Advisory Opinion #177

Parties: Wasatch School District, Heber City
Issued: November 30, 2016

TOPIC CATEGORIES:
Impact Fees
Compliance with Mandatory Ordinances
Interpretation of Ordinances

Utah law requires that a building used for human occupancy connect to an accessible sewer line that is within 300 feet of the boundary of the property. This requirement is mandatory and contains no exceptions. The law requires connection in this circumstance, and likewise requires that Heber City accept that connection where surplus capacity exists.

The Impact Fees Act expressly prohibits a city from delaying construction of a school because of a dispute over impact fees. Prohibiting connection to the sewer line because of an impact fee dispute delays construction and violates this provision of the Act.

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ADVISORY OPINION (PART 1)

Advisory Opinion Requested By:	Wasatch School District
Local Government Entity:	Heber City
Applicant for Land Use Approval:	Wasatch School District
Type of Property:	Multiple projects
Date of this Advisory Opinion:	November 30, 2016
Opinion Authored By:	Brent N. Bateman Office of the Property Rights Ombudsman

ISSUE

May Heber City deny Wasatch County School District's connection of a new school to the City-owned sewer system, where the new school is adjacent to the sewer line but outside of the municipal boundaries, until the School District pays the City's disputed impact fees?

SUMMARY OF ADVISORY OPINION

Utah law requires that a building used for human occupancy connect to an accessible sewer line that is within 300 feet of the boundary of the property. This requirement is mandatory and contains no exception because the new construction is outside of the municipal boundaries of the owner of the sewer system. The law requires connection in this circumstance, and likewise requires that the City accept that connection where surplus capacity exists.

The Impact Fees Act expressly prohibits a city from delaying construction of a school because of a dispute over impact fees. Prohibiting connection to the sewer line because of an impact fee dispute delays construction and violates this provision of the 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 Mr. Jared L. Anderson, on behalf of the Wasatch County School District, on August 27, 2015. A copy of that request was sent via certified mail to Mayor David R. Phillips, Heber City, 75 North Main Street, Heber, Utah 84032.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for an Advisory Opinion submitted by Mr. Jared L. Anderson, on behalf of the Wasatch County School District, on August 27, 2015.
2. Letter submitted by Mr. Jared L. Anderson, received July 18, 2016, requesting the Office of the Property Rights Ombudsman proceed with the Advisory Opinion.
3. Response submitted by Mr. J. Mark Smedley, Attorney for Heber City, via email, on July 19, 2016.
4. Response submitted by Mr. Anderson, via email, on August 10, 2016.
5. Letter, dated August 5, 2016 and supplemental letter, dated August 9, 2016, submitted by Mr. Smedley on August 15, 2016.
6. Response submitted by Mr. Anderson, via email, on September 1, 2016.
7. Response submitted by Mr. Smedley, via email, on November 8, 2016.
8. Response submitted by Mr. Anderson, via email, on November 11, 2016.

BACKGROUND

Wasatch County School District (District) has multiple school-related construction and development projects underway both inside and outside the boundaries of Heber City, Utah. As Heber City has imposed various impact fees on the District's projects, multiple disputes have arisen. The District and the City have attempted over several months to resolve their disputes over the impact fees, but have been unsuccessful. The District has thus requested this Advisory Opinion.

Of the several questions presented, at least one is very time sensitive. The District must begin construction immediately on Daniel Elementary School in order to accommodate students there during the next school year. Daniel Elementary is not within Heber City boundaries, but lies adjacent to the boundary road. Daniel Elementary will use the adjacent road as its primary access, and more importantly, will connect to the Heber City-owned sewer main that exists beneath the road. This connection has resulted in the City's sewer impact fees being imposed upon the District. As with many of the City's other impact fees, the District disputes these fees. The urgency arises because Heber City has elected to prevent Daniel Elementary from connecting to the City's sewer system until the School District pays the disputed impact fees, thus delaying construction.

Time is insufficient to address every question under review in this Advisory Opinion request and still accommodate the District's construction schedule for Daniel Elementary. Accordingly, in order to maximize the opportunity for the parties to resolve this matter without further legal action, the Advisory Opinion will be separated into multiple parts.[1] This Part 1 will address the single issue of whether, under the Impact Fee Act, the District can connect the school to the Heber City sewer without further delay.

ANALYSIS

I. The Impact Fees Act

The Utah Impact Fees Act (Act), found in Chapter 11-36a of the Utah Code, authorizes local governments to impose certain impact fees on new development activity, in order to mitigate the impacts of the new development on public infrastructure. The Act defines an impact fee as "a payment of money imposed upon new development activity as a condition of development approval to mitigate the impact of the new development on public infrastructure." UTAH CODE § 11-36a-102(8)(a). Development activity, including the building of schools, causes an impact on public infrastructure. Impact fees are the payment of money by new development to mitigate those impacts. *See* UTAH CODE § 11-36a-304(d).

Impact fees are an exaction, *Salt Lake County v. Bd. of Educ.*, 808 P.2d 1056, 1058 (Utah 1991), and must be roughly proportional, both in nature and extent, to the impacts created by the development activity. *See* UTAH CODE § 10-9a-508(1). Impact fees are always a function of *impacts*. The amount of the impact fee must correspond to the amount of impact. As with all exactions, if development activity has no impacts, then there is no impact fee. Where an impact exists, the impact fee must be proportional to that impact. Impact fees are how development pays for what it consumes. But as with all exactions, an impact fee that requires a developer to pay more than its share, to pay disproportionally for impacts it did not create, is illegal and unconstitutional in violation of the takings clause.

The Impact Fee Act contains multiple regulations and restrictions, all meant to ensure that impact fees are estimated, calculated, imposed, and spent in proportion to the impact of the development activity. Because schools present particular needs and provide particular benefits to a community,

[1] Each part of this Advisory Opinion will represent a full and separate Advisory Opinion of this Office under UTAH CODE § 13-43-205.

schools have a unique impact. Accordingly, the Act contains several provisions that apply only to schools. One important regulation regarding schools is found in UTAH CODE § 11-36a-202(1)(b), which reads: "(1) A local political subdivision or private entity may not: . . . (b) delay the construction of a school or charter school because of a dispute with the school or charter school over impact fees."

The District accuses Heber City of violating this provision. Heber City has determined that it will not allow Daniel Elementary to connect to its sewer system until the dispute over Heber City's impact fees is resolved. Heber City argues that no violation of the Act has occurred because Daniel Elementary is located outside of the Heber City boundaries. The City argues that it is not obligated to allow Daniel Elementary to attach to its sewer system. Accordingly, the City concludes that it may impose whatever conditions it feels appropriate in exchange for its agreement to allow the school to attach, including a condition that the impact fees are paid first.

II. The Canons of Statutory Construction

Resolution of this issue requires use of the canons of statutory construction. When interpreting a statute, we look first to the statute's plain language to determine its meaning. *Bd. of Educ. of Jordan Sch. Dist. v. Sandy City Corp.*, 2004 UT 37 ¶9. The primary goal of interpretation is "to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." *Foutz v. City of South Jordan*, 2004 UT 75, ¶11. If the plain language of an ordinance is sufficiently clear, the analysis ends there. *General Construction & Development, Inc. v. Peterson Plumbing Supply*, 2011 UT 1, ¶ 8.

Further, "our interpretation of a statute requires that each part or section be construed in connection with every other part or section so as to produce a harmonious whole." *State in Interest of J.M.S.*, 2011 UT 75 ¶13. In addition, "it is axiomatic that a statute should be given a reasonable and sensible construction and that the legislature did not intend an absurd or unreasonable result." *State ex rel. Div. of Consumer Prot. v. GAF Corp.*, 760 P.2d 310, 313 (Utah 1988). Finally, "omissions in statutory language should be taken note of and given effect." *Biddle v. Washington Terrace*, 1999 UT 110, ¶14.

III. The Obligation to Connect to the Sewer

Under Utah statutory law, a human-occupied building must connect to a sewer if it is within 300 feet of an available sewer line. UTAH CODE § 10-8-38(2) states that:

> In order to defray the cost of constructing, reconstructing, maintaining, or operating a sewer system or sewage treatment plant, a municipality may: (i) require connection to the sewer system if the sewer is available and within 300 feet of the property line of a property with a building used for human occupancy.

Thus, a City may require that the building connect to the sewer if it is within 300 feet of an available line. Heber City has elected to impose that requirement. HEBER CITY CODE § 13.08.050 states that "the owners of all buildings used for human occupancy are required to connect to the

City sewer system where the sewer is available and within 300 feet of the property line." Thus, this rule has been made mandatory within Heber City.

But another section of the Utah Code contains even stronger language:

> IPC, Section 701.2, is deleted and replaced with the following: "701.2 Sewer required. *Every building* in which plumbing fixtures are installed and *all premises* having drainage piping *shall be connected* to a public sewer where the sewer is accessible and is within 300 feet of the property line in accordance with Utah Code, Section 10-8-38."

UTAH CODE § 15A-3-307(1). This section amends a portion of the International Plumbing Code, which has been adopted by law to apply to all construction in Utah. UTAH CODE § 15A-2-103. The language of this section is plain and mandatory – "every building . . . and all premises . . . shall be connected."

Exceptions for unique circumstances are notably absent from these statutes or the Heber City code. "Omissions in statutory language should be taken note of and given effect." *Biddle*, 1999 UT 110, ¶14. The statutory language unequivocally requires connection to a nearby available line, and makes no accommodation that depends upon ownership of the line or upon municipal, county, or service district boundaries. Instead, the statutes use words such as "all" and "every" and "required." As it stands, the plain language of these statutes requires all buildings within 300 feet of a sewer to connect to that sewer. Accordingly, we can find no support for the premise that connection need not occur if the connection will cross a municipal boundary.

Accepting that connection to a nearby available line is mandatory in all cases raises another question, posited by Heber City: must the owner of the sewer line also accept that connection? We conclude that it must. Heber City argues that the City owns and controls its sewer system, and although it may be required to accept connections within the City, it cannot be required to accept extra-municipal connections, or provide service outside of its municipal boundaries, whether nearby or not. UTAH CODE § 10-8-38(d) does indeed state that: "A municipality *may* sell and deliver water or sewer services to others beyond the limits of the municipality from the surplus capacity of the municipality's waterworks or sewer system" (emphasis added). A plain language reading of this statute clearly indicates that providing extraterritorial sewer service is optional for the municipality.

Nevertheless, the requirement to connect within 300 feet appears in the same section of the Utah Code, and the two subsections must be read in harmony. *J.M.S.*, 2011 UT 75 ¶13. Accordingly, we find that this section requires sewer connections within 300 feet where surplus capacity exists. If surplus capacity does not exist, then the connection cannot be said to be "available." But where available and within 300 feet, connection is mandatory, even across boundaries.

Furthermore, requiring one party to connect without requiring the other party to accept that connection would leave the first party's ability to comply with the law at the mercy and whim of the second party. The statutes cannot be read to lead to an absurd result. *GAF Corp.*, 760 P.2d at 313. It would be absurd to require a developer to comply with a law that it is impossible to

comply with. This effectively leaves a developer, within 300 feet of a sewer line that the municipality will not allow connection to, unable to develop his land at the City's whim. If Heber City is not required to accept, then the District cannot be required to connect. This would leave the district with no option but to place a massive septic system immediately adjacent to an available sewer connection.

Accordingly, we find that the Utah Code obligates Daniel Elementary to connect to the Heber City Sewer system, because the sewer line, with available capacity, is within 300 feet of the boundary of the school property. Since this connection is not optional, the City is likewise obligated to allow the connection if it has surplus capacity.

IV. The Requirement to Permit Construction

UTAH CODE § 11-36a-202(1)(b) states that: "(1) A local political subdivision or private entity may not: . . . (b) delay the construction of a school or charter school because of a dispute with the school or charter school over impact fees." This statute plainly prohibits delaying construction of a school because of an impact fee dispute. It allows no exceptions. Accordingly, Heber City must not delay the construction of Daniel Elementary because of an impact fee dispute.

As discussed above, Heber City does not have the discretion to deny the Daniel Elementary connection. Nevertheless, even if Heber City could in fact refuse the connection, conditioning the connection upon the payment of impact fees causes an impermissible delay and violates this statute. This section of the Impact Fee Act is plain and straightforward. Nothing in this plain language indicates that any city, whether the school is within the boundaries or not, or whether the city can refuse connection or not, can delay construction of a school over an impact fee dispute. Thus, Heber City must cooperate with the District in allowing the construction of Daniel Elementary to go forward.

CONCLUSION

The multitude of impact fee disputes between the District and the City must be resolved separately and in their own time, including those regarding Daniel Elementary School. Future Advisory Opinions will address the specific fees that have been challenged. Meanwhile, however, Heber City must allow the Wasatch School District to connect Daniel Elementary to its sewer system, and to construct its school.

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 § 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:

Mayor David R. Phillips
Heber City
75 North Main Street
Heber City, Utah 84032

On this _____ Day of November, 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.

_____
Office of the Property Rights Ombudsman