

# Advisory Opinion #168

Parties: Kearns Improvement District

Issued: June 30, 2016

## TOPIC CATEGORIES:

**Impact Fees**

Kearns Improvement District's Draft Sewer Impact Fee and Draft Water Impact Fee both substantially comply with the Impact Fees Act.

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The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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### ADVISORY OPINION

Advisory Opinion Requested By:                      Kearns Improvement District

Local Government Entity:                              Kearns Improvement District

Scope of Advisory Opinion:                              Early Review: Draft Water & Sewer  
Impact Fee Facility Plan & Analysis

Date of this Advisory Opinion:                              June 30, 2016

Opinion Authored By:                                      Brent N. Bateman  
Office of the Property Rights Ombudsman

### ISSUE

Early review of Kearns Improvement District's draft Sewer & Water Impact Fees.

### SUMMARY OF ADVISORY OPINION

Kearns Improvement District's draft Sewer Impact Fee and Water Impact Fee substantially comply with the Utah 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 Keith J. Larsen, P.E. of Bowen Collins & Associates Inc., on behalf of Kearns Improvement District on January 20, 2016. As a courtesy, a copy of that request was sent to Ross Ford, Executive Director of the Utah Home Builders Association, on January 21, 2016. No further 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. Kearns Improvement District's Draft Water & Sewer Capital Facility Plan, dated January 2016, and prepared by Bowen Collins & Associates Inc.
2. Kearns Improvement District's Draft Sewer Impact Fee Facility Plan, dated January 2016, and prepared by Bowen Collins & Associates Inc.
3. Kearns Improvement District's Draft Sewer Impact Fee Analysis, dated June 2016, and prepared by Bowen Collins & Associates Inc.
4. Kearns Improvement District's Draft Water Impact Fee Facility Plan, dated January 2016, and prepared by Bowen Collins & Associates Inc.
5. Kearns Improvement District's Draft Water Impact Fee Analysis, dated June 2016, and prepared by Bowen Collins & Associates Inc.

## INTRODUCTION: EARLY REVIEW OF IMPACT FEES

Kearns Improvement District (KID) intends to adopt new impact fees for both sewer and water facilities. KID has requested that this Office review, prior to enactment of the fees, its Draft Sewer and Water Impact Fee Facility Plans (IFFP) & Impact Fee Analyses (IFA), and opine whether their impact fee documents comply with the Utah Impact Fees Act (Act). We undertake this review in accordance with UTAH CODE § 13-43-205(1)(a)(iii).

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

Likewise, early review of an impact fee by the Property Rights Ombudsman is limited to a *legal* review for compliance with the Act. No attempt is made to review the fees' accounting and engineering conclusions beyond a 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 Office of the Property Rights Ombudsman has reviewed the Utah Impact Fees Act<sup>1</sup> and reviewed Kearns Improvement District's draft Sewer Impact Fee and draft Water Impact Fee. We find that the present drafts of Kearns Improvement District's Draft Sewer Impact Fee and Water Impact Fee substantially comply with the Impact Fee Act.<sup>2</sup>

All aspects of the Act have been considered, and every attempt has been made to apply the Act's requirements to KID's impact fee documents. In the interest of efficiency, only a few of the many considerations and examinations undertaken will be discussed herein.

### **I. The *Credit for User Fees* Appropriately Provides a Credit against Future Bond Payments to New Users**

KID's Water IFA and Sewer IFA both set forth the maximum allowable impact fee that KID may charge, using the procedures required by the Act. In addition, both IFAs provide and calculate a credit, called *Credit for User Fees*, which must be provided to new users against the total impact fee. The credit decreases over time. As the credit decreases, the maximum amount that can be charged as an impact fee accordingly increases year-to-year. This credit is appropriate and complies with the Impact Fees Act.

As explained in both IFAs, this credit arises from the fact that the KID has or will enter into bonds to build some of its facilities. As a result of its building program, some existing deficiencies will be cured, and the level of service for existing users will increase. However, the Act prohibits using impact fees to cure existing deficiencies or to raise the level of service for existing users. New users are paying for their level of service through impact fees. The bonds that will be used to pay for these new facilities will be repaid through user fees. New users will pay impact fees, AND will pay user fees after connecting to the system, thus paying off a portion of the bonds. This essentially will require new users to pay impact fees for their own use, but also pay towards curing existing deficiencies and raising the level of service for other users. This is not permitted under the Act.

KID has extrapolated the portion of the future bond payments that new users will pay, but will have already paid with impact fees, and created a credit against the impact fees. The impact fees are discounted to the extent of those credits. Users that build earlier will, over time, pay more in user fees, and thus pay more of the bond payments than users who build in the future. Thus, the

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<sup>1</sup> The Impact Fees Act is found in Title 11, Chapter 36a of the Utah Code.

<sup>2</sup> This review process has included discussion with representatives of KID and with the preparer of the fees. Where questions or concerns about compliance with the Act have arisen, those have been communicated to and discussed with KID. As a result of these discussions, KID has revised its documents or provided answers to questions in an attempt to resolve concerns and to receive an overall positive Advisory Opinion.

later a user joins the system, the less that user pays towards the bond, and the less the credit. Thus, the discount reduces every year and the maximum impact fee increases.

The Impact Fees Act requires KID to consider all revenue sources to finance the impacts on system improvements, and to reduce its impact fees to the extent of those sources. UTAH CODE § 11-36a-302(2). This credit, and the resulting yearly increase in the maximum fee, comply with this portion of the act and appropriately consider alternative means to pay for facilities.

## **II. Impact Fees May be Used for the Planned Improvements to the Administrative and Shop Buildings**

The KID IFFPs include impact fee charges for planned improvements to the shared administrative and shop buildings. The planned improvements include curing numerous and extensive existing deficiencies in the current buildings. This raises questions upon first reading because impact fees may not be used to correct existing deficiencies. UTAH CODE § 11-36a-302. In addition, the documents show a clear intent to raise the existing level of service for the administrative and shop buildings.<sup>3</sup> Impact fees cannot be used to raise the current level of service for existing customers. *Id.*

Nevertheless, the KID IFFPs do not violate the Act here. KID is careful to exclude both the existing deficiencies and the increase in the level of service from the impact fee calculation. Only those improvements to the administration and shop buildings needed to bring new growth to the proposed level of service are included in the fees. This is permitted under the Act. Only a very small percentage of the total costs of the improvements to the administrative and shop buildings are attributed to new growth and included in the impact fees. No fault could be found in these calculations.

In addition, some question may exist regarding whether the administrative and shop buildings are eligible for impact fees at all. According to the Act, public facilities eligible for impact fees include “(a) water rights and water supply, treatment, storage, and distribution facilities; (b) wastewater collection and treatment facilities.” UTAH CODE § 11-36a-102(16). Although nothing in these statutes directly indicates that administrative offices or equipment maintenance shops are contemplated here, inclusion of those facilities in these definitions does not require a very expansive reading of the statutory language. Thus, the administrative and shop buildings are eligible under the Impact Fees Act.

## **III. Equivalent Residential Units**

KID’s impact fees are a factor of Equivalent Residential Units (ERUs). The KID IFFPs use ERUs to calculate present and future levels of service, and the IFAs distribute impact fees using ERUs. But, apart from a cursory definition of ERUs as “the demand that a typical single family residence places on the system,” KID’s impact fee documents do not provide any further insight into the value or nature of an ERU.

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<sup>3</sup> The level of service for the Administrative and Shop Buildings are measured in terms of shop bays per ERU for the Shop Buildings, and square feet of office space per ERU for the administrative building.

Information about ERUs necessary to justify its calculations and ensure compliance with the Act is instead found in KID's Draft Water & Sewer Capital Facility Plan, dated January 2016. ERUs are calculated therein as a function of historical consumption by the number of residential connections. For example, a residential water ERU represents "monthly water production summed and divided by the total number of residential connections." Moreover, non-residential ERUs, are "calculated by dividing the non-residential water production by the average residential water demand." The Capital Facility Plan then calculated the total number of ERUs by adding the residential and non-residential ERUs.

This complies with the Act, although more thorough consideration of the many different residential and non-residential use types, and the corresponding differences in usage, may improve the calculation. Consideration of the differences between residential averages and non-residential averages accounts for the greatest differences, and thus sufficiently enables calculation of the impact fee. We recommend that more concrete reference be made to the Capital Facility Plan in the IFFPs to these ERU calculations for ease of reference.

#### **IV. General Compliance with the Act**

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. The KID IFFPs, throughout the documents, contain explicit and sufficient identification of facilities upon which KID intends to spend impact fees.

The KID IFFP likewise correctly identifies and calculates existing and proposed levels of service.<sup>4</sup> Performance or demand upon a particular facility may be measured in multiple ways. The KID IFFP makes a subtle distinction between *performance standard* and *level of service*. The performance standard is the *desired* minimum level of performance for each component, while the existing level of service is the *actual* current performance of the component. The proposed level of service is the *proposed* actual performance of the component in the future. Although this distinction is not found in the Act, it is useful in determining existing deficiencies, which is in turn useful in identifying which portions of costs are attributable to new growth. In any event, the KID impact fee calculations comply with the act in that they identify existing and proposed levels of service.

### **CONCLUSION**

The KID draft Sewer Impact Fee and draft Water Impact Fee substantially comply with the Impact Fee Act. A reading of the documents shows that KID has reviewed the Impact Fee Act

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<sup>4</sup> UTAH CODE § 11-36a-302(1) requires an IFFP to "identify the existing level of service," and to "establish a proposed level of service." 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).

carefully and has attempted to understand it and follow its requirements. To the extent that question have arisen, KID has been very responsive in answering them and revising its documents. There may be many ways to calculate an impact fee. Overall, KID has attempted to do so carefully and conscientiously.

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:

Kearns Improvement District  
Attn: Pamela Gill, General Manager  
5350 West 5400 South  
Kearns, Utah 84118

On this \_\_\_\_\_ Day of \_\_\_\_\_, 2016, 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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