

Advisory Opinion #206

Party: Central Weber Sewer Improvement District

Issued: December 21, 2018

TOPIC CATEGORIES:

Impact Fees Act

Central Weber Sewer Improvement District's draft Sewer Impact Fee substantially complies with the Utah Impact Fees Act.

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ADVISORY OPINION

Advisory Opinion Requested By: Keith J. Larson, P.E. of Bowen Collins & Associates

Local Government Entity: Central Weber Sewer Improvement District

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

Date of this Advisory Opinion: December 21, 2018

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

ISSUE

Early review of Central Weber Sewer Improvement District's draft Sewer Impact Fees.

SUMMARY OF ADVISORY OPINION

Central Weber Sewer Improvement District's draft Sewer Impact Fee substantially complies 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. Larson, P.E. of Bowen Collins & Associates Inc., on behalf of Central Weber Sewer Improvement District on November 27, 2018. As a courtesy, a copy of that request was sent to Ross Ford, Executive Director of the Utah Home Builders Association, on November 30, 2018. 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. Central Weber Sewer Improvement District's Draft Sewer Impact Fee Facility Plan, dated November 2018, and prepared by Bowen Collins & Associates Inc.
2. Central Weber Sewer Improvement District's Draft Sewer Impact Fee Analysis, dated November 2018, and prepared by Bowen Collins & Associates Inc.

INTRODUCTION: EARLY REVIEW OF IMPACT FEES

Central Weber Sewer Improvement District (CWSID) intends to adopt new impact fees for its sewer facilities. CWSID has requested that this Office review, prior to enactment of the fees, CWSID's Draft Impact Fee Facility Plan (IFFP) & Impact Fee Analysis (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 and their compliance with the Act. 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, found in Title 11, Chapter 36a of the Utah Code, and CWSID's draft Sewer Impact Fee. We find that the present drafts of CWSID's Draft Sewer Impact Fee substantially comply with the Impact Fee Act.

I. Equivalent Residential Units

CWSID calculates its impact fees using Equivalent Residential Units (ERUs). The IFFP uses ERUs to calculate present and future levels of service, and the IFA distributes impact fees per ERU. The IFFP defines an ERUs as "the demand that a typical single family residence places on the system." The IFFP then goes on to explain that: "An average household size of 3 persons/household was then used to estimate equivalent residential units in the District."

Appropriately, the IFFP distinguishes, or at least translates, nonresidential uses into ERUs using the following method:

Because neither of the existing master plans distinguish between residential and nonresidential contributions to the District's facilities, an approach to distinguish residential from nonresidential was developed using a per capita biochemical oxygen demand (BOD) loading rate of 0.17 lbs/day.

The IFFP then calculated the total number of ERUs by adding the residential and non-residential ERUs, to achieve a total of 86,253 ERUs in the District.

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 based upon oxygen demand appears sound. It is important to know that an ERU will always be an imperfect way to standardize all possible uses within an area. Residential uses alone account for many different types of residential units, and commercial and industrial uses vary greatly. However, calculating ERUs on this basis seems reliable and provides sufficient accuracy of uses for purposes of the Impact Fee Act.

II. Average Flows vs. Peak Flows

An ongoing debate exists regarding the level of service and capacities necessary to comply with the Impact Fee Act, in particular with regard to sewer impact fees. The problem concerns the difference between actual average daily use of sewer facilities by a typical ERU, and the capacity a sewer facility must maintain, usual by state regulation, to handle emergency/peak possible flows. Many wonder whether basing a level of service on peak possible flows rather than realistic actual flows does not overstate the level of service and inflate impact fees needlessly.

The CWSID addresses this issue by dividing its level of service into components. The projected flow to establish the level of service varies depending on the nature of each component. Generally, therefore, the level of service is capacity is calculated based upon peak flows for conveyance (pipeline) facilities, and upon average daily flows for treatment facilities. The IFFP also accounts for specific components which will need to provide an improved level of service, and how that will be achieved, and which currently provide an adequate level of service. This calculation provides a good solution to this problem and complies with the Impact Fee Act.

III. Ten Year Improvements

Also meriting mention is the CWSID's decision to include only those improvements that will be needed within the next 10 years into its impact fee calculation. Although the District's plans include significantly larger facilities, only those needed within 10 years will be included. This wise decision complies with the Act, as well as simplifies compliance with other aspects of the Impact Fee Act such as the six-year spend or encumber requirement.

IV. The Credit for User Fees

CWSID's Sewer IFA provides and calculates 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.

This credit arises from the fact that the CWSID 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 some aspects of 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.

CWSID 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 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. This is a good solution and ensures that the fees will comply with the Impact Fee Act.

CONCLUSION

The CWSID draft Sewer Impact Fee substantially complies with the Impact Fee Act. The documents show that CWSID has reviewed the Impact Fee Act carefully and has attempted to understand it and follow its requirements.

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.