for each fee.

IV. Costs for Existing Capacity Must Reflect Actual Expenditures and Must be Distributed Proportionately Between New Growth and Existing Residents

The Impact Fees Act allows a local government to charge impact fees for buy-in to existing capacity. UTAH CODE § 11-36a-302(1)(a)(iii). However, the buy-in is permitted on a cost recovery basis only. In other words, a City may only charge impact fees to recoup amounts *actually expended* in establishing the existing facilities. UTAH CODE § 11-36a-202(1)(a)(iii). The Act prohibits collection of impact fees on any basis other than actual expenditures. Impact fees are never calculated on a present-replacement-value basis.

The Toquerville draft IFA appears to calculate some of its impact fees based upon the present day value of the facilities, rather than to recoup what the City actually spent on the facilities. Table V-F on page 23, for example, shows the impact fee calculation for the parks facilities. This appears to calculate the present value cost of all the facilities associated with the existing parks. Nothing can be found to illustrate whether these figures, used in calculating the impact fee for the existing parks, shows actual expenditures or the present values. The table strongly indicates that it represents present values, since no distinction is made between various parks and equipment purchased and built at various times. The act requires an examination of what actually went into establishment of the parks, not what the park facilities are worth to replace.

Likewise, the trails impact fee establishes a price per mile of existing trail. Nothing indicates what the City actually spent to acquire or construct the trails. This is impermissible under the Act. A local government may only collect impact fees for existing capacity to recoup costs actually incurred in establishing the capacity.

Moreover, the cost for each facility is to be distributed among all users, including existing residents and anticipated new growth. New growth pays its share, but only its proportionate share. *See* UTAH CODE § 10-9a-508(1). Once existing capacity is exhausted, and once the City recoups new growth's share of the actual expenditures used in establishing that existing capacity, impact fees can no longer be collected for that capacity. If growth continues, new facilities and new impact fees should be established. The Toquerville City draft impact fees do not comply with these mandatory principles.

V. Impact Fees May Not be Used to Cure Existing Deficiencies

Impact fees may only be spent on new facilities made necessary by new growth. UTAH CODE § 11-36a-102(8)(a). The Act prohibits imposing an impact fee to cure system deficiencies. UTAH CODE § 11-36a-202(1)(a)(i). On page 10, Toquerville City states that it has sufficient water pumps for all anticipated growth. However, the City finds that an additional back-up water pump will be needed, and states that impact fees should be expended on that. This is an impermissible expenditure of impact fees for system deficiencies. A back-up pump will not create new capacity, and is not made necessary by new growth. The back-up water pump would be needed to serve existing development. Thus, the back-up pump is an existing deficiency and not eligible for impact fees.

Likewise on page 13, the IFA indicates that impact fees are going to be used to repair the water pressure problem at junction 89. Nothing has been included to show that new growth makes this expenditure necessary. If the water pressure problem exists prior to the burdens on the system caused by anticipated development activity,[8] it is an existing deficiency. Impact fees cannot be used to cure existing deficiencies.

VI. The Draft Documents are Incomplete

In addition to the items discussed above, the Toquerville City draft IFFP and IFA contain numerous internal inconsistencies, unproven or unexplained assumptions, and incomplete calculations. These must be addressed prior to enactment of the fee. A brief discussion of several of these follows. Others may exist.

• Present Demographics

Critical to any calculation of impact fees is the establishment of present population and existing units. The Toquerville City impact fee documents are very inconsistent in their calculation and use of these numbers throughout. On page 2, the City indicates that it intends to determine the number of residences within its borders using the number of customers that pay for culinary water.[9] However, the number of residential connections shown in the IFFP is not consistent. Near the top of page 2, the IFFP indicates that there are 495 users tied to the culinary water system. But later on the same page, the documents states that there are 515 residential connections. 495 is used again on page 7. Page 10 indicates that there are 495 ERUs, where previously 495 is indicated to be the number of actual residential connections. Immediately thereafter the number of equivalent residential connections is shown in the table as 515. On page 10 and several times thereafter, 2015 ERUS are also shown as 520. These inconsistencies are unexplained.

• Projected Growth Rate

In calculating its future population, Toquerville indicates that its projected growth rate is 3.87%. However, apart from indicating the number is used by the "State of Utah" and future populations are based upon a "DEA Estimate" the IFFP does not establish the basis for that growth rate calculation. No information is provided regarding the source of that number. Further, nothing is provided to show whether there are any factors that might influence that growth rate, such as remaining developable land or expected annexations.

[8] Should the current water pressure be sufficient to serve existing development, and the water pressure problem will only occur when new development attaches to the system, it may be said that the facilities to improve the water pressure are facilities made necessary by new growth, and are thus eligible for impact fees.

[9] The IFFP contains little discussion about the demographic makeup of Toquerville City. Thus, whether the number of residential culinary water hookups as the basis for the City's impact fees complies with the Act cannot be assessed. It may be valid if the City contains only single family detached residences, and no high density residential, commercial, industrial, or agricultural users connect to the culinary water system. The demographics of the City should be established in the IFFP, and a calculation of present users should generally consider all users. By itself, the discussion regarding Toquerville Heights, and their unique water usage situation, calls the validity of this calculation into doubt.

• Assumptions and Incomplete Data

In several locations throughout Toquerville's impact fee documents, assumptions are made and data shown is incomplete. These assumptions should be verified and data should be completed prior to enactment of the fee, so that an accurate fee can be assessed. On page 7, the document states that due to the fact that the majority of properties in Toquerville Heights are xeriscaped, "*it is assumed that* each residential connection in Toquerville Heights and Westfield Road has an average of 0.10 acres of land that is irrigated with culinary water." No basis is shown for that assumption. On page 9, Toquerville states that it will analyze water rights using 300 gallons per user, without any foundation to show the source of that number. In addition, Table V-A on page 17 contains incomplete data.

Conclusion

Toquerville City's Draft *Water/Streets/Parks & Trails Impact Fee Facility Plan & Analysis* is deficient or out of compliance with the Act in multiple ways. Extensive revision may bring it into compliance and allow Toquerville City to charge a justifiable and defensible impact fee.

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 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:

Renee Garner, City Recorder/Clerk
Toquerville City
212 Toquer Blvd
PO Box 27
Toquerville, Utah 84774

On this 9th day of October, 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.

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Office of the Property Rights Ombudsman