GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Boyer Dixie, L.C. / Dixie Montessori Academy
Local Government Entity:	Washington City
Applicant for the Land Use Approval:	Boyer Dixie, L.C.
Type of Property:	Charter School
Date of this Advisory Opinion:	July 10, 2015
Opinion Authored By:	Brent N. Bateman, Lead Attorney Office of the Property Rights Ombudsman

Issues

Has Washington City properly calculated and imposed impact fees upon the development of the Dixie Montessori Academy?

Summary of Advisory Opinion

Washington City's impact fee charges to the Dixie Montessori Academy do not comply with the Impact Fee Act. Charter schools are public schools under Utah law and enjoy unique treatment under the Impact Fee Act. Impact fees can only be charged to schools when development of the school directly results in the need for additional system improvements. Washington City must give full effect to these provisions of the Act.

Moreover, impact fees must be based upon impact. Under the Impact Fee Act, impacts arise when development activity takes place. Subdivision of land alone is not development activity under the Act, and does not create the impacts that impact fees assuage. Charging an impact fee at the time of subdivision, without consideration of the actual impacts from development activity, is impermissible under the Impact Fee 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 Robert A. McConnell on behalf of Boyer Dixie, L.C. on February 27, 2015. A copy of that request was sent via certified mail to Danice B. Bullock, City Recorder of Washington City, at 111 North 100 East, Washington, Utah. 84780. The City received that copy on March 4, 2015.

Evidence

The following documents and information with relevance to the issue involved in this Advisory Opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion, with attachments, submitted by Boyer Dixie, L.C., received February 27, 2015.[1]
2. The Utah Impact Fees Act, UTAH CODE § 11-36a-101 *et seq.*

Background

Boyer Dixie is the owner and developer of approximately 30.261 acres of land in Washington City, Utah. On a portion of that land, Boyer Dixie has developed the Dixie Montessori Academy, a charter school approved by the Utah State Board of Education. To develop the school site, Boyer Dixie subdivided the parcel into two lots, one of approximately 10 acres, and a second lot containing the balance. The Dixie Montessori Academy has been constructed upon the 10 acre site and is currently serving students. The remaining property is undeveloped.

[1] The policy and practice of the Office of the Property Rights Ombudsman, and indeed the preference, is to invite and encourage all interested parties to respond to a request for Advisory Opinion. However, the OPRO lacks the ability to *require* that any party participate. Washington City received multiple invitations to submit materials and arguments in support of its position, but the City did not do so.

The requesting party is entitled to receive its Advisory Opinion whether other parties contribute or not, so this Office must issue its opinion without the benefit of the City's participation. Lack of participation does not, however, result in a default decision automatically favoring the requesting party. Full efforts are made, based upon the factual information provided, to give credit to the unresponsive party, provide an accurate and unbiased opinion, and decide the matter on its merits.

In connection with the development of the Dixie Montessori Academy, Washington City levied the following impact fees upon Boyer Dixie:

Electrical Impact Fee	$48,065.00
Wastewater Treatment Impact Fee	$1,948.00
Wastewater Impact Fee	$1,912.35
Streets and Roadways Impact Fee	$634,926.00
Water Impact Fee	$3,499.65
Storm Water Impact Fee	$117,277.90

Boyer Dixie believes that several of these impact fees are illegal and excessive under the Impact Fee Act. First, Boyer Dixie argues that the Streets and Roadways Impact Fee is excessive because the City has imposed the fee according to the City's schedule for private schools rather than for public schools. According to Boyer Dixie, the Dixie Montessori Academy is a public school, and assessment as a public school would result in a reduction of the Streets and Roadways Impact Fee by nearly half.

Boyer Dixie further believes that the Streets and Roadways Impact Fee is excessive because the development of the school does not necessitate the installation of new streets and roadways infrastructure. They argue that under the Impact Fee Act, cities may not charge impact fees to schools unless the construction of the school necessitates the new infrastructure.

And finally, Boyer Dixie objects to the imposed Storm Water Impact Fee. Boyer Dixie argues that although it has developed the school site on the smaller lot, it has been wrongly charged storm water impact fees at the time of subdivision application, which has deprived it of an opportunity to demonstrate that its development plan has not impacted the City's storm drain infrastructure.

Analysis

I. Charter Schools are Public Schools under Utah Law, Including for the Imposition of Impact Fees

Boyer Dixie's first issue concerns whether the Dixie Montessori Academy is a public or private school for purposes of charging impact fees. It appears that Washington City's impact fee schedule differentiates between public schools and private schools. Boyer Dixie asserts that the impact fees have been charged according to the private school schedule. Were it charged under the public school schedule, the impact fees would be significantly lower.

Utah law is unequivocal that approved charter schools are public schools. UTAH CODE § 53A-1a-503.5 ("Charter schools are: (a) considered to be public schools within the state's public education system.") This statute contains no qualifications limiting its applicability or purpose including the oft seen qualifier "For purposes of this section." Thus by the plain language of the Utah Code, approved charter schools are public schools in Utah.

Nothing can be found to justify a limited application or different conclusion for purposes of impact fees, or to permit a local jurisdiction to adopt its own definition of charter schools in its impact fee documents. The Utah Impact Fee Act, UTAH CODE §§ 11-36a-101 *et seq.*, contains multiple provisions applicable to schools. *See, e.g.*, UTAH CODE §§ 11-36a-202(2), -302(4). In every single instance where schools are mentioned in the Impact Fee Act, charter schools are also mentioned and placed in exactly the same status as public schools. In fact, UTAH CODE § 11-36a-403(2) provides that, for purposes of exemption, public schools and charter schools must be treated identically: "An impact fee enactment that provides an impact fee exemption for development activity attributable to a school district or charter school shall allow either a school district or a charter school to qualify for the exemption on the same basis."

Accordingly, charter schools are public schools under Utah law, including for the imposition of impact fees. A charter school thus cannot be charged an impact fee under a schedule different from that charged to a public school.

II. Washington City May Only Impose Impact Fees upon the Dixie Montessori Academy for New Infrastructure Directly Resulting from its Development

Boyer Dixie next contends that it has been inappropriately charged Streets and Roadways Impact Fees. Boyer Dixie contends that its school has been built at the end of an existing and improved road, and that the new school has not necessitated construction of new roads or other transportation public facilities. Thus, they argue, the Impact Fee Act prohibits Washington City from charging Streets and Roadways Impact Fees.

Roadway facilities are permissible public facilities for which impact fees can be imposed. UTAH CODE § 11-36a-102(16)(e). As always, the ability to charge impact fees is a question of impact. UTAH CODE § 11-36a-102(8)(a). Development activity will have an impact upon the public infrastructure, and that impact causes the need for new facilities. The Developer may then pay impact fees as its share of the cost for those facilities. For example, the developer of a shopping mall will pay road impact fees. Those fees provide the developer's share of the new road facilities needed because of increased traffic caused by the mall, and thus assuage the impact the shopping mall creates. Often those impact fees will pay for preexisting infrastructure improvements some distance from the shopping mall, but nonetheless "reasonably related" to the new development activity, UTAH CODE § 11-36a-304(1)(d)(ii). The developer thus relieves the impact on a system-wide basis. This occurs frequently and is permissible under the Impact Fee Act. *See* UTAH CODE §§ 11-36a-102(21) ("'System improvements' means: (i) existing public facilities that are: . . . (B) designed to provide services to service areas within the community at large; and (ii) future public facilities . . . intended to provide services to service areas within the community at large."). This allows a local government to prioritize its infrastructure needs. So long as a development does not pay for more than its own impact, and the improvements are reasonably related to the development activity, it is normally unnecessary that the public improvements be a *direct result* of the development activity that caused the impact.

Schools and charter schools, however, enjoy different treatment under the Impact Fee Act. The Act expressly provides that impact fees to schools and charter schools arise only for facilities that are a *direct result* from the school's development activity. UTAH CODE § 11-36a-202(2)(a)(ii) states that:

> Notwithstanding any other provision of this chapter, a political subdivision or private entity may not impose an impact fee:
> . . . .
> (iii) on a school district or charter school unless:
> (A) the development resulting from the school district's or charter school's development activity directly results in a need for additional system improvements for which the impact fee is imposed; and
> (B) the impact fee is calculated to cover only the school district's or charter school's proportionate share of the cost of those additional system improvements.

According to this section, a local government cannot impose an impact fee on a charter school, unless the development of that school *directly* results in the need for *additional* system improvements. And the fee charged is limited to the proportionate share of those additional improvements. Statutes and ordinances must be construed so that "all parts thereof [are] relevant and meaningful." *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996). Furthermore, we must presume "that each term included in the ordinance was used advisedly." *Carrier v. Salt Lake County*, 2004 UT 98, ¶30. The word *directly* indicates that the need for new system improvements must arise as a direct result of construction of the school. Improvements that arise indirectly or out of some other local need cannot be the basis for the impact fees to schools. Moreover, the word *additional* indicates that the new infrastructure must not previously exist. In other words, a local government may only charge impact fees to schools when the development of the school causes a direct need for new infrastructure – *i.e.* but for the school was being built, the infrastructure would not be necessary.

The specific street and roadway public facilities for which Washington City imposes impact fees are unknown. Nevertheless, Boyer Dixie contends that the development of the school has not directly necessitated the construction of any additional street and sidewalk improvements. Under Utah law, Washington City may only charge impact fees for development of the Dixie Montessori Academy to the extent that the Academy has *directly* necessitated *additional* public improvements. If it has not, the impact fees violate the act.

III. Subdivision of Land Alone Does Not Create the Impact Necessary to Impose Impact Fees

Finally, Boyer Dixie contends that is has been inappropriately charged a storm water impact fee and a habitat conservation impact fee. Boyer Dixie claims that the City would not process its subdivision application until those fees were paid. They argue that a subdivision application does not constitute development activity under the Impact Fee Act. Boyer Dixie thus had no

opportunity to show that the impacts of their development should result in a different fee calculation.

An impact fee is "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). Under this definition, an impact fee is imposed upon "development activity." "Development activity" is defined in the Act as "any construction or expansion of a building, structure, or use, any change in use of a building or structure, or any changes in the use of land that creates additional demand and need for public facilities." UTAH CODE § 11-36a-102(3). Thus, for purposes of the Act and in order to charge impact fees, physical construction to a building or changes in use—changes that create an additional demand for public facilities—must take place.

Subdivision of land alone changes the legal status of property, but it does not by itself change the physical characteristics of the land nor change the demand to public services or facilities. For example, after subdivision, the need to manage storm water runoff does not change. Storm water runoff need only be managed after construction occurs that reduces the ability of water to permeate the soil. Subdivision itself does not grant a property owner any special entitlement to develop property, nor is property development necessary after subdivision of land. Actual construction and development upon the subdivided land still must follow statutory procedures and standards, and those are the changes that create an impact upon the land.

The purpose of impact fees is to address those impacts. As discussed above, a city cannot charge impact fees unless there is an impact. Subdivision of land alone does not fit the definition of development activity under the Impact Fee Act. Development activity is defined as construction, use, or other changes to the physical characteristics of the land that creates that impact. Development activity is necessary in order to impose impact fees.

The subdivision of land will frequently occur as part of an overall development scheme, and at the time of subdivision, anticipated construction activity will be planned and known. However, subdivision of land is also possible and permissible without a plan or intent to undertake any development activity upon land. Impact fees are a product of impacts. The appropriateness of impact fees and the amount to be charged cannot be known until the impact of the development activity is known.

Impact fees cannot be slavishly charged according to a set schedule and formula. Under the Act, specific circumstances regarding the development and its impact must be taken into consideration when impact fees are imposed. *See, e.g.*, UTAH CODE § 11-36a-402. A property owner, and in particular a school or charter school, is entitled to have the impact fees reviewed for fairness and proportionality to the impact created. UTAH CODE § 11-36a-402(1)(c):

> A local political subdivision . . . shall ensure . . . that an impact fee enactment contains:
>
> . . . .

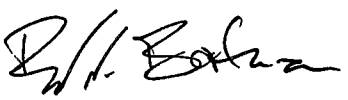
(c) a provision authorizing the local political subdivision . . . to adjust the standard impact fee at the time the fee is charged to:
(i) respond to: . . . (B) a request for a prompt and individualized impact fee review for the development activity of the state, a school district, or a charter school and an offset or credit for a public facility for which an impact fee has been or will be collected; and
(ii) ensure that the impact fees are imposed fairly. . . .

Thus, in order to determine whether impact fees are appropriate, the development activity must at least be anticipated, and under the Act the developer must have the opportunity to obtain an individualized review of the fee in light of the anticipated development activity. Imposing an impact fee at the time of subdivision, without knowing the specifics of the development activity, is contrary to the plain provisions of the Impact Fee Act.

Conclusion

Schools and charter schools enjoy special treatment under the Impact Fee Act. A local government cannot simply charge schools and charter schools the same impact fees that it charges other development activity. Charter schools are public schools in Utah, and local governments may only charge impact fees to charter schools for infrastructure that arises as a direct result of the construction of the charter school. Boyer Dixie claims that its school has necessitated no new infrastructure. If so, Washington City cannot charge impact fees under the Act.

Moreover, impact fees may only be charged when there are impacts. Impacts arise from development activity. Subdividing land alone is not development activity as defined in the Act. Thus, Washington City may not charge impact fees to Boyer Dixie at the time of subdivision unless development activities resulting in impacts to the land are shown.



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.

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:

Danice B. Bulloch, City Recorder
Washington City
111 North 100 East
Washington, Utah 84780

On this 10th day of July, 2015, 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.

Cynthia W Nelsen

Office of the Property Rights Ombudsman