

Advisory Opinion 295

Parties: Mountain Sunrise Academy / Saratoga Springs City

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TOPIC CATEGORIES:

Exactions on Development Impact Fees Act

Although schools enjoy certain benefits with regard to impact fees, the development activity of schools, like any development that has an impact on a community, must pay its own way. The Impact Fees Act does not exempt schools from paying impact fees, and the “directly results” provision of Utah Code 11-36a-202(2)(a)(iii)(A) cannot mean that schools do not pay their share of existing capacity. Doing so would result in other developers paying for the school’s impacts, which violates the constitutional exaction principles. A local government is free to exempt schools from paying impact fees, but they must find another way to pay for those impacts without rolling them back into impact fees for others to pay.

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ADVISORY OPINION

Mountain Sunrise Academy v. Saratoga Springs City

October 1, 2024

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ISSUE

Do the impact fees imposed by Saratoga Springs City comply with the provisions of Utah law?

SUMMARY OF ADVISORY OPINION

Although schools enjoy certain benefits with regard to impact fees, the development activity of schools, like any development that has an impact on a community, must pay its own way. The Impact Fees Act does not exempt schools from paying impact fees, and the “directly results” provision of Utah Code 11-36a-202(2)(a)(iii)(A) cannot mean that schools do not pay their share of existing capacity. Doing so would result in other developers paying for the school’s impacts, which violates the constitutional exaction principles. A local government is free to exempt schools from paying impact fees, but they must find another way to pay for those impacts without rolling them back into impact fees for others to pay.

OPINION

Mountain Sunrise Academy (“**Academy**”) requests this Advisory Opinion in order to determine whether Saratoga Springs City (“**City**”) has appropriately assessed impact fees. No facts appear to be in controversy. Likewise, facts are not critical to the conclusions herein, so they need not be rehearsed here.

Academy’s request for Advisory Opinion raises several legal questions, each of which deserves address. City has submitted a comprehensive response to Academy’s questions, and raises several good points of its own. Nevertheless, for efficiency’s sake,

¹ I am grateful to been given the opportunity by the parties, by appointment through the Office of the Property Rights Ombudsman, to author this opinion. In the two decades or so that I have been closely involved with impact fees, the question of how impact fees should, and do, apply to schools has arisen often. Now, in testament to the chasm between opposing viewpoints of this issue, here it is again.

this opinion does not attempt to review the questions asked one by one. Instead, the issues raised in the Academy's request are addressed here with a broader discussion of the Utah Impact Fees Act and other relevant legal principles.

1. Impact Fees and the Exaction Rules

The Utah Impact Fees Act ("**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(9)(a). Development activity, including the building of schools, causes an impact on the community's public infrastructure. Impact fees are one way that development pays for its impacts. See UTAH CODE § 11-36a-304(1)(d).

Impact fees are an exaction, in that they are a contribution to public infrastructure required for approval of development activity. *Salt Lake County v. Bd. of Educ.*, 808 P.2d 1056, 1058 (Utah 1991). Impact fees must therefore follow the exaction rules, in addition to the provisions of the Act. An impact fee must therefore be roughly proportional, in both nature and extent, to the impacts created by the development activity. See UTAH CODE § 10-9a-508(1). See also *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).² The Act is largely designed to achieve that proportionality. See, e.g., UTAH CODE § 11-36a-603(1)(c).

Like any exaction, an impact fee that requires development activity to pay more than its proportionate share, or to pay 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). This principle in particular is critical to understanding impact fees. The Utah Legislature has crafted the entire impact fee scheme in Utah in accordance with this fundamental principle. A developer pays its full fair share of impact fees, but not more than its fair share. This is because whenever a developer must pay for more than its own share of impact fees, that developer pays for the impacts created by others. One developer's overpayment means other developers get a free ride. This circumstance violates the exactions test.

This aligns with the current jurisprudence on exactions from both the United States Supreme Court and the Utah Supreme Court. Increasingly, as exactions have been examined, those courts have made it clear that any exaction that requires a developer to pay more than its fair share is an unconstitutional taking, no matter what form the exaction takes. See e.g., *Sheetz v. County of El Dorado, California*, 144 S. Ct. 893

² The "exaction test," also known as the "Nollan/Dolan Rough Proportionality Test" or simply "rough proportionality" is well established and documented. The reader may easily obtain the basics and principles of the exaction test at the Office of the Property Rights Ombudsman website.

(2024); *Koontz v. St. Johns River Water Management Dist.*, 570 U. S. 595; *Nollan v. California Coastal Comm'n*, 483 U. S. 825; *Dolan v. City of Tigard*, 512 U. S. 374; *B.A.M. Dev., L.L.C. v. Salt Lake County*, 2012 UT 26. Courts have held to the principle that “One of the principal purposes of the takings clause is to ‘bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” *Dolan v. County of Tigard*, 512 U.S. 374 (1994) quoting *Armstrong v. United States*, 364 U.S. 40, 49, L. Ed. 2d 1554, 80 S. Ct. 1563 (1960). Accordingly, a local government cannot charge an exaction to a developer, including an impact fee, where that exaction requires the developer to pay for more than its own share.

2. Schools and the “Directly Result” Provision

Because schools address particular public needs and provide particular public benefits, schools have a unique impact on the community. Accordingly, the Act contains several provisions specifically applicable to schools. For example, the legislature has decided that schools never have to pay impact fees for parks or trails. UTAH CODE § 11-36a-202(2)(iii). This is because schools provide facilities to the community that actually reduce the need for local parks and open spaces. No impact, no impact fee.

Relevant here is the provision in UTAH CODE § 11-36a-202(2)(a)(iii)(A), which prohibits charging any impact fees to schools that do not “directly result” in the need for “additional system improvements.”³ Academy argues here that this statutory language prevents City from charging schools impact fees to buy into existing capacity, and perhaps indeed any impact fees at all. Academy reasons that existing capacity is not new construction, and therefore not “additional system improvements.” This argument is supported by Advisory Opinion 225, which arrived at the same conclusion using a well-applied plain language analysis.

Nevertheless, in making this argument, Academy, and by necessity Advisory Opinion 225, overlook one critical element of exaction law. Any interpretation that allows a government, even by statute, to exempt certain bodies from paying their equitable share for impact fees, which results in those impacts being paid by other developers, is unconstitutional. Wherever such a statute, ordinance, or rule results in the costs of an impact being redistributed into the impact fees for others to pay, a violation of the Nollan/Dolan rough proportionality test occurs. Even if that interpretation is fully supported by the plain language – even if that interpretation accurately reflects the legislative intent – it violates the exaction test because it does not provide a method to pay for those impacts without redistributing the cost back into impact fees.

³ “Notwithstanding any other provision of this chapter, a political subdivision or private entity may not impose an impact fee: . . . on a school district or charter school unless . . . 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.” UTAH CODE § 11-36a-202(2)(a)(iii)(A) (emphasis added).

The Act recognizes this. The Act clearly permits local governments to waive or discount any impact fee at any time, including expressly allowing local governments to waive impact fees to schools. UTAH CODE § 11-36a-403(1)(a)(i). However, all waivers or discounts, including the school waiver, requires the waiver to establish “one or more sources of funds other than impact fees to pay for that development activity.” UTAH CODE § 11-36a-403(1)(b). That means the waived impact fees must be paid by general fund moneys, grants, the public at large, or by some other method besides rolling it back into the impact fee pot.

This applies no differently to existing capacity than it does to new construction. If a developer does not have to pay to connect to and use existing capacity, usually some other developer who paid to install it is stuck paying more than its share. An illustration may be useful: Often a developer must pioneer infrastructure, meaning that the first developer in an area must install the infrastructure to serve the development. The exaction rules state that this developer need only install the infrastructure it will use. However, good planning principles require that future development be considered when installing infrastructure. Accordingly, the first developer is often required by the local government to oversize infrastructure. Then when subsequent developers arrive, they can connect to what exists rather than digging up the road again to add a plethora of small pipes, exponentially increasing the costs and impacts of growth. Excess capacity in many systems exists for exactly this reason – oversizing installed by an early developer, necessitated by good planning.

Normally, in order to prevent the first developer from shouldering more than its own burden, the local government arranges with the first developer for reimbursement of those amounts expended beyond the first developer’s proportionate share. Often this reimbursement takes the form of impact fees collected by subsequent developers. But if a subsequent developer, including a school, will connect to that existing capacity but does not pay impact fees, the first developer is not reimbursed. The school did not have to pay its share of the cost in installing the infrastructure. The first developer has paid for the impacts of another developer. This is a violation of the exaction law.

Advisory Opinion 225 implicitly seems to recognize this problem. In an attempt to address it, that Advisory Opinion proposes that local governments, when preparing their IFFP, consider areas where schools will be built and plan their impact fee charges around such situations. However, without a requirement that those impacts be paid by some other means, to match the requirement that schools be exempted, again just redistributes the impact costs belonging the school back into the impact fees for others to pay. It does not prevent the impacts caused by the school being charged, through impact fees, to other developers.

Moreover, Academy’s (and Advisory Opinion 225’s) interpretation of the “directly results” provision, even under a plain language analysis, is not the only possible reading

of that statute. Specifically, it is not necessary to conclude that “additional facilities” must mean “newly constructed facilities.” The statutory language states that impact fees can only be charged to schools if the development activity “directly results in a need for additional system improvements.” Development activity will often require additional facilities, but it does not follow that those additional facilities must be newly constructed. Additional facilities may already be in the ground, but unused. The new development activity may make using those unused facilities necessary. It is not necessary, therefore, to read the “directly results” language in a way that violates the exaction test.

Accordingly, giving one type of development an exemption from impact fees, where that development is having a measurable impact, and without establishing a source to pay for those impacts outside of impact fees, simply redistributes the cost of those impacts back into the impact fee total to be paid by someone else. That violates Nollan/Dolan and is an unconstitutional exaction. Academy will impact City. If the City chooses not to find a different source to pay for Academy’s impacts, and thus exempt the Academy having an impact from impact fees, Academy must pay the fees, school or not, existing capacity or not.

3. Academy Has Not Met The Burden Of Proof For Its Remaining Questions.

Academy raises several other questions in its request for Advisory Opinion related to whether City’s impact fees were properly adopted and charged:

- A. Did Saratoga have a proper impact fee facilities plan (IFFP) adopted and effective during the relevant timeframe, late 2019 through mid-2020?
- B. If so, does that IFFP specifically reference Mountain Sunrise’s anticipated fees?
- C. If not referenced, did Saratoga properly amend its IFFP to include that reference?
- D. Does Saratoga’s transportation-impact-fees category in its invoice include any “roadway or sidewalk” costs prohibited by law?
- E. Did Saratoga have a proper impact fee analysis (IFA) adopted and effective during the relevant timeframe, one that actually anticipated and analyzed Mountain Sunrise’s development activity?
- F. If all the above were in place, were the impact fees properly calculated using “realistic estimates” and including proper disclosure of the “assumptions underlying those estimates” in the IFA.

- G. Did Saratoga comply with all the enactment provisions for the fee in question? Again, no information was provided in response to the GRAMA request on this point.
- H. Have any other new schools burdened with Saratoga's impact fees received any "exemptions" or discounts that should be offered to Mountain Sunrise as well.

These questions are thoughtful and valid. However, they are generally unsupported except to argue that the City did not provide the information to prove the City's compliance with the Act. Academy has therefore failed to meet its burden of proof regarding these questions.

"[A] presumption of constitutionality attaches to the legislative decisions of municipalities when they establish impact fees." *Home Builders Association of Utah v. City of North Logan*, 1999 UT 63, ¶ 9, 983 P.2d 561, 564 (citing *Banberry Development Corp. v. South Jordan City*, 631 P.2d 899, 904 (Utah 1981)). Thus, if a developer challenges the validity of an impact fee, the local political subdivision imposing the fee "must first disclose the basis of its calculations" *North Logan*, 1999 UT 63, ¶ 8 (citations and alterations omitted). When that information is disclosed, "[t]he burden then falls upon the challenger to show [that the fee fails] to comply with the constitutional standard of reasonableness." *Id.* 1999 UT 63, ¶ 8. Accordingly, it appears that City has provided at least some of the documents that are required: the Impact Fees Facilities Plan, and an Impact Fees Analysis. Assuming that City has provided those documents, the burden now is on the person challenging the impact fee, Academy, to prove that the act has been violated. Simply asking questions about whether proper procedures were followed is not sufficient to establish a violation. As while is not the job of a court to go through the record and make the case for the party with the burden of proof, it is likewise not appropriate for the author of this Advisory Opinion. Academy must answer its own questions to meet its burden. To be clear, this Advisory Opinion expresses no conclusion regarding whether the amounts charged are appropriately calculated – only that Academy has not met its burden to show that they are not.

It is also noted that City in their submission has provided answers to each of Academy's questions to this Advisory Opinion. So the burden is squarely on the Academy.

CONCLUSION

I conclude, therefore, that although schools enjoy certain benefits with regard to impact fees, they still, like any entity that has an impact on a community, must pay their own way. The Impact Fees Act does not exempt schools from paying impact fees, and the "directly necessary" provision does not mean that a school does not pay for existing capacity that it will benefit from. If the local government wants to exempt schools, they can. But Constitutional law requires that the local government also find another way to

pay for those impacts. Academy is not exempt from impact fees, and not exempt from paying impact fees for existing capacity. Likewise, Academy has not met its burden to prove that the impact fees or procedures to adopt them are flawed.

Very truly yours,

Dentons Durham Jones Pinegar P.C.



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