Advisory Opinion #204

Parties: Ryan Walz; City of American Fork
Issued: December 12, 2018

TOPIC CATEGORIES:

Impact Fees Act

If a development will detain all of its storm water, and thus not use the City's storm water system, it will have no impact on the City's system. Thus the City cannot charge impact fees to the developer for storm sewer. Potential use of the City system in the event that the flow exceeds the project's detention capacity are speculative and do not justify charging the full impact fee. Impact fees cannot be charged where development has no impacts.

UTAH CODE § 10-6-160(4)(ii), states that a city cannot enforce a plan review requirement on plans that have been stamped by a licensed engineer or architect. This provision applies only to residential development. Since the development in question is a commercial project, that statute does not apply, and the City can charge plan review fees.

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ADVISORY OPINION

Advisory Opinion Requested By:	Ryan Walz
Local Government Entity:	American Fork City
Type of Property:	Commercial Development
Date of this Advisory Opinion:	December 12, 2018
Opinion Authored By:	Brent N. Bateman Office of the Property Rights Ombudsman

ISSUE

Can the City charge (1) Storm Sewer Impact Fees against a development that will detain all of its storm sewer runoff, and (2) plan check fees on commercial development where plans have been stamped by a licensed engineer or architect?

SUMMARY OF ADVISORY OPINION

If the development of the Marina Cove Phase 3 will detain all of its storm water, and thus not use the City's storm water system, it will have no impact on the City's system. Thus the City cannot charge impact fees to the developer for storm sewer. Potential use of the City system in the event that the flow exceeds the project's detention capacity are speculative and do not justify charging the full impact fee. Likewise, concerns about charging the fee to every new project in order to maintain the level of service at a lower cost is not supported by the Impact Fee Act. Impact fees cannot be charged where development has no impacts.

UTAH CODE § 10-6-160(4)(ii), states that a city cannot enforce a plan review requirement that has been stamped by a licensed engineer or architect. The tenets of statutory construction require that this provision be read to apply only to residential development. Since the Marina Cove Phase 3 is a commercial project, that statute does not apply, and the City can charge plan review fees to Marina Cove Phase 3.

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 Ryan Walz on August 21, 2018. A copy of that request was sent via certified mail to Terilyn Lurker, City Recorder, City of American Fork, 51 East Main Street, American Fork, 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 Ryan Walz on August 21, 2018.
2. Response from Cherylyn M. Egner, Attorney for the City of American Fork, on October 1, 2018

BACKGROUND

Ryan Walz is the owner of the Marina Cove commercial development in American Fork City. On March 14, 2018, Mr. Walz submitted to the City a final request for building permit to enable him to construct Phase 3 of the development.

Following the application, the City's Public Works department forwarded to Mr. Walz an invoice totaling $109,380.73. Impact fees for storm drain, road, police, and fire represented the most significant charges on the invoice by far. The invoice also contained charges for plan checks, building permits, and for other fees.

Mr. Walz has requested this Advisory Opinion because he feels that at least two of the fees on the invoice, the storm drain impact fees and the plan check fees, are unjustified and illegal. Mr. Walz argues that the storm drainage will be entirely contained within his property, and thus he should not have to pay storm drain impact fees if his development has no impact on the system. Further, Mr. Walz argues that UTAH CODE § 10-6-160(4)(ii) exempts him from plan review because the plans were stamped by a licensed architect or engineer.

The City admits that the development will detain its storm runoff, but argues that the development nonetheless has an impact on the City storm drain system because the storm drain system is intended to serve all properties within the City and each property must pay its share to

maintain the level of service. Also, should the developer's system fail, the City must maintain the capacity to accommodate the developer's runoff.

The City further argues that it is entitled to charge plan check fees on Phase 3 because UTAH CODE § 10-6-160(4) applies only to residential development and not to commercial development.

ANALYSIS

I. Impact Fees May Only Be Charged for Impacts on the System

The Utah Impact Fees Act, found in Chapter 11-36a of the Utah Code, 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 creates impacts on public infrastructure. Impact fees are a way for a development to pay for the impacts it creates. Impact fees are a type of exaction, *Salt Lake County v. Bd. of Educ.*, 808 P.2d 1056, 1058 (Utah 1991), and must therefore be roughly proportional, both in nature and extent, to the impacts created by the development activity. *See* UTAH CODE § 10-9a-508(1).

As its name implies, impact fees are a function of impacts. As with all exactions, the amount of the fee must be roughly proportional to the amount of impact the development creates. Greater impacts justify higher fees.[1] Likewise, if development activity has no impacts, there can be no impact fee. *See B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, ¶12 (holding that the exaction and the costs of assuaging the impact must be roughly equivalent); *see also* UTAH CODE § 11-36a-102(8)(a) (the definition of impact fees tying it to the impact of the new development), UTAH CODE § 11-36a-603(1) (requiring refund of impact fee where no impact has resulted), UTAH CODE § 11-36a-402 (allowing offsets of impact fees where the developer provides system improvements that reduce the need for the facilities). Moreover, an impact fee that requires a developer to pay more than its share, *i.e.*, to pay disproportionately for impacts it did not create, is unconstitutional in violation of the takings clause. *See generally Call v. City of West Jordan*, 614 P.2d 1257 (Utah, 1980).

The documents submitted indicate that the developer will detain all of its stormwater runoff on site, and thus will not use the City's system. How this will be done has not been provided. But assuming that the developer will not use the City's system, then the developer is having no impact on the system and cannot be charged impact fees.

[1] An Impact Fee Analysis establishes the highest impact fee that can be charged to a development. UTAH CODE § 11-36a-402(1)(b). But that does not mean that every development must and should pay this highest fee. The Impact Fee Act contemplates in multiple places that adjustments should be made to the actual fee charged depending on factors such as impacts, available funds, and provision of system improvements by a developer. *See, e.g.,* UTAH CODE § 11-36a-402, *and* UTAH CODE § 11-36a-304. Although charging the highest possible fee can be the baseline and the norm, lowering the fee should occur when justified.

The City argues that although all storm water will be detained on site, it may still charge impact fees, primarily due to the fact that the City system must be prepared to accept the storm water in the event that runoff from the property exceeds the detention capacity. Nothing has been provided to indicate whether this is likely or why this would happen. Nevertheless, assuming it is possible, whether the City will ever actually accept water from the development is speculative. Thus, it cannot be said that the City can charge the full impact fee, or any impact fee, to a development that will detain its water, just as it would charge a development with no detention that would daily rely of the City's storm sewer system.

Moreover, the documents do not indicate whether or not Marina Cove Phase 3 will even be connected to the City's storm sewer system. If there will be no connection, then the claim that there will be no impacts is even stronger. Conversely, if there is a connection, then the claim that there will be some impact on the system may have weight, though with 100% water detention on site, the City still cannot charge the full impact fee. If impacts are reduced or eliminated, then the impact fee must also be reduced or eliminated.

Finally, the argument that the City can charge impact fees to the development with no impacts in order to retain the level of service is really another way of saying that the City wants this development to pay the fee so that the developments that actually use the system can pay a slightly smaller fee to maintain their service. The Impact Fee Act does not support this argument. *See* UTAH CODE § 11-36a-302(1)(c). Accordingly, if the development is having no impact on the City's storm sewer system, the City cannot charge storm sewer impact fees to the development.

II. The "Architect's Stamp" Provision Applies Only to Residential Development

Mr. Walz argues that UTAH CODE § 10-6-160(4)(ii) exempts Marina Cove Phase 3 from plan review because the plans were stamped by a licensed architect or engineer. That section of the Utah Code reads:

> (4)(a) A city may not enforce a requirement to have a plan review if:
> (i) the city does not complete the plan review within the time period described in Subsection (3)(a) or (b); and
> (ii) a licensed architect or structural engineer, or both when required by law, stamps the plan.

The City argues that this language applies only to residential development, and thus not to Marina Cove Phase 3.

Statutory interpretation begins with an analysis of the plain language of the statute. *Carrier v. Salt Lake County*, 2004 UT 98 ¶30. 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 is sufficiently clear, the analysis ends there. *General Construction & Development, Inc. v. Peterson Plumbing Supply*, 2011 UT 1, ¶ 8. Further, it is presumed that the legislative body used each word advisedly. *Selman v. Box Elder County*, 2011 UT 18, ¶18. "When the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed." *Id*.

Here, the meaning of this statute turns upon the simplest of words: *and*. Assuming that each word was intentional and use advisedly, the word *and* at the end of subsection (i) plainly means that both subsections (i) *and* (ii) must be satisfied in order to avoid a plan review. Subsection (ii) concerns a stamp by an architect or engineer. However, subsection (i) refers to a failure to complete review within "the time period described in Subsection (3)(a) or (b)." Those subsections read as follows:

> (3)(a) A city shall complete a plan review of a construction project *for a one to two family dwelling or townhome* by no later than 14 business days after the day on which the plan is submitted to the city.
> (b) A city shall complete a plan review of a construction project for a *residential structure* built under the International Building Code, not including a lodging establishment, by no later than 21 business days after the day on which the plan is submitted to the city.

UTAH CODE § 10-6-160(3) (emphasis added). Both of these provisions clearly refer to and are limited to forms of residential construction. These time frames do not refer to commercial construction. Both subsections (i) and (ii) in section 160(4) must be satisfied. But subsection (i) cannot be satisfied on a commercial development. The plain language indicates that the legislative intent was to apply the "architect's stamp" rule to residential development. Thus, to the extent that Marina Cove Phase 3 is not residential development, then the "architect's stamp" provision does not apply.

CONCLUSION

Impact fees are always a function of impacts. Where its impact is reduced, the impact fee is proportionally reduced. If the development of the Marina Cove Phase 3 will detain all of its storm water, and thus will not use the City's storm water system, it will not have a direct impact on the City's system. Where the impact is zero, the impact fee is also zero. Where it is minimal, the impact fee is also minimal. Thus the City cannot charge full impact fees to the developer for storm sewer.

Conversely, the tenets of statutory construction require that UTAH CODE § 10-6-160(4)(ii), regarding the City's ability to enforce a plan review, be read to apply only to residential development. Since the Marina Cove Phase 3 is a commercial project, that statute does not apply.

Brent N. Bateman, Lead Attorney
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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.