IMPACT FEES

A primer on the historic and current collection of Impact Fees and the Utah Impact Fees Act

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ROADMAP

- Brief review of Exactions and “Rough Proportionality”
- Collection of fees before the adoption of the Utah Impact Fees Act
- The Utah Impact Fees Act (1995)

IMPACT FEES AS A FORM OF EXACTION

- Exactions are contributions that are imposed by a local government as a condition of development approval.
- Forms of exactions:
  - Dedication of land
  - Construction of public improvements
  - Money (i.e., fees in lieu, impact fees, connection fees).
- Designed to lessen the negative impacts of new development.

SCOPE OF EXACTIONS: Rough Proportionality

- Exactions must meet the “rough proportionality” analysis which was established in two landmark United States Supreme Court cases:
  - *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987)
  - *Dolan v. City of Tigard*, 512 U.S. 374 (1994)

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Nollan: The (brief) Facts

- The Nollans owned a beach-front property with an existing building that they desired to remodel/reconstruct.
- The California Coastal Commission had certain land-use authority over the Nollan's land-use application.
- The Commission had an already existing public policy of promoting public access to beaches.
- In furtherance of the stated policy, and in connection with the approval of the Nollan's land-use application, the Commission required the Nollans to grant an easement over a portion of their property to connect two public beaches.
- The Nollans challenged the dedication requirement up to the United States Supreme Court.

Nollan: The Arguments

- **Nollan**: The Commission's requirement that the Nollans dedicate an easement constituted an unlawful taking of property without just compensation in violation of the Takings Clause.

- **Commission**: A condition of approval that furthers a government interest (public access to beaches) does not constitute a "taking" if the refusal to grant the permit would have otherwise also furthered that same interest. In other words, if the Commission were to refuse the permit because granting the permit would have otherwise prohibited or impaired public "access" to the beach, a condition of approval that mitigated that same negative impact should be permissible.

Nollan: The Holding: Essential Nexus Required

- The *Nollan* case helped clarify that exactions are only appropriate where there is a connection ("**nexus**") between the condition being imposed ("exaction") and the governmental interest at issue.
- In this case, the exaction was the requirement that a public access easement be granted across the Nollan's property.
- The governmental interest (which the court found was legitimate) was the providing of public access to California Beaches.

Nollan: The Holding: Essential Nexus Required

- There **wasn't** a sufficient nexus between the exaction (easement) and the governmental interest (public access to beaches).

"The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. ***When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban.*** *Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster."*

Nollan v. California Coastal Commission, 483 U.S. 825, 837 (1987)

Dolan: The (brief) Facts

- Ms. Dolan owned a retail store in Tigard Oregon.
- Dolan wanted to add-on to the existing building.
- The re-development also included new paved parking stalls and additional building footprints which affected the impervious surface area of the site.
- Dolan's application was approved by the City's planning commission with the conditions that she: (1) dedicate a portion of her property for storm drain improvements; and (2) dedicate a 15-foot strip of land as a pedestrian/bicycle pathway.
- These conditions amount to approximately 10% of her total site.

Dolan: The Arguments

- **Dolan**: Challenged the Planning Commission's dedication requirements on the basis that they were **not consistent with *Nollan*** (they lacked an essential nexus to the stated governmental interest).

- **Commission**: The Planning Commission argued that the storm drain dedication **was related** to the City's interest of preserving floodplains and Dolan's anticipated development activity impacted that interest. Additionally, the pedestrian pathway dedication was related to the City's interest of providing safe walk routes and Dolan's development would create drive more traffic to the area (which the trail would help offset).

Dolan: The Issue

- The United States Supreme Court took the Dolan case up on appeal because it recognized that when it decided Nollan, it failed to address whether there was the "**required degree of connection** between the exactions imposed by the City and the projected impact of the proposed development."

Dolan, 512 U.S. 374, 377 (1994)

- In other words, the Court needed to address not just whether there was a relationship between the stated interest and the exaction, but whether the relationship was **proportional**.

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Dolan: The Issue (cont'd)

"The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is ***whether the requirement has some reasonable relationship or nexus to the use to which the property*** *is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit."*

Dolan: The Holding: Proportionality

- There was no ***reasonable*** relationship between the floodplain dedication and the impacts of the new building.
- There was no ***reasonable*** relationship between the bicycle pathway dedication and the increase in traffic.

- "*The city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement.* ***The city simply found that the creation of the pathway 'could offset some of the traffic demand…and lessen the increase in traffic congestion****.'"*
- *"**No precise mathematical calculation is required**, but the city must make some effort to **quantify** its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."*

Dolan v. City of Tigard, 512 U.S. 374, 395

Utah Commentary on *Dolan*: B.A.M. II

"Of course, the [Dolan] Court did not mean rough proportionality at all. While 1 to 1 is a proportion, so is 1 to 1000, as any fifth-grade student will be happy to tell you. **Any two numbers, measured by the same units, form a proportion. So to be roughly proportional literally means to be roughly related, not necessarily roughly equivalent**, which is the concept the Court seemed to be trying to describe. **The proportion of 1 to 1.01 is roughly equivalent, while the proportion of 1 to 3 is not, for example**. **Unfortunately, by using the phrase "rough proportionality," the Court has engendered vast confusion about just what the municipalities and courts are expected to evaluate when extracting action or value from a landowner trying to improve real property.** In this instance, rather than adopting the name chosen by the United States Supreme Court, we will use the more workable description of **rough equivalence**, on the assumption that it represents what the Dolan Court actually meant."

B.A.M. Development v. Salt Lake County, 196 P.3d 601, 603, 2008 UT 74, ¶ 8 (2008)

Honorable Mention: *Koontz*

- *Koontz v. St. Johns River Water Management District*
- This case reaffirmed the "Rough Proportionality" analysis of Nollan/Dolan applies not only to dedications of land, **but also to demands for money**.
- Additionally, the Court in Koontz held that **Nollan/Dolan analysis also applies where the government denies a land-use application**.
- In other words, if a condition of approval fails under Nollan/Dolan, a denial of the same land-use application on the similar/same basis as the condition is also improper.

Utah's Impact Fee History: Pre-1994

- Prior to the adoption of the Impact Fees Act in 1994, local governments still imposed monetary exactions as a way of offsetting development-related impacts.
- HOWEVER, the **authority** to do so (and the **reasonableness** of such monetary exactions) was often challenged by developers.
- Impact fees were inconsistent across jurisdictions and the justifications for charging them were (at least in the developers' eyes) baseless.

Utah's Impact Fee History: Pre-1994

"*The courts of this state and others have approved the legality of such [impact] fees but are still struggling to define the limits of reasonableness that must be imposed upon their amount.* ***Without legal limits imposed by statute or constitution, subdivision charges could easily be used to avoid statutory requirements for bonding municipal improvements, statutory limits on municipal taxation, and legal limits on restrictive or exclusionary zoning***."

Banberry Development Corp. v. South Jordan City, 631 P.2d 899, 902 (Utah 1981)

SOME EARLY CHALLENGES

- ***Murray City v. Board of Educ. Of Murray City School District*** **(1964)** – Sewer service fee imposed by the City (which fee was based upon the anticipated use of the sewer by each building) is upheld as a reasonable service payment which was based upon actual usage by the School District.
- ***Weber Basin Home Builders Ass'n v. Roy City*** **(1971)** – City increased building permit fees from $12 to $112 in one jump. The increase was not reflective of the actual costs for the City to provide the services rendered under an issued building permit. It was ruled invalid.
- ***Home Builders Ass'n of Greater Salt Lake v. Provo City*** **(1972)** – Provo City required sewer connection fees from new development connecting to the sewer. Fee was determined using the net value of the system divided by the number of connections. That determination resulted in a reasonable fee that was imposed in a non-discriminatory manner.

SOME EARLY CHALLENGES (cont'd)

- ***Lafferty v. Payson City* (1982)** – Payson imposed an "impact fees" for each building permit to offset the costs for municipal services. The new fees weren't equitable because they "fixed the entire cost of new facilities on newly developed properties without assurance that the costs were equitable in relation to benefits conferred and in comparison with costs imposed on other property owners in the municipality."
- ***Patterson v. Alpine City* (1983)** – Alpine established a sewer connection fee of $700 that could be pre-purchased. After one month, the fee would be raised to $1,000, and then again one month later to $1,500 (with the intent of encouraging pre-purchase of the connection). "*We do not purport to know whether $700, $1,000, or $1,500, or none of those amounts is in fact a reasonable charge to construct, maintain, and operate Alpine's system. But all three amounts obviously cannot be reasonable within a two-month period.*"

The Trailblazers*: Call* and *Banberry*

- Two Utah Supreme Court cases decided before the enactment of the Utah Impact Fees Act helped shape the Impact fees act:

    - *Call v. City of West Jordan* (1979 – 1990)

    - *Banberry Development Corp. v. South Jordan City* (1981)

Call v. City of West Jordan: The Facts

- This case spans approximately **13 years of litigation** in the trial and appellate courts of Utah.
- Originated in 1979 (pre-*Nollan/Dolan*) after West Jordan enacted an ordinance **requiring that developers dedicate 7% of their land** (or the equivalent amount in dollars) to the City for flood control measures and/or recreational facilities.
- Call challenged the dedication requirement on numerous grounds including:
    - The dedication **provided benefit to the City but no recognizable benefit to the development**.
    - The dedication amounted to an **unconstitutional taking** of land without just compensation.
    - The dedication was a **revenue-raising scheme** and therefore amounted to an improper levy of a tax.

Call v. City of West Jordan: The Roadmap

- ***Call I* (1979)** – In this first appeal, the Utah Supreme Court **upheld the City's ordinance** (that developer's dedicate 7% of land for storm drain and/or recreational facilities). However, the Court remanded the case to the trial court with direction to consider whether other sums of money paid by Call to the City in connection with the Development should satisfy the donation requirements of the ordinance.
- ***Call II* (1980)** – Before making it back to the trial court, the Supreme Court took the matter back up on a re-hearing to review whether the ordinance was constitutional. The court concluded that the ordinance was constitutional on its face, but that Call should be given an opportunity to present evidence to determine whether it was **constitutional as applied**. In other words, Call's argument that there was no demonstrable benefit to his development had some merit (or, put differently, that there was no relationship between the City's need for storm drain facilities and Call's development).
- ***Call III* (1986)** – On this appeal, the Court was tasked with determining whether the City's ordinance was **adopted according to proper notice requirements**. The Court held that proper notice procedures had not been followed and, as a result, the ordinance was void ab initio.
- ***Call IV* (1990)** – In 1987, the trial court, on a written order, awarded Call approximately $31,000 but denied other claims for relief (including attorney fees). Call appealed those denials and the appeal was sent to a very frustrated and tired Utah Supreme Court. All denials were affirmed.

Call v. City of West Jordan: Significance

The thirteen-year saga of cases that is now collectively referred to as simply *Call v. West Jordan*, highlights the need that existed in Utah to **define the scope of authority and establish uniform procedures for local governments to prepare, adopt, and implement reasonable development impact fees.**

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Banberry Dev. Corp. v. South Jordan: The Facts

- *Banberry* was decided in 1981 on the heels of the Utah Supreme Court's decision in *Call II* (regarding West Jordan's 7% land dedication ordinance and whether the ordinance had been constitutionally applied to Call).
- The case was brought by a group of developers that **challenged South Jordan's authority to impose park improvement and water connection fees**.
- Also challenged the City's criteria for determining/judging whether such fees were **reasonable**.
- The Supreme Court, in reversing the trail court's pre-trial motions that (1) the park improvement fee was valid, and (2) the advance collection of a water connection fee was impermissible, stated that its previous decisions in *Call v. West Jordan* **"[left] open the question of the reasonableness of any individual fee charged or land dedication required" and that "this question of reasonableness must be resolved on the facts in each particular case."**

Banberry: The Holding

"To comply with the standard of reasonableness, a municipal fee related to services like water and sewer must not require newly developed properties to bear more than their ***equitable share of the capital costs in relation to benefits conferred****. To determine the equitable share of the capital costs to be borne by newly developed properties, a municipality should determine the relative burdens previously borne and yet to be borne by those properties in comparison with the other properties in the municipality as a whole;* ***the fee in question should not exceed the amount sufficient to equalize the relative burdens of newly developed and other properties.****"*

Banberry Development Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981).

Banberry: The Seven Factors

- To simplify this analysis even further, the Court articulated seven factors that are "among the most important factors the municipality should consider in determining the relative burden already and yet to be borne by newly developed properties and other properties…."

1. The **cost of existing** capital facilities.
2. The **manner of financing existing capital facilities** (such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants).
3. The relative extent to which the newly developed properties and other properties in the municipality have **already contributed** to the cost of existing capital facilities (by such means as user charges, special assessments, or payment from the proceeds of general taxes).
4. The relative extent to which the newly developed properties and the other properties in the municipality **will contribute** to the cost of existing capital facilities in the future.
5. The extent to which the newly developed properties are **entitled to a credit** because the municipality is requiring their developers or owners (by contractual arrangement or otherwise) to provide common facilities (inside or outside the proposed development) that have been provided by the municipality and financed through general taxation or other means (apart from user charges) in other parts of the municipality.
6. **Extraordinary costs**, if any, in servicing the newly developed properties.
7. The **time-price differential** inherent in fair comparisons of amounts paid at different times.

Banberry: Conclusions

- In *Banberry*, the court draws the conclusion that in the context of monetary exactions, **"reasonableness" is not measured in the traditional land-use test of "rational basis" or "reasonably debatable."** Rather, "*reasonableness obviously holds the municipality to a higher standard of rationality than the requirement that its actions not be arbitrary or capricious*."
- *Banberry*, with very little of the theater and to-do of its predecessor *Call*, not only re-affirmed the ability of local governments to impose subdivision fees as a pre-condition to development, but also **established workable and clear guardrails for local governments to impose *reasonable* fees** within their jurisdictions.

IMPACT FEES ACT

- Introduced in 1994.
- Codified as Utah Code Ann. § 11-36a-101, *et seq.*
- In terms of legislation, the Impact Fees Act is actually pretty simple:
  - Title & Definitions (Part 1)
  - Scope of Impact Fees (Part 2)
  - How to Establish an Impact Fee (Part 3)
  - How to adopt (enact) an Impact Fee (Part 4)
  - Notice requirements (Part 5)
  - Using Impact Fee Proceeds (Part 6)
  - Challenging Impact Fees (Part 7)

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IMPACT FEES DEFINED

WHAT IT IS

A payment of money imposed upon new development activity as a condition of development approval (a.k.a. “exaction”) to mitigate the impact of the new development on public infrastructure.

WHAT IT IS NOT

A tax, a special assessment, a building permit fee, a hookup fee, a fee for project improvements or other reasonable permit or application fee. It is not a revenue measure designed to increase Government’s general funds.

IMPACT FEES ACT – Useful Definitions

Development Activity. This term helps define the types of development for which an impact fee may be imposed. It includes "**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.**" However, "development activity that consists of the construction of an internal accessory dwelling unit" is exempted from the imposition of impact fees. This exception for internal accessory dwelling units is only one example where impact fees are not imposed on development activity.

Enactment. This term is used to define the formal adoption of an impact fee for a local government. For Cities and Counties, the **"enactment" is synonymous with ordinance**. Part 4 of the Impact Fees Act highlights some of the necessary language for enactments and provides additional guidance on addressing matters such as the service areas subject to the fee, exemptions, how fees were calculated, dealing with credits, and impact fees and schools.

IMPACT FEES ACT – Useful Definitions

Impact Fee Analysis (IFA). This is the written analysis that is required to be prepared prior to the enacting of an impact fee by a local government. The impact fee analysis provides, among other things, a **detailed review of the impacts of anticipated development activity on public facilities while analyzing what improvements need to be made to those public facilities in order to maintain an established level of service**. The impact fee analysis is generally prepared by an outside firm/agency and the costs of that preparation may be included in the calculation of impact fees.

Impact Fee Facilities Plan (IFFP). Like the impact fee analysis, the impact fee facilities plan must be completed before imposing an impact fee. The impact fee facilities plan must include, among other things, an identification of the existing **level of service** for public facilities; establish a **proposed level of service**; identify excess capacity that can be used to accommodate future growth; identify **future demands on public facilities from new development activity**; and identify the means by which the local government will meet those growth demands. In addition, the impact fee facilities plan must generally consider the financing mechanisms and revenue sources for financing improvements to applicable public facilities.

IMPACT FEES ACT – Useful Definitions

Local Political Subdivision. This term defines the types of local governments that may impose impact fees and includes counties, municipalities (cities and towns), local districts, special districts, special service districts, and the Point of the Mountain State Land Authority.

Project Improvements. These include improvements that are "necessary for the use and convenience of the occupants or users of development resulting from a development activity." Project improvements are distinguishable from "system improvements" (defined below) in that they only service individual neighborhoods and not the community at large. For example, a sewer trunk line that runs down a collector or arterial road may be considered a "system improvement" if it services multiple neighborhoods. Project improvements are not included in the impact fee analysis.

IMPACT FEES ACT – Useful Definitions

Public Facilities. This term defines, and by definition limits, the types of facilities for which a local government may charge impact fees. Such facilities must have a useful life of ten years or more and include: (1) **water** rights and water supply, treatment, storage, and distribution facilities; (2) **wastewater** collection and treatment facilities; (3) **storm water,** drainage, and flood control facilities; (4) municipal **power** facilities; (5) **roadway** facilities; (6) **parks**, recreation facilities, open space, and trails; (7) public safety facilities; (8) **environmental** mitigation; and (9) municipal **natural gas** facilities.

Roadway Facilities. These are facilities for which an impact fee may be collected and may include, if identified in the impact fee facilities plan for the established level of service, "all necessary appurtenances." Appurtenances may include curb-adjacent sidewalk, streetlights, traffic signals, and signs (among other things).

IMPACT FEES ACT – Useful Definitions

Service Area. A service area is a geographic boundary in which one or more public facilities provide services within that area. There may be one or more service areas within the jurisdiction of a local government. There need not be the same number of service areas for different types of public facilities. For example, a water system may have multiple service areas (to account for topography or specialized factors) while the roadway system may have just one service area for the same local government. Each enactment must provide a description of the service area or areas for which an impact fee is imposed. The Impact Fees Act refers to "sound planning or engineering principles" to help local governments establish what their service area or areas should be.

System Improvements. These are distinguishable from project improvements, in that they are **defined in an impact fee analysis and designed to provide services to the community at large**. Impact fees collected by a local government should only reflect the cost of system improvements that are projected to be incurred or encumbered within six years after the day on which the impact fee for those improvements is paid.

IMPACT FEES ACT – Scope

- **Who may impose impact fees?**
  - Counties
  - Municipalities (cities and towns)
  - Local Districts
  - Special Districts
  - Special Service Districts
  - Point of the Mountain State Land Authority)

IMPACT FEES ACT – Scope

- **What can impact fees be collected for?**
  - Public Facilities (as defined in Utah Code Ann. 11-36a-102(17))

- **What limitations Exist on the collection of Impact Fees?**
  - No impact fees to cure existing deficiencies in a public facility
  - Raise the established level of service in a public facility
  - Recoup more than the local political subdivision's actual cost for excess capacity in an existing system improvement.

IMPACT FEES ACT – Scope

- **Prohibited Parties from whom impact fees may not be collected:**
  - Residential components of development to pay for a fire suppression vehicle
  - School district or charter school for a park, recreation facility, open space, or trail.
  - School district or charter school (unless the school's development activity results in need for additional system improvements and the fee is only imposed to cover the schools proportionate share).
  - If the development activity is for a law enforcement facility, no fee may be collected from the Utah National Guard, the Highway Patrol, or a state institution of higher education that has its own police.
  - Development activity on fair park land
  - Development activity for an internal accessory dwelling unit.

IMPACT FEES ACT – Schools

- Local political subdivisions **<u>may not</u>** impose impact fees on school related development activity under the following circumstances:
    - the development activity is designed to replace one school with another (same or different locations);
    - the school related development activity creates no increased demand for public facilities; and
    - the new and replacement schools are located within the same boundary of the local government.
- If the new school *does* create increased demands for public facilities above what the previous school required, then any impact fees imposed by the local government for the school related development activity shall only be based on the need the new school creates above the existing demand of the old school.

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IMPACT FEES ACT – Internal ADUs

- HB 82 (2021) permitted Internal ADUs in any area primarily zoned for residential use (with minor exception and conditions).
- HB 82 also amended the Impact Fees Act to prohibit the collection of impact fees for Internal ADUs.
- While not explicitly addressed within the Impact Fees Act, it stands to reason that this prohibition is applicable to construction of an Internal ADU within a new primary structure (new construction), as well as for the construction of an internal accessory dwelling unit within an existing primary structure.

IMPACT FEES ACT – External ADUs

- In the collective light of the Impact Fees Act and the provisions of Utah Code Ann. § 10-9a-530 regarding internal accessory dwelling units, it arguable whether local governments may impose impact fees for external (detached) accessory dwelling units where such uses are permitted or conditional.
- If a local government chooses to do so, it should first assess the actual impacts of such uses and incorporate those findings into the impact fee facilities plan and impact fee analysis for the respective public facilities.
- NOTE ON STUDYING ADU IMPACTS: IFFPs/IFAs makes data-backed assumptions that are applied broadly to defined types of new development activity. A study of the impacts of an 800sq/ft external ADU with an accompanying 1200sq/ft primary structure could potentially reveal that the combined impact of the external ADU with its primary structure on a public facility is actually LOWER than a similarly sized (2000sq/ft) single-family home on its own.

IMPACT FEES ACT – Establishment

- Before imposing an impact fee, each local political subdivision must prepare an IFFP to determine what public facilities are needed to serve new development.
- If the components of the IFFP are included in the general plan, no separate IFFP is needed.
- Also, if the local political subdivision has a population, or serves a population of less than 5,000 and charges impact fees of less than $250,000 annually, no IFFP is required. However, any impact fees that are imposed must be reasonable (in compliance with the Impact Fees Act) and comply with all notice requirements.

IMPACT FEES ACT – Components of IFFP

- For political subdivisions required to prepare an IFFP, the IFFP must:
  - Identify the existing level of service
  - Establish a proposed level of service (can't exceed existing except under certain circumstances)
  - Identify excess capacity to accommodate future growth at the proposed level of service
  - Identify demands placed upon existing public facilities by new development activity at the proposed level of service.
  - Identify the means by which the political subdivision or private entity will meet those growing demands.
  - Consider all revenue sources to finance the impact on system improvements (including grants, bonds, interfund loans, impact fees, anticipated dedications of system improvements).
  - Include a public facility for which an impact fee may be charged or required for a planned school district or charter school if the location of the school is made known either through the planning process or the school district request that the public facility be included in the impact fee facilities plan.
  - Certification of IFFP

IMPACT FEES ACT – Components of IFA

- Prior to adopting an Impact Fee, each political subdivision shall prepare an IFA that:
  - Identifies the **impact anticipated development activity will have** on any existing capacity of a public facility.
  - Identifies the impact **anticipated impact on system improvements** required by the anticipated development activity to **maintain the level of service** for each public facility.
  - Describes how the **impacts** from anticipated development activity are **reasonably related to that anticipated development activity**.
  - Estimates the **proportionate share of costs** for existing capacity that will be recouped and the costs of impacts on system improvements that are reasonably related to new development.
  - **Identifies how the impact fee was calculated**.
    - Costs that may be included:
      - The construction contract price
      - Cost of acquiring land, improvements, materials, and fixtures
      - Construction related services that are tied directly to the system improvements including the costs for planning, surveying, and engineering fees.
      - For a political subdivision, debt service charges, if the political subdivision might use impact fees as a revenue stream to pay the principal and interest on bonds, notes, or other obligations issue to finance the costs of the system improvements.
      - Expenses for overhead.
  - **Certification** of the IFA.

IMPACT FEES ACT – Enactment

- In order to make effective the impact fees identified in the IFA and as supported by the IFFP, a local political subdivision or private entity must adopt an impact fee enactment.
- An impact fee enactment may **not adopt an impact fee that exceeds the highest justified fee of the IFA** and the impact fees adopted by the enactment **may not take effect until 90 days after** the day on which the enactment is approved.
- Notwithstanding, if the proposed impact fees are lower than the current impact fees, a local government may reduce the current impact fees being imposed until the effective date of the new enactment.

IMPACT FEES ACT – Enactment

- The following **must** be included in the Enactment:
  - The **service area** within which impact fees will be imposed and for what types of land use categories they apply;
  - A **schedule of impact fees** that specifies the amount of the impact fee for each type of system improvement;
  - The **formula used to calculate each impact fee**;
  - A provision allowing an **adjustment to the standard impact fee to account for unusual circumstances** or a request for an individualized assessment by a school district or charter school.
  - A provision allowing for the **adjustment of the impact fee based upon studies and data** submitted by the developer.
  - A provision allowing for **credits** to be applied by developers, school districts, and charter schools if any of those dedicate land for system improvements, build and dedicate some or all of the system improvement, or provide additional capacity in any system improvement.
  - A provision requiring **credits** against impact fees for dedications of land to the public or construction of system improvements that **offset the need for an identified system improvement**.

IMPACT FEES ACT – Enactment

- The following **may** be included in the Enactment:
  - A provision that provides an **exemption** for:
    - Development activity attributable to low-income housing, the state, a school district, or a charter school; OR
    - Other development activity with a broad public purpose.
  - A provision that establishes **other sources of funds to pay for development** activity.

IMPACT FEES ACT – Notice Requirements

- The Impact Fees Act sets forth strict notice requirements for different components of the impact fee establishment and enactment process.
- Those notice requirements are broken down as follows:
  - Notice of Intent to Prepare an IFFP
  - Notice of Intent to Adopt or Amend an IFFP
  - Notice of Intent to Prepare an IFA
  - Notice of Intent to Adopt an Impact Fee Enactment

IMPACT FEES ACT – Notice Requirements

- Notice of Intent to PREPARE an IFFP
  - For at least **10 days before actually amending an existing IFFP** or creating a new IFFP, each local government must provide written notice of its intent to do so.
  - The notice of intent for the IFFP must indicate two things: (1) that the local government intends to create a new, or otherwise amend an existing, IFFP; and (2) show the geographic area where the proposed facilities will be located.
  - The Notice of Intent to Prepare an IFFP must be noticed up as a **class A notice under Utah Code Ann. § 63G-30-102 for at least 10 days before contracting to prepare the IFFP**.

IMPACT FEES ACT – Notice Requirements

- Notice of Intent to ADOPT or AMEND an IFFP
  - Once the new/amended IFFP is prepared, a local government must provide public notice at least **10 days before the day on which the public hearing is scheduled** to take public comment on the IFFP.
  - The notice must be **mailed to each affected entity at least 10 calendar days before** the day of the public hearing and treated as a "**Class B Notice**" in compliance with UTAH CODE ANN. § 63G-30-102 for at least 10 days before the public hearing.
  - A copy of the IFFP and a summary designed to be understood by a lay person should be **made available to the public and should be included within each public library within the local government's jurisdiction**.

IMPACT FEES ACT – Notice Requirements

- <u>Notice of Intent to PREPARE an IFA</u>
  - Just as with an IFFP, each local government must provide notice of its intent to prepare (or of its intent to contract to prepare) an IFA prior to actually doing so.
  - The notice of intent to prepare an IFA should follow the notice requirements of **"Class A Notices" under Utah Code Ann.§ 63G-30-102 for at least 10 days** before contracting to prepare the IFA.
  - Unlike the notice requirements for an IFFP, however, the Impact Fees Act does not require that additional public notice be provided or that a public hearing be held for adoption of the IFA. However, a **summary of the IFA** designed to be understood by a lay person must still be prepared and be made available for public review by posting it on the local government's website OR providing copies to each public library within the local political subdivision.

IMPACT FEES ACT – Notice Requirements

- Notice of Intent to ADOPT an Impact Fee Enactment
  - Once an IFFP and IFA have been prepared, a local government may notice up its intent to adopt an impact fee enactment. As with the public notice and public hearing requirements for an IFFP, the notice and hearing requirements for an impact fee enactment are **treated as a "land-use regulation"** for municipalities and counties (although no planning commission involvement is required).
  - Just as with an IFFP, a local government must **make a copy of the enactment publicly available at least 10 days before** the day on which the public hearing is to be held to take public comment on the enactment.
  - The notice must also include: (1) a statement regarding the local government's intent to enact (or otherwise modify) a specific type of impact fee; (2) contain the date, time, and place of the public hearing and public meeting where the enactment will be discussed; and (3) be mailed to each affected entity at least 10 days before the public hearing.
  - The Notice must also be posted as a **"Class A Notice"** in compliance with UTAH CODE ANN. § 63G-30-102 for at least 10 days before the public hearing.
  - A local government may decide to adopt the enactment on the same day the public hearing is held. However, an enactment of an impact fee is not effective for 90 days after the day on which it is adopted by the local government. **The public hearings for an enactment may also be held the same night as the public hearings for the adoption of an IFFP.**

IMPACT FEES ACT – Proceeds

- **Accounting** – Political subdivisions must create unique and separate interest-bearing accounts for each type of impact fee that is collected. Additionally, each deposit must be accompanied by a receipt that shows the source and amount of the impact fee(s) paid; the date on which the fees were paid; the project from which they were collected; the name and address of the individual paying the fees.
- **Expenditure** – Impact Fees collected by a political subdivision may only be spent or encumbered for a specific public facility for which the fee was collected. Must occur within six years after collection.
- **Refunds** – If not spent or encumbered within six years, the political subdivision must refund the impact fees to the “original owner” or “claimant(s)”

IMPACT FEES ACT – Challenges

- **<u>Who can bring a challenge</u>** – Any person or entity residing in or owning property within a service area, or an association representing the interest of persons or entities owning property within a service area.
- **<u>What types of challenges</u>**
  - **Notice Challenge (30 days after payment)** – challenge to political subdivisions strict adherence to notice requirements. Sole remedy is equitable and requires government to fix defective notice.
  - **Procedural Challenge (180 days after payment)** – challenge to political subdivisions failure to follow procedures with exactness. If successful, government may only charge impact fees that were appropriately enacted.
  - **Impact Fee Challenge (One year after payment)** – challenge to the impact fee itself (i.e. dispute regarding the methodology of the IFFP/IFA, the calculation of the fees, etc.). Remedy is a refund of the delta between the improper fee and the correct fee.
  - **Impermissible/Untimely Expenditure (One or Two year after Six-Year Period)** – challenge to whether the political subdivision spent the impact fees on property public facilities (one year after six-year period); or challenge to whether the political subdivision spent or encumbered the collected fees within six years of collecting (two year after six-year period).

IMPACT FEES ACT – Challenge Procedure

- The Impact Fees Act contemplates **administrative** and **judicial** processes for addressing challenges to impact fees.
- A local government may adopt, by ordinance or resolution, administrative procedures by which a challenge to an impact fee are to be handled.
- The scope and process by which an administrative challenge are to be handled is not detailed in the Impact Fees Act other than a strict requirement that local governments make their decisions within 30 days after the day on which the administrative challenge is filed.
- If a local government elects to adopt an administrative procedure, it is suggested that the local government also implement a form that is required to be filled out by a claimant and that details what information is needed to administratively process the challenge.
- Notwithstanding a local government's adoption of an administrative challenge process, a **claimant may bring a challenge in any Utah State District Court having proper jurisdiction prior to exhausting any of the local government's administrative processes**.
- Reasonable attorney fees and costs may be awarded to the prevailing party in an action challenging impact fees.

IMPACT FEE CASES – Honorable Mentions

- B.A.M. Development, L.L.C. v. Salt Lake County
- Gardner v. Board of County Com'rs of Wasatch County
- Board of Trustees of Washington County Water Conservancy Dist. v. Keystone Conversions, LLC
- Board of Educ. of Jordan School Dist. v. Sandy City Corp.
- Home Builders Ass'n of Utah v. City of American Fork
- Patterson v. Alpine City
- Alpine Homes, Inc. v. City of West Jordan
- Washington Townhomes, LLC v. Washington County Water Conservancy District

QUESTIONS?

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