Advisory Opinion #197

Parties: Andrea Franklin; Morgan County
Issued: May 25, 2018

TOPIC CATEGORIES:
Impact Fees Act

The County soccer facility in Morgan City is not currently identified in the County's IFFP. Consequently, the County may not spend collected park impact fees on the facility unless it amends its IFFP to include that facility.

The County may spend impact fees on any facilities it selects within its service area, and the service area may include the entire county. Nevertheless, as County officials decide which facilities to identify and spend park impact fees on in its IFFP, they need to conscientiously ensure the fees spent on facilities demonstrably provide a benefit to the development that paid the fees.

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ADVISORY OPINION

Advisory Opinion Requested By:	Andrea Franklin
Local Government Entity:	Morgan County
Type of Property:	Public Recreational
Date of this Advisory Opinion:	June 4, 2018
Opinion Authored By:	Jordan S. Cullimore Office of the Property Rights Ombudsman

ISSUES

Does the Morgan County Park Impact Fee Facilities Plan and Impact Fee Analysis allow the County to spend $100,000 of impact fee money on a public soccer facility in Morgan City?

Does the Plan comply with legal requirements in the Utah Impact Fees Act?

SUMMARY OF ADVISORY OPINION

The County soccer facility in Morgan City is not currently identified in the County's IFFP. Consequently, the County may not spend collected park impact fees on the facility unless it amends its IFFP to include that facility.

The County may spend impact fees on any facilities it selects within its service area, and the service area may include the entire county. Nevertheless, as County officials decide which facilities to identify and spend park impact fees on in its IFFP, they need to conscientiously ensure the fees spent on facilities demonstrably provide a benefit to the development that paid the fees.

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 Andrea Franklin on January 17, 2018. A copy of that request was sent via certified mail to Jann L. Farris, Attorney for Morgan County, at 48 Young Street, Morgan, Utah.

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 Andrea Franklin on January 17, 2018.
2. Reply Memorandum prepared by Lewis Young Robertson & Burningham, submitted by Jann L. Farris, Attorney for Morgan County, received February 27, 2018.
3. Morgan County Park Impact Fee Facilities Plan and Impact Fee Analysis, date November 9, 2016.

BACKGROUND

According to Ms. Franklin's Advisory Opinion Request, the Morgan County Council voted in October 2017 to spend $100,000 of collected impact fees to construct a soccer facility on property Morgan County (the County) owns in the City of Morgan. This decision concerned Ms. Franklin because, according to her understanding, the County collected most of the $100,000 in impact fee money from development that had occurred in Mountain Green[1], where Ms. Franklin lives. She feels that since the fees were collected largely from development in Mountain Green, the money should be spent on providing services in the Mountain Green area to Mountain Green residents, where very few public and park facilities currently exist to serve the growing community.

Ms. Franklin reviewed the County's Park Impact Fee Facilities Plan and Impact Fee Analysis (the IFFP and IFA) and concluded that the County Council's decision to spend $100,000 on a park facility in Morgan City violates the IFFP and IFA, and applicable law. She then submitted a Request for Advisory Opinion on the question to this Office.

ANALYSIS

Under Utah law, an impact fee is "a payment of money imposed upon new development…as a condition of development approval to mitigate the impact of the new development on public infrastructure." UTAH CODE § 11-36a-102(8)(a). An impact fee is one method a local government may use to fund certain types of facilities and infrastructure to serve new growth within the

[1] Mountain Green is a census-designated place within Morgan County.

community. The Utah Impact Fees Act (the Act), UTAH CODE CHAPTER 11-36a, outlines the rules a local government must follow to calculate, enact, collect, and spend impact fees.

Prior to imposing an impact fee, a local government must prepare an Impact Fee Facilities Plan (IFFP) to determine the public facilities necessary to serve new growth. *See* UTAH CODE § 11-36a-301(1). The local government must also prepare an Impact Fee Analysis (IFA) for each category of impact fee it establishes. *See* UTAH CODE § 11-36a-303. The IFA identifies the anticipated impacts of new growth, and also identifies how each impact fee is calculated. Here, the Park Impact Fee Facilities Plan and Impact Fee Analysis were prepared as a single document, which we will refer to as "the IFFP and IFA", dated November 9, 2016.

Ms. Franklin argues that, while she believes the analysis correctly calculated the park impact fee, the IFFP and IFA do not contain sufficient guidance about how to spend the collected fees. Specifically, she argues that the IFFP and IFA lack three critical components the Impact Fees Act requires: (1) a future capital facilities analysis, (2) a financing strategy listing future projects and showing how impact fees and other financial strategies will be used to implement the plan, and (3) a proportionate share analysis showing how the impacts of new development relate to the plan.

Morgan County contends that each of these components is present in the Parks IFFP and IFA, and that the plan legally allows the County to spend the $100,000 on the soccer facility in Morgan.

I. Compliance with the Utah Impact Fees Act

A. Future Capital Facilities Analysis

The Impact Fees Act, in part, requires an IFFP to:

1. Identify the community's existing level of service[2];
2. Establish a proposed level of service;
3. Identify excess capacity to accommodate future growth at the proposed level of service;
4. Identify demands new development places on existing public facilities at the proposed level of service; and
5. Identify the means through which the local government will meet the growth demands.

See UTAH CODE § 11-36a-302(1)(a).

This required analysis identifies facilities the local government presently provides to the community, and forecasts facilities the local government must add to maintain the existing level of service for present and future residents of the community. Ms. Franklin contends that this

[2] The Act defines "level of service" as the "performance standard or unit of demand for each capital component of a public facility within a service area." UTAH CODE § 11-36a-102(11). In the County's IFFP and IFA, the demand unit is population. *Morgan County Park Impact Fee Facilities Plan and Impact Fee Analysis*, November 9, 2016, p. 7.

analysis must include a "list of capital projects necessary to serve new growth…." *Andrea Franklin Letter to County Council*, dated November 15, 2017. Such a list is relevant because the Act further provides that the local government may only spend impact fees on facilities, "(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(1)(a)-(b).

The County concedes that its approach here is generalized and vague, but it also contends that the approach nonetheless meets the Act's requirements. To support its position, the County refers to a prior Opinion issued by this Office in which we concluded that "a vague plan to spend [impact fees] as the need and opportunities arise," while not preferable, is nonetheless sufficient to satisfy the Act. Table 6.1 on page 13 of the County's IFFP and IFA lists "Regional Parks" and "Community Neighborhood Parks" as facilities needed to maintain the County's level of service. The analysis further states that:

> Future planning for park land is an ongoing process, based on the changes in population and community preference. The County will purchase and improve parks to maintain the level of service defined in [the IFFP and IFA]. … Actual future improvements will be determined as development occurs, and the opportunity to acquire and improve park land arises.

The County's plan does not identify specific facilities for which impact fees will be collected and spent. Since UTAH CODE 11-36a-602(1)(a) only allows a local government to spend impact fees on a facility "*identified* in the impact fee facilities plan" (emphasis added), we conclude, upon further reflection and consideration, that the plain language[3] of the act requires the IFFP to specifically identify facilities the local government will spend impact fees on. A vague plan that doesn't identify specific facilities is therefore legally insufficient and does not satisfy the Act's requirements.

Since the soccer facility for which the County Council would like to spend impact fees is not identified in the County's IFFP, the County may not presently spend impact fee money on that facility. This does not preclude the County from amending its IFFP to include the soccer facility. It may do so simply by following the notice and amendment procedures outlined in the Act. If, however, the County does not choose to amend its IFFP to include the soccer facility, it may not spend collected impact fees on that facility.

B. Financing Strategy

Ms. Franklin further argues that the County's IFFP and IFA lacks a legally sufficient financing strategy. Regarding financing considerations, the Act requires the IFFP to "consider all revenue sources to finance the impacts on system improvements, including: (a) grants; (b) bonds; (c) interfund loans; (d) impact fees; and (e) anticipated or accepted dedications of system improvements." UTAH CODE § 11-36a-302(2). Moreover, the Act requires the IFFP to establish

[3] Statutory interpretation begins with an analysis of the plain language of the provision. *Carrier* 2004 UT 98 ¶ 30, 104 P.3d 1208. "When the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed." *Selman v. Box Elder County*, 2011 UT 18, ¶ 18, 251 P.3d 804.

that "impact fees are necessary to maintain a proposed level of service that complies with [the Act]," before imposing impact fees on development. UTAH CODE § 11-36a-302(3).

The County's IFFP and IFA satisfy these requirements. On page 13 and 14 of the document, the analysis adequately considers all appropriate revenue sources. It establishes the need to use impact fees specifically on page 15, and generally throughout. Accordingly, the IFFP and IFA satisfy the Act's financing strategy requirements.

C. Proportionate Share Analysis

Finally, Ms. Franklin asserts that the County's IFFP and IFA does not contain a required proportionate share analysis showing how the impacts of new development are related to the plan for new development. The Act requires an IFA to "estimate the proportionate share of: (i) the cost 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." UTAH CODE 11-36a-304(d). The Act indicates that an IFA fulfills this requirement by considering several factors that have come to be known as the "*Banberry* factors". *See* UTAH CODE § 11-36a-304(2). These factors were first articulated in the Utah Supreme Court case, *Banberry Development Corporation v. South Jordan City,* 631 P..2d 899, 903 (Utah 1981).

The Utah legislature codified these factors in the Act as follows:

> (2) In analyzing whether or not the proportionate share of the costs of public facilities are reasonably related to the new development activity, the local [government]…shall identify, if applicable:
>
> (a) the cost of each existing public facility that has excess capacity to serve the anticipated development resulting from the new development activity;
> (b) the cost of system improvements for each public facility;
> (c) other than impact fees, the manner of financing for each public facility, such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants;
> (d) the relative extent to which development activity will contribute to financing the excess capacity of and system improvements for each existing public facility, by such means as user charges, special assessments, or payment from the proceeds of general taxes;
> (e) the relative extent to which development activity will contribute to the cost of existing public facilities and system improvements in the future;
> (f) the extent to which the development activity is entitled to a credit against impact fees because the development activity will dedicate system improvements or public facilities that will offset the demand for system improvements, inside or outside the proposed development;
> (g) extraordinary costs, if any, in servicing the newly developed properties; and
> (h) the time-price differential inherent in fair comparisons of amounts paid at different times.

UTAH CODE § 11-36a-304(2)(a)-(h). *See also Banberry,* 631 P.2d at 904.

While the County's IFFP and IFA does not include a dedicated section outlining the proportionate share analysis, the document nonetheless appropriately and adequately includes the analysis of applicable factors throughout the document.[4] Consequently, the IFFP and IFA satisfy the Act's proportionate share analysis requirements.

II. The "Demonstrable Benefit" Principle

The Act requires a local government to establish "service areas" in which impact fees may be collected and spent. *See* UTAH CODE 11-36a-402. A local government may establish a single service area that covers the entire jurisdiction, or it may create multiple service areas that serve different parts of the community. UTAH CODE § 11-36a-102(19)(b). Here, the County's IFFP and IFA establish the park impact fee service area to include the entire County. The Act permits this. S*ee* UTAH CODE 11-36a-402(1)(a); *see also* UTAH CODE § 11-36a-102(19). With a County-wide service area, the County may spend collected impact fees, regardless of the source, on park facilities throughout the County as long as the facility is appropriately identified in the IFFP and IFA.

Ultimately, Ms. Franklin's would like to see the County use impact fees to measurably benefit the development that paid the park impact fees. This concern is reasonable and appropriate. The Utah Supreme Court touched on this concern in the *Banberry* opinion previously referenced. In *Banberry*, the court explained that a local government, when assessing and spending impact fees[5], must comply with a "constitutional standard of reasonableness." *See Banberry,* 631 P.2d at 902. The local government must take into account certain considerations for a fee to be reasonable.

One of those considerations involves the "demonstrable benefit" principle. *Banberry,* 631 P.2d at 905. In explaining this principle, the court in *Banberry* drew a distinction between "centralized facilities", such as sewer treatment facilities, that benefit an entire community uniformly, and "dispersed resources", such as park facilities, that may measurably benefit users differently in different parts of the community due to proximity or other factors. Regarding fees to construct dispersed resources, the court stated that, while the "benefits derived from the [fees] need not accrue *solely* to the [development that paid the fees]," the benefits derived from the fees "must be of *'demonstrable benefit'* to [that development]." *Id.* (emphasis added).

The court did not specifically explain how to accomplish this, and County officials possess broad discretion to make decisions they think will best serve the public interest. As the County now considers whether to identify the proposed soccer facility as a facility for which it may spend impact fees in its IFFP, it should keep this principle in mind and be careful to ensure that fees

[4] See, for example the discussion of excess capacity on page 3, consideration of revenue sources on pages 13-14, and consideration of developer credits, extraordinary costs, and time-price differential on page 17.

[5] The *Banberry* opinion refers to "exactions". An impact fee is a form of development exaction. "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.

assessed on development to construct park facilities are used to construct facilities that "demonstrably benefit" the development that paid the fees.[6]

CONCLUSION

The soccer facility the County would like to spend impact fees on is not currently identified in the County's IFFP. Consequently, the County may not spend collected park impact fees on the facility unless it formally amends its IFFP to include that facility.

As County officials decide which facilities to identify and spend park impact fees on in in its IFFP, they need to conscientiously ensure the fees are spent on facilities that demonstrably and measurably benefits development that paid the fees.

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

[6] To be clear, we are not drawing any conclusions about whether the proposed soccer facility in Morgan does or does not demonstrably and proportionately benefit development that paid the fees.

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:

Jann L. Farris, Attorney
Morgan County
48 Young Street
Morgan, UT, 84050

On this _____ Day of _____, 2018, 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