Advisory Opinion #101

Parties: Mike & Carri Blackham and Garden City

Issued: July 6, 2011

TOPIC CATEGORIES:
R(v): Other Topics (Interpretation of Ordinances)

Local governments may charge fees for services or benefits provided. Operating a public water system confers distinct and tangible benefits on all properties served by the system, whether the property owners actually use the water service or not. A reasonable "standby fee" may be charged to properties which have not yet connected to the water system. The fees charged must be imposed fairly on all similarly-situated properties, and should be reasonably related to the costs of providing the service or benefits.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Mike Blackham
Local Government Entity:	Garden City
Applicant for the Land Use Appeal:	Mike and Carri Blackham
Type of Property:	Residential Subdivision
Date of this Advisory Opinion:	July 6, 2011
Opinion Authored By:	Brent N. Bateman, Lead Attorney, Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

Can a city legally charge a standby water fee on vacant lots in order to pay the debt of a new water treatment plant?

Summary of Advisory Opinion

In Utah, local governments enjoy broad authority to carry out the duties and powers granted to them. This authority includes wide latitude on decisions to construct and operate public utilities, including discretion on how to fund such operations. Local governments may charge fees for services or benefits provided. Operating a public water system confers distinct and tangible benefits on all properties served by the system, whether the property owners actually use the water service or not. The presence of the system enhances the value and marketability of land, and all properties benefit from the fire suppression provided by hydrants included with the public water system. Given the broad authority and latitude afforded to local governments, and the benefits provided by public water systems, a reasonable "standby fee" may be charged to properties which have not yet connected to the water system.

The fees charged, however, must be imposed fairly on all similarly-situated properties, and should be reasonably related to the costs of providing the service or benefits. Any distinction in fees based on ownership or physical characteristics of the properties involved must be justified by specific findings. Otherwise all similarly-situated properties should be charged an equal fee.

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 Mike and Carri Blackham on November 3, 2010. A copy of that request was sent via certified mail to John Spuhler, Mayor of Garden City. The city submitted a response to the Office of the Property Rights Ombudsman, which was received on December 8, 2010. The Blackhams then submitted a response to that communication on December 15, 2010, and the city submitted the final received response on January 10, 2011.

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, including attachments, filed November 3, 2010 with the Office of the Property Rights Ombudsman by Mike and Carri Blackham.
2. Response from Garden City, including attachments, submitted by John Spuhler, City Mayor, received on December 8, 2010.
3. Response to response, submitted by Mike Blackham, property owner, on December 15, 2010.
4. Return Response from Garden City, submitted by Mayor John Spuhler, received on January 10, 2011.

Background

Garden City is located near Bear Lake, a popular vacation spot in Northern Utah. Along with a few full-time residents, the city has many seasonal visitors who own property in the area. Some properties owned by seasonal visitors contain cabins, vacation homes, etc. However, there are many platted lots that are vacant and owned by out-of-town visitors, kept for future use and development.

In 2001, Garden City was notified by the State Division of Drinking Water of a new water classification which required the City to upgrade its water treatment plant. Garden City understood that such upgrades would be very costly and were not optional. Because of the low number of full-time residents, Garden City determined that it would be impossible or inequitable to finance the cost of the new water treatment plant through only the full-time residents of the

City. After consulting with experts and legal counsel, the City developed a plan to fund the new water treatment plant. This plan included augmenting the City standard water charges, and also imposing a small standby water fee upon the numerous vacant lots in the City.

The standby water fee as imposed only applies to owners of vacant lots in approved and recorded subdivisions, and would be $10.00 per month, per lot. The City further decreed that owners of multiple lots that were contiguous with one another in these areas could "encumber" the lots and would be charged only one fee for the group of lots, without regard to the actual number of lots. This structure, the city believes, will help to pay the bond and recoup the cost of installing the new infrastructure.

Mike and Carri Blackham do not live in Garden City, but own three noncontiguous vacant lots in an approved subdivision within Garden City, numbered 113, 61, and 24. They have been charged the standby fee for each of their lots. Their request to encumber the lots was denied because they are not contiguous. Moreover, after failing to pay the standby charge, a penalty of nonpayment has been assessed. The property owners challenge the fee.

Analysis

I. A Fee Imposed by a Local Government May Be Imposed to Recover Costs Incurred in Providing a Service or Benefit.

It is well established in Utah law that service fees may be imposed by government as cost recovery for services or benefits actually provided. In *V-1 Oil Co. v. Utah State Tax Commission*, 942 P.2d 906 (Utah 1996), in the context of distinguishing taxes and fees, the Utah Supreme Court discussed the concept of fees charged by government entities:

> [A] fee raises revenue either to compensate the government for the provision of a specific service or benefit to the one paying the fee or to defray the government's costs of regulating and policing a business or activity engaged in by the one paying the fee.

Id., 942 P.2d at 911 (*quoting* BLACK'S LAW DICTIONARY). The court went on to say that a fee is "[a] charge fixed by law for services of public officers or for use of a privilege under control of government." *Id.* In addition, the Court held, for a service fee to be valid, the fee must "bear a reasonable relationship to the services provided, the benefits received, or a need created by those who must actually pay the fee." *Id.* With this foundation, multiple cases and statutes in Utah have discussed how government may impose various fees. Although each case examines a different kind of fee, each consistently holds that fees may only be used to reimburse or defray the costs of providing services to the payee of the fee. *See e.g., Tooele Associates Ltd. Partnership v. Tooele City Corp.*, 2011 UT 4; *Board of Education of Jordan School District. v. Sandy City Corp.*, 2004 UT 37, ¶24; *Banberry Development Corp. v. South Jordan City*, 631 P.2d 899, 905 (Utah 1981); UTAH CODE ANN. § 10-9a-510. A review of these and many other cases

leave no questions that service fees in Utah may be imposed to recover costs for services or benefits rendered to the payee of the fee.[1]

II. The City Provides A Service to the Vacant Lots, Because the Availability of the Water System Enhances the Value of the Lots, and Provides Fire Protection.

Even if the Blackhams do not connect to the water system or use any of the water, they nevertheless receive a service from the City, and may therefore be subject to a reasonable fee. The Blackhams can readily access the system and receive water service if they choose, but they receive a benefit even if they don't connect to the system. The City's water system contributes to the value and marketability of the property, and provides water for fire suppression. Given these direct and tangible benefits, and the broad grant of power to municipal governments to fund construction and maintenance of waterworks, a standby fee is an acceptable means of raising funds for water systems.

A. Local Governments Have Broad Authority to Enact Ordinances Necessary to Promote Public Health, Safety, or Welfare.

In Utah, local governments enjoy fairly broad authority to carry out their duties and to promote the public's health, safety, or welfare. The Utah Code grants several specific duties and powers to municipal governments, and also includes a general grant to

> pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter [*i.e.*, Chapter 10-8], and as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and its inhabitants, and for the protection property in the city.

UTAH CODE ANN. § 10-8-84(1). Cities are specifically charged with construction of water systems. "A city may: . . . construct, maintain, and operate waterworks, sewer collection, sewer treatment systems, gas works, electric light works, telecommunications lines, cable television lines, or public transportation systems . . .." *Id.* § 10-8-14(1)(a). In addition, cities may set water rates (*See id.*, § 10-8-22), and may enact and enforce ordinances governing the management of water systems and protecting them from damage or contamination (*See id*., §§ 10-7-14, 10-8-15). Finally, the Utah Legislature specifically enacted the following:

> Whereas, the purification of drinking water and the treatment of raw sewage are important to public health and create an unusual need for money with which to create proper facilities for the protection of the people of the state of Utah, ***it is hereby declared to be the public policy of this state to grant the privilege to municipalities to raise funds to improve the aforementioned health standards***, to encourage the municipalities to provide that no waste shall be discharged into any waters of the state of Utah without first being given proper treatment, to provide

[1] Fees cannot be used to raise revenue or fund general government services. Such activities are funded by taxes. *See V-1 Oil Co.*, 942 P.2d at 911.

> for the treatment of water to be used for drinking purposes to protect the health of the citizens and to give municipalities the discretion to determine the priority of development of the facilities directed toward the elimination of health hazards and pollution of public waters.

Id., § 10-7-14.1 (emphasis added).[2]

Cities have the specific responsibility to construct and operate water systems, and have the authority to regulate the management and conduct of such systems. The policy of the state is also to grant cities the privilege to raise funds to build and maintain water systems. In order to carry out this important function, cities must have the financial means to fund its activities. One reasonable and acceptable way for cities to generate the necessary funds to construct and operate water systems is to charge a reasonable fee on all properties, including those which have not yet connected to the water system.

This conclusion is supported by decisions from the Utah Supreme Court, which has long recognized that local governments enjoy broad authority to promote the public welfare.

> When the State has granted general welfare power to local governments, those governments have independent authority apart from, and in addition to, specific grants of authority to pass ordinances which are reasonably and appropriately related to the objectives of that power, *i.e.*, providing for the public safety, health, morals, and welfare.

State v. Hutchinson, 624 P.2d 1116, 1126 (Utah 1980). In *Hutchinson*, the court explicitly rejected the "Dillon Rule," which narrowly restricted local government authority to specific legislative grants.[3] "[W]e will give local government much latitude in creating solutions to problems . . .." *Price Development Co. v. Orem City*, 2000 UT 26, ¶ 19, 995 P.2d 1237, 1245.

Thus, since cities have specific grants of authority to construct and maintain water systems, they also have independent authority and much latitude to pass ordinances reasonably and appropriately related to carrying out that authority. Moreover, the Utah Legislature has determined that cities should have the privilege to raise necessary funds for water systems. Given the statutory authorization and the broad latitude approved by the Utah Supreme Court, a standby fee is an appropriate and reasonable means to raise funds for the construction and maintenance of water systems.[4]

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[2] Cities are also authorized to impose a special property tax levy for water and sewer systems. *See* UTAH CODE ANN. § 10-7-14.2.

[3] The Utah Supreme Court expressed its position in unequivocal terms: "[T]he Dillon Rule of strict construction is not to be used to restrict the power of a [local government] under a grant by the Legislature of general welfare power or prevent [them] from using reasonable means to implement specific grants of authority." *Hutchinson*, 624 P.2d at 1127.

[4] It is also worth mention that cities not only have the *authority* to construct water systems, but the State has given them the specific *duty* to provide culinary water which satisfies minimum quality standards. Section 10-8-84 and the reasoning in *Hutchinson* support a conclusion that cities also have much latitude to determine how to fund water systems in order to comply with the State's mandate.

B. The Owners Benefit From the Water System, Even if They Have Not Connected to It.

The Blackhams receive a benefit from the water system, even if they don't have a connection and don't actually use the water. The existence and availability of the system enhances the value and marketability of all adjoining properties. Part of the value of the Blackham's property is attributable to the fact that the municipal water system is available and ready to be used. This benefit is tangible and measureable.[5] In addition, even if the Blackhams do not connect to the water system, they receive a very real benefit, because the system includes hydrants for fire suppression. Although the Blackhams may never have the need for fire suppression, they nevertheless benefit from the system's existence.

In *V-1 Oil*, the Utah Supreme Court found that petroleum companies benefitted from a mitigation fund, and so the surcharges which financed the fund were not taxes, but legitimate fees. The case concerned surcharges for the "Petroleum Storage Tank Fund," which was created to cover damages from spills. Petroleum companies were charged an annual fee on each tank, along with a fee on each gallon of petroleum sold. V-1 Oil challenged the surcharges as invalid taxes. The company argued that because it received no direct benefit, the charges were taxes and had been improperly enacted.

Ultimately, the court determined that "V-1 does benefit from the Fund because a spill at one of its tanks would be covered by the Fund." *V-1 Oil*, 942 P.2d 906, 916 (Utah 1997) (decision on rehearing). This coverage, even if it was never needed, benefitted the oil company. Since there was a benefit conferred, the surcharges which financed the Fund could be considered fees rather than taxes.[6]

If the Petroleum Storage Tank Fund provided a benefit to an oil company, then the City's water system provides a benefit to the Blackhams. The system directly adds to the value and marketability of their property, and they have access to fire suppression if the need arises. Even if the Blackhams never connect to the City's water system, they nevertheless receive direct and tangible benefits. Therefore, the City can charge them a fee which is reasonably related to the Blackhams' fair share of the costs associated with the system.

The Utah Supreme Court indicated support for such a conclusion in *Home Builders Association of Greater Salt Lake v. Provo City*.[7] That decision concerned the validity of connection fees for a sewer system. The court referred approvingly to a decision from New Jersey, which held that both unimproved properties and actual users should contribute to the cost of a sewer system: "[T]he unimproved property was benefitted by the improvement, and more specifically, the unimproved property would benefit unfairly in respect to the capital cost and interest thereon as may have been paid in the past by users of the sewer." *Id.*, 28 Utah 2d at 405, 503 P.2d at 453 (discussing *Airwick Industries, Inc. v. Carlstadt Sewerage Authority*, 270 A.2d 18 (N.J 1970)).

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[5] It could also be argued that the system confers an "intangible" benefit upon properties within the City, because it improves the overall quality of life.

[6] The court also considered whether the charges bore a reasonable relationship to the cost of the benefit. The court deferred to the legislature's judgment, and noted that there was no evidence presented that the charges were unreasonable. *V-1 Oil*, 942 P.2d at 917.

[7] 28 Utah 2d 402, 404-05, 503 P.2d 451, 452-53 (1972).

Other states have considered whether the existence or availability of a utility can be considered "service" which justifies payment of standby or "privilege" fees. The North Carolina Court of Appeals held that by making a utility service available, "a city has furnished a service, thus authorizing it to set a rate for this service." *Ricks v. Town of Selma*, 392 S.E.2d 437 (N.C. Ct. App. 1990). The North Carolina court based its conclusion on state statutes authorizing construction and maintenance of public utilities, and granting cities the power to charge fees for the service. A similar conclusion was reached by the Michigan Supreme Court in *Seltzer v. Sterling Township*.[8] Like the decision in *Ricks*, the Michigan court concluded that a state law which authorized cities to set rates for public utilities included the authority to charge a "privilege fee" to property owners who had utility service available, but did not use the service.[9]

The Oklahoma Attorney General concluded that the broad powers enjoyed by local governments include authority to impose a standby or privilege fee on properties which have not actually connected to a public water system. The opinion concluded that availability of a public utility was a "service" for which a fee could be charged.

> While Oklahoma law does not expressly authorize a city to enact an ordinance that imposes a fee to defray the costs associated with construction of a water treatment plant on persons residing within annexed territories who choose not to use the city water supply, the power may be fairly implied from the express grant of powers.

Question Submitted by Anderson, 2009 OK AG 29 (November 12, 2009).[10]

In contrast, the New Mexico Supreme Court and the Texas Court of Appeals held that standby fees were not allowed unless specifically authorized by their respective state laws. The New Mexico decision concluded that standby fees were authorized for sewer systems, but not for waterworks, due to unique language in the applicable state laws.[11] In 1990, the Texas Court of Appeals held local governments were not authorized to charge standby fees.[12] However, in 1998, such fees were upheld, because the state legislature had approved them.[13]

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[8] 123 N.W.2d 722 (Mich. 1963). The decision concerned a "privilege fee" charged to properties for water service.

[9] The Utah Code empowers cities to "fix the rates to be paid for the use of water furnished by the city." Utah Code Ann. § 10-8-22. The Michigan state law granted cities the power "to provide for the imposition and collection of charges, fees, rentals, or rates for the service, facilities and commodities furnished by . . . public improvements." *Seltzer*, 123 N.W.2d at 724. Furthermore, "[w]ith authority being given to acquire or construct a public project . . . it must necessarily follow that authority to pay for the project is at the same time granted." *Id.*

[10] The Attorney General's opinion included discussion of the *Airwick Industries, Seltzer,* and *Ricks* decisions (among others), and a discussion of the broad powers granted to local governments.

[11] *Chapman v. City of Albuquerque*, 335 P.2d 558 (N.M. 1959). The court also concluded that sewer systems benefitted adjoining properties whether the property was connected to the sewer or not. *See also Kennedy v. City of Ukiah*, 138 Cal. Rptr. 207 (Cal. Ct. App. 1977)(standby fee authorized by state law); *Central Iron & Steel Co. v. Harrisburg*, 114 A. 258 (Pa. 1921)("ready-to-serve" fee upheld).

[12] *See Graham v. City of Lakewood Village*, 796 S.W.2d 800 (Tex. App. 1990).

[13] *See McMillan v. Texas Natural Resources Conservation Comm'n*, 983 S.W.2d 359 (Tex. App. 1998). The decisions from New Mexico, and particularly those from Texas, demonstrate how the "Dillon Rule" narrowly restricts local government powers.

In conclusion, Utah municipal governments enjoy broad powers and much latitude to construct and maintain water systems, and to set the rates for the use of those systems. That broad authority includes the power to establish reasonable standby fees to help fund construction of public utilities. The availability of a public utility is a "service" to an adjoining property, because of the direct and tangible benefits conferred, even if the property does not actually connect to or use the utility. Since all properties benefit from the operation of a public utility, all properties should bear a reasonably fair portion of the costs to construct and maintain the utility.

III. The Fee Must be Reasonably Related to the Cost of Providing the Water System, and Must be Applied Fairly to All Similarly-Situated Properties.

As discussed above, for a service fee to be valid, it must "bear a reasonable relationship to the services provided, the benefits received, or a need created by those who must actually pay the fee." *V-1 Oil,* 942 P.2d at 911. In this matter, nothing has been provided to show that the $10 per month fee relates to the cost to the City to provide that benefit. Service fees are available for cost recovery only, and may not provide an excessive profit to the City.[14] A fee must reflect the reasonable cost of providing the service or benefit. Nothing has been provided to show that to be the case.

Even with deference to the City's discretion to set fees, it appears from the documentation provided that the standby fee charged to vacant lot owners was, at worst, picked at random, and at best, set by a determination of how much would necessarily be charged to pay off the debt service, while maintaining service charges to actual users and full-time residents at an acceptable level. The documentation reflects that this choice was not made hastily, and that the City consulted a litany of experts in an effort to ensure that the fee was justified. Nothing in the record, however, reflects that the fee was set to reflect the cost of providing any service or benefit. Without such support, the acceptable amount for a standby fee cannot be determined.

Moreover, allowing lot owners to "encumber" their lots, and join multiple contiguous lots and pay only one fee, indicates that the fee has been administered unfairly. Similarly-situated property owners should bear an equitable share of the financial burdens for public improvements. *See Home Builders Association of Utah v. City of North Logan,* 1999 UT 63, ¶ 9, 983 P.2d 561, 564. Each lot receives the same benefit. It has not been shown that contiguous lots under single ownership are entitled to pay a smaller fee than non-contiguous parcels owned by the same owner. Unless the City can justify the distinction, it cannot allow owners of contiguous lot to pay less than the owners of non-contiguous lots. To allow otherwise requires property owners with non-contiguous lots to pay not only their share of the cost for the benefits, but also a portion of the share of contiguous lot owners. The fee must be charged equally to similarly-situated property owners.

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[14] The fees charged do not necessarily have to be exactly equal to the funding required. *See V-1 Oil*, 942 P.2d at 917: "We [*i.e.,* the Court] have held that a fee may exceed the cost of providing the intended service and remain reasonable. Fee-setting bodies are entitled to flexibility in their legislative solutions to problems. The problems they address are not susceptible of exact measurement." *Id.* (internal quotations and cites omitted).

Conclusion

Local governments have broad authority and much latitude to determine how to construct and maintain public utilities. That authority and latitude includes discretion on how to fund public utilities. Local governments may set utility rates, which reflect the reasonable cost to provide the service or benefit of the public utilities. All properties receive direct and tangible benefits from public utilities, whether the owners actually use the services or not. The value and marketability of the property is increased by the availability of utility service, and all properties benefit from fire suppression provided through public water systems. Since there is a benefit provided by the availability of a public utility, local governments may charge a reasonable fee to all properties adjoining the system, whether they actually use the utility or not.

The fees charged must be reasonably related to the cost of providing the service or benefit. Exact mathematical equality is not necessary, but service fees should provide cost recovery only. All similarly-situated properties must be treated equally, and any distinctions due to ownership or the parcel's physical characteristics must be justified by the local government.

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:

Mayor Ken Hansen
Garden City
145 West Center
Garden City, Utah 84028

On this _____ Day of July, 2011, 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