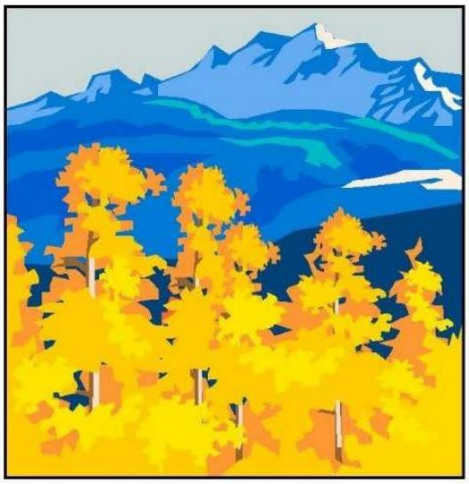

THE UTAH LAND USE INSTITUTE

IMPACT FEES

Utah Land Use Regulation Topical Series

Chase Andrizzi, Author

October 2023

Funding for these materials is provided by the Utah Department of Workforce Services, Division of Housing and Community Development. The Office of the Property Rights Ombudsman has also provided funding for this training program from the 1% surcharge on all building permits in the State of Utah. The Utah Land Use Institute deeply appreciates the ongoing support of the S. J. and Jessie E. Quinney Foundation and Salt Lake County.

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TABLE OF CONTENTS

IMPACT FEES

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October 2023

INTRODUCTION

Local governments in Utah have long collected fees from new development in an attempt to offset the impacts associated with new growth. In doing so, they have garnered the criticism of developers and – as reflected in the host of cases addressed in more detail in this publication – fought off legal disputes which sought to challenge the reasonableness of such fees and the underlying authority of local governments to impose them.[3] In the wake of such criticisms and legal battles, or perhaps in spite of them, the Utah legislature adopted the Impact Fees Act[4] to shore up the authority of local governments to impose such fees while also providing clarity on how they were to be calculated, implemented, and used.

This publication is designed to explain historic state and federal case law that laid the foundation for the Impact Fees Act (Chapter 1); grasp the scope and applicability of the Impact Fees Act through a brief study of a some of its important terms and provisions (Chapter 2); and study some of the relevant Utah Case Law that came in the wake of the Impact Fees Act (Chapter 3). In addition, this publication includes helpful guides for elected officials and local governments who may find themselves tasked with adopting and implementing impact fees in their jurisdiction (Chapter 4) and a brief summary of some of the relevant pre- and post-Impact Fees Act case law (Chapter 5).

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[2] The Office of the Property Rights Ombudsman has provided funding for this book from the 1% surcharge on all building permits in the State of Utha. Appreciation is also expressed to the Division of Housing and Community Development of the Department of Workforce Services for funding the project which produces these topical summaries of land use regulations. The Utah Land Use Institute also expresses continuing appreciation for the ongoing funding provided by the S. J. and Jessie E. Quinney Foundation and the Dentons Law Firm.

[3] See *Banberry Development Corp. v. South Jordan City*, 631 P.2d 899, 902 ("The courts of this state and others have approved the legality of such 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.")

[4] Codified as UTAH CODE ANN. § 11-36a-101 *et seq*.

CHAPTER 1: PRE- IMPACT FEES ACT FRAMEWORK

Impact Fees are, by definition, a form of exaction.[5] A development exaction is a mandatory contribution of land, improvements, or fees to a governmental entity as a condition precedent for development approval.[6] Exactions are usually imposed by a governmental entity prior to the issuance of a building permit or zoning/subdivision approval.[7] Governmental exactions are permitted so long as they meet certain standards that are designed to protect constitutional rights of landowners.

Prior to the Impact Fees Act, it was not uncommon for local governments in Utah to impose exactions of money or land as a condition of development approval. And while such fees were generally viewed as permissible[8], local governments' implementation and application of those fees were far from harmonious.[9] In an attempt to combat the inconsistent, and oftentimes unreasonable, application of development exactions the Utah Supreme Court created certain parameters for local governments to equitably distribute capital costs attributable to new growth in light of the burden borne by previous development.[10] As later established by the United States Supreme Court, such governmental exactions were required to identify an "essential nexus" between the exaction and a legitimate state interest.[11] Additionally, the exaction needed to be "roughly proportionate" in nature and scope to the impact of the proposed development activity.[12]

These general parameters and requirements are set forth in a number of landmark United States Supreme Court and Utah cases, and they have also been adopted by the Utah Legislature for municipalities[13] and counties[14]. To better understand them and their role in paving the way for the Impact Fees Act, a thorough review of a few of these cases is warranted.

A. Seminal Utah Case Law: *Call* and *Banberry*.

As discussed previously, prior to the adoption of the Utah Impact Fees Act, local governments in Utah implemented and applied development exactions in a broad, incongruent, and often unreasonable way. Two challenges to such development exactions have significantly shaped the Impact Fees Act as we know it today. The first, *Call v. City of West Jordan*, highlights a 13-year legal battle which ultimately confirmed a local government's authority to impose certain development exaction requirements[15] and the process by which those are to be implemented.[16] The second, and often viewed as the more significant

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[5] See UTAH CODE ANN. § 11-36a-102(9) (2022) "Impact Fees are 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.'"

[6] *Salt Lake County v. Board of Educ*., 808 P.2d 1056, 1058 (Utah 1991).

[7] *Id.*

[8] See generally, *Call v. City of West Jordan*, 614 P.2d 1257, 1258 (Utah 1980) (Call II) (holding that the dedication requirements were constitutional on their face). See also *Home Builders Ass'n. of Greater Salt Lake v. Provo City*, 503 P.2d 451, 453 (Utah 1972) (finding that a fee that does not amount to a revenue measure, but is instead a charge for a service rendered, which is not on its face constitutionally impermissible).

[9] Compare *Call v. City of West Jordan*, 727 P.2d 180 (Utah 1986) (Call III) (finding generally that the City applied the dedication requirement ordinance correctly as to Call); *Lafferty v. Payson City*, 642 P.2d 376 (UT 1986) (The fees were un-reasonable 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.")

[10] See generally, *Banberry Development Corp. v. South Jordan City*, 631 P.2d 899, 902 (Utah 1981).

[11] See *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987)

[12] *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994)

[13] UTAH CODE ANN. § 10-9a-508.

[14] UTAH CODE ANN. § 17-27a-507.

[15] See generally *Call v. City of West Jordan*, 614 P.2d 1257 (Utah 1980) (Call II); see also *Call v. City of West Jordan*, 727 P.2d 180 (Utah 1986) (Call III).

[16] See generally *Call v. City of West Jordan*, 788 P.2d 1049 (Utah App. 1990) (Call IV).

of the two, *Banberry Development Corp. v. South Jordan City*, established seven factors that local governments should use to test the reasonableness of development exactions.

1. The Thirteen Year Saga of *Call v. City of West Jordan*

In 1975, West Jordan City passed an ordinance that required subdividers to dedicate seven percent of the proposed subdivision to the City "for the benefit and use of the citizens of the City of West Jordan…or in the alternative…the City may accept the equivalent value of the land in cash…."[17] John Call and Clark Jenkins initiated this action to challenge the City's ordinance on grounds that: (1) requiring such a dedication was not within the City's granted powers; (2) the dedication was not to the benefit of the subdivision, but rather the entire City; (3) the dedication amounted to an unlawful exercise of eminent domain power without just compensation; and (4) the ordinance unlawfully imposed a tax.

In Call I, the first of four cases in the same matter, the Utah Supreme Court ruled that: (1) the City's ordinance was "within the scope of authority and responsibility of the city government in the promotion of the health, safety, morals, and general welfare of the community;"[18] (2) the purpose of the ordinance was to benefit the subdivision *and* the general welfare of the entire community;[19] (3) the pre-requisite of dedicating property is not a taking because the City has not compelled the subdivider to develop his property; and (4) the ordinance, which the court viewed as being "reasonably designed and carried out for the purpose intended"[20], was not a prohibited tax. Despite rejecting each of Call's arguments in this case, the Court remanded the matter back to the trial court to consider whether other sums paid by Call to the City exceeded the amount he was lawfully required to pay or dedicate to the City under the Ordinance.

Emboldened by the dissent in Call I, or perhaps due to obvious frustration with the holding of the majority, Call petitioned the Utah Supreme Court for a rehearing on whether the ordinance was constitutional on its face and as applied. On rehearing, the Court in Call II held that "the rule adopted by this Court in Call I…cannot be applied without plaintiffs being given the opportunity to present evidence to show that the dedication required of them had no reasonable relationship to the needs for flood control or parks and recreation facilities created by their subdivision…."[21] Accordingly, the Court in Call II found that the ordinance was constitutional on its face but that the trial court should hear evidence from Call to determine whether the ordinance was appropriately applied.

With clear direction from the Utah Supreme Court in back-to-back hearings, the trial court dismissed Call's case after he amended his complaint to include a claim that the City failed to follow statutory requirements when it enacted the ordinance at issue. Call appealed to the Supreme Court for a third time. In Call III, the Utah Supreme Court held that because the ordinance was passed without a validly noticed public hearing, it was invalid and void *ab initio* (from its inception). The case was again remanded to the trial court with direction to enter judgment for Call with his costs being awarded.

But wait, there's more. Dissatisfied with the trial court's refusal to grant certain motions, Call (for a fourth time) appeals the trial court's ruling in this matter. At issue in Call IV were the trial court's refusal to grant call: (1) entry of judgment on a § 1983 civil rights claim; (2) attorney's fees; (3) joinder of other subdividers as parties; and (4) costs.[22] The appeals court affirmed the trial court's ruling (the reasons for which are of little value to this text, or the substantive matters described herein).

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[17] *Call v. City of West Jordan*, 606 P.2d 217, 218 (Utah 1979) (Call I).

[18] *Id.* at 219

[19] *Id.* at 220 (stating that "it is so plain as to hardly require expression that if the purpose of the ordinance is properly carried out, it will redound to the benefit of the subdivision as well as to the general welfare of the whole community")

[20] *Id.* at 221

[21] *Call v. City of West Jordan*, 614 P.2d 1257, 1259 (Utah 1980) (Call II).

[22] *Call v. City of West Jordan*, 788 P.2d 1049, 1050 (Utah App. 1990) (Call IV).

In summary, 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 development impact fees.

2. The *Banberry* Reasonableness Factors

In 1981, after having had heard and ruled on Call I-II, the Utah Supreme Court decided the landmark case of *Banberry Development v. South Jordan City*. In this case, a group of developers challenged the City's authority to impose, as a condition of development, water connection and park improvement fees. Specifically, the developers contested the City's authority to impose such fees and, if they were in fact authorized to impose such fees, the criteria for judging their reasonableness.[23]

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."[24] In order to guide the trial court on determining whether such the water connection fee and park improvement fee were reasonable, the Court provided the following direction:

> *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.*[25]

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…."[26] The factors are:

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.

[23] *Banberry Development Corporation v. South Jordan City*, 631 P.2d 899 (Utah 1981)

[24] *Id.* at 901.

[25] *Id.* at 903.

[26] *Id.* at 903-04

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.[27]

Although the court articulated these seven factors in describing the analysis that should accompany the determination of reasonableness for water connection fees, it also stated that "the factors to be considered in the determination of relative burden [for park improvement fees] are similar to the factors discussed in…connection with water connection fees."[28]

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."[29]

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.

B. United States Supreme Court Cases: Essential Nexus, Rough Proportionality, Payments of Money

1. *Nollan v. California Coastal Commission*: Essential Nexus Required

In 1982, James and Marilyn Nollan applied to the California Coastal Commission for a coastal development permit which would allow the Nollans to demolish a bungalow on the property that they had been renting and replace it with a larger and more modern home. The Nollan's bungalow was located on the beach in Ventura County, California and was walking distance from parks to the north and south. The California Coastal Commission approved the Nollan's application but required, as a condition of that approval, that the Nollan's grant an easement to allow the public access over a portion of the Nollan's property to make it simpler for the public to travel from one park to the other. The Nollans protested the Commission's condition that they include the easement and eventually sought relief from the California state courts on the matter. The issue of the easement condition bounced around the State Courts for a few years where the matter was twice sent back to the California Coastal Commission for reconsideration. Eventually, the Nollans appealed their constitutional takings claim to the United States Supreme Court.

The California Coastal Commission's primary argument at the United States Supreme Court rested on the premise that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."[30] Stated differently: if the Commission were to refuse the permit because granting the permit would have otherwise prohibited or impaired public "access" to the beach (a governmental interest in the

[27] *Id.* at 904

[28] *Id.* at 905.

[29] *Id*.

[30] *Nollan v. California Coastal Commission*, 483 U.S. 825, 836 (1987).

Commission's mind), a condition of approval that mitigated that same negative impact (and furthered the governmental interest) should be permissible. The United States Supreme Court (mostly) agreed. However, the United States Supreme Court also stated that "the evident constitutional propriety [of the condition] disappears…if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[31] In other words, "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"[32] In lay terms: if the reason for denying the permit does not *justify* the governmental interest, then the condition replacing that denial also fails.

In summary, the Commission's comprehensive plan to provide publicly accessible beaches was arguably a legitimate governmental interest.[33] Accordingly, an *appropriate* exercise of police power in relation to that interest would be permissible. What was not permissible, however, was the Commission's conditional approval which would have required the Nollan's to grant a public access easement over their property. The condition did not, at least in the United States Supreme Court's eyes, further the Commission's stated governmental interest of providing publicly accessible beaches.[34]

2. *Dolan v. City of Tigar*d: Rough Proportionality in Nature and Extent

Florence Dolan owned a plumbing and electric supply store in Tigard, Oregon. Dolan applied to the City for a permit to re-develop her property by demolishing, in sections, the existing building and re-building the store on a separate phase of the site. In addition, Dolan planned on paving parking spaces for the new construction (which was an improvement from the previous gravel parking lot). The City's planning commission approved Dolan's application with two conditions (which conditions were based upon existing and codified city development standards). First, the Tigard planning commission required Dolan to dedicate a portion of her property for improvement of a storm drain system as her property was partially located within an existing floodplain. Second, the Tigard planning commission required that Dolan also dedicate a 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. These dedication requirements encompassed approximately 7,000 square feet (or 10% of the total property).

As to the pedestrian/bicycle pathway requirement, the planning commission justified the condition by finding that certain customers of Dolan's store would potentially use the bike path and that creation of the bike path could offset some of the traffic demand on nearby streets and thereby mitigate traffic congestion in the area. Additionally, the planning commission concluded that the floodplain dedication was reasonably related to the impact caused by Dolan in increasing the impervious surface area of the site as a result of the proposed development.

Dolan appealed the City's decision up through the state Land Use Board of Appeals, the Oregon Court of Appeals, and the Oregon Supreme Court (each of which affirmed the City's findings and conclusions). Dolan appealed to the United States Supreme Court which, recognizing that there was inconsistency in the State's application of *Nollan* to the present case, took the matter up on appeal. The United States Supreme Court 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."[35]

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[31] *Id*. at 837.

[32] *Id*. At 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981))

[33] *Id.* at 841 ("The Commission may well be right that [preserving beach access] is a good idea.")

[34] *Id.* at 838 ("It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacle to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them.")

[35] *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994)

Accordingly, the Supreme Court analyzed what many other state courts coined the "reasonable relationship" test. The Court stated:

> *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.*[36]

The *Dolan* court, however, argued that the term "reasonable relationship" carried too much similarity to the term "rational basis" and, as a result, chose the term "rough proportionality" to "encapsulate what [it] hold[s] to be the requirement of the fifth amendment."[37] With this standard, however, "[n]o precise mathematical calculation is required, but the City must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[38]

Relying upon the "rough proportionality" standard, the Court concluded that "the findings upon which the city relied do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building."[39] Additionally, the Court found that "the City ha[d] not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate[d] to the city's requirement for a dedication of the pedestrian/bicycle pathway easement." Accordingly, the City's objectives of mitigating floodplain damage and reducing traffic congestion, while admirable, were not sufficiently connected (a.k.a. roughly proportionate) to the impact of the proposed development and, as such, constituted an "unconstitutional condition" in violation of the Fifth Amendment to the United States Constitution as applied to her through the states under the fourteenth amendment.

3. *Koontz v. St. Johns River Water Mngmt District*: Monetary Exactions Subject to Nollan/Dolan[40]

In 1972, Coy Koontz purchased approximately 15 acres of wetlands near Orlando, Florida. That same year, the State of Florida passed legislation that created five water management districts which were tasked with regulating construction that impacted the state's water. Accordingly, any development on Koontz's property would be subject to review and approval by one of these water management districts; in this case, the St. John's River Water Management District.

In 1994, Koontz submitted a permit application to the St. Johns River Water Management District for permission to develop 3.7 acres of his nearly 15-acre site. As part of his application to the District, and in acknowledgement of state law (which required developer mitigation of any negative impacts on the water resources of the state), Koontz offered to grant to the District, a conservation easement which would have prohibited future development on the remainder of his property. The District refused his offer and instead provided Koontz with two options. First, the District told Koontz he could reduce the size of his development (from 3.7 acres, down to one acre) and grant a conservation easement over the remainder of the land (13.9 acres). Alternatively, the District offered Koontz the option to develop his property as

[36] *Id.* at 390 (quoting *Simpson v. North Platte*, 206 Neb. 240, 245, 292 N.W.2d 297, 301 (1980)).

[37] *Id.* at 391.

[38] *Id*.

[39] *Id.* at 395.

[40] Although decided in 2013 (after the Utah Impact Fees Act was adopted), *Koontz* plays a pivotal role in shaping and understanding the authority of local governments to collect monies as a form of exaction and in lieu of land dedication or improvements. In this sense, Koontz supports a local government's authority to exact impact fees from developers as a condition of development approval.

proposed (3.9 acres) so long as he granted the conservation easement over the rest of the site *and* paid to make improvements to District-owned wetlands.

Koontz sued the District, arguing that their conditions were unconstitutional and violated the standards set forth in *Nollan/Dolan*. The state trial and appellate courts agreed with Koontz and ruled that the District's conditions violated the "nexus" and "rough proportionality" components of *Nollan/Dolan*. The Florida State Supreme Court, however, reversed the previous decision on grounds that: (1) *Nollan/Dolan* did not apply because the District *denied* Koontz's application; and (2) a demand (a.k.a. "condition of approval") for money does not give rise to a claim under *Nollan/Dolan*.

The United States Supreme Court reversed the State Supreme Court's decision on two specific grounds. First, the US Supreme Court held that the "nexus" and "rough proportionality" requirements of *Nollan/Dolan* must be met even though the District denied Koontz's application. Specifically, the Court posited that if *Nollan/Dolan* did not apply to denials, then governments could simply impose their unconstitutional conditions as conditions precedent to permit approvals. On that issue the Court stated that "[i]t is settled that the unconstitutional conditions doctrine applies even when the government threatens to withhold a gratuitous benefit."[41]

Second, the Court held that demands for money, and not just demands for land, are subject to *Nollan/Dolan*. In coming to this holding, the Court concluded that if monetary demands were not subject to the requirements of *Nollan/Dolan*, then governments could simply condition land use approvals on the payment of money (the value of which could be equivalent to, or even greater than, an alternative and unconstitutional demand for land) and thereby circumvent *Nollan/Dolan*. More specifically, the Court stated:

> *We note as an initial matter that if we accepted this argument, it would be very easy for land-use permitting officials to evade the limitations of Nollan and Dolan. Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value.*[42]

In this light, the Court clarified that *Nollan/Dolan* applies: (1) in cases where the government demands money, in lieu of property, as a condition of land use approval; and (2) when government denies a land-use application.

C. Chapter One Summary

As highlighted in the Utah Supreme Court cases of *Call* and *Banberry* along with the United States Supreme Court cases of *Nollan*, *Dollan*, and *Koontz,* local governments have authority to impose certain requirements as conditions of development approval. Such requirements apply to land use decision whether the local government approves or denies the application. Additionally, such requirements may include demands for payments of money so long as those requirements have an essential nexus between the government interest and the requirement; and the requirements is imposed in a roughly proportionate manner, both in nature and extent, to address the impacts created by the development. The Utah Impact Fees Act of 1995 builds, in part, on the principles found in these cases.

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[41] *Koontz v. St. Johns River Mgmt. Dist.*, 133 W.Ct 2586, 2590 (2013) (citing *United States v. American Library Assn., Inc.*, 539 U.S. 194, 210 (2003))

[42] *Id.* at 2599.

CHAPTER 2: UTAH IMPACT FEES ACT

In 1995, the Utah State Legislature first introduced the Impact Fees Act. As part of the Impact Fees Act, the legislature adopted important definitions, further clarified the scope of local governments to impose impact fees, and detailed important procedures for establishing, adopting ("enacting"), challenging, and using funds generated by impact fees. This Chapter is intended to provide a brief overview of some of those key items and to assist the reader in navigating some of the special provisions of the Impact Fees Act.

A. Important Definitions (see UTAH CODE ANN. § 11-36a-102 for a list of all impact fee definitions)

1. 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."[43] However, "development activity that consists of the construction of an internal accessory dwelling unit" is exempted from the imposition of impact fees.[44] This exception for internal accessory dwelling units is only one example where impact fees are not imposed on development activity. Others are described later in this chapter.

2. 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. A sample enactment is provided in Chapter 4.

3. 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.[45]

4. 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.

5. 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 service districts, and the Point of the Mountain State Land Authority.

[43] UTAH CODE ANN. § 11-36a-102(3).

[44] UTAH CODE ANN. § 11-36a-202(2)(a)(vi). Impact Fees and Internal ADU's are discussed in greater detail in Section E of this Chapter.

[45] UTAH CODE ANN. § 11-36a-305(1)(e).

6. 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."[46] 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.

7. Proportionate Share. This term takes its roots from the "rough proportionality" analysis of *Nollan/Dolan* and *Banberry* as described above in that it defines the "cost of public facility improvements that are roughly proportionate and reasonably related to the demands and needs of any development activity."[47]

8. 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. The collection of impact fees for environmental mitigation is limited in scope and is addressed more clearly in UTAH CODE ANN. § 11-36a-205.

9. 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."[48] Appurtenances may include curb-adjacent sidewalk, streetlights, traffic signals, and signs (among other things).

10. 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. [49] Each enactment must provide a description of the service area or areas for which an impact fee is imposed.

11. System Improvements. These are distinguishable from project improvements (see definition above), 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.

B. What to Do Before Adopting An Impact Fee

The Impact Fees Act provides more guidance on the procedures for establishing an impact fee than it does on actually using the proceeds collected from impact fees. This is perhaps, as highlighted by Call

[46] UTAH CODE ANN. § 11-36a-102(15)(a)(ii).

[47] UTAH CODE ANN. § 11-36a-102(16).

[48] UTAH CODE ANN. § 11-36a-102(19)(a).

[49] The Impact Fees Act refers to "sound planning or engineering principles" to help local governments establish what their service area or areas should be. See UTAH CODE ANN. § 11-36a-102(20)(a).

III,[50] one of the more legitimate bases for challenging an impact fee. Accordingly, it is of substantial importance that local governments strictly follow the procedural requirements for notices, hearings, and preparation of impact fee analyses and impact fee facilities plans prior to enacting any impact fees.

1. Public Notice Requirements.[51]

Prior to preparing an Impact Fee Facilities Plan ("IFFP"), Impact Fee Analysis ("IFA"), or adopting an impact fee enactment, each local government is required to provide certain public notices. Because the notice requirements are different for the IFFP, IFA, and enactment, a brief summary of each is provided below.

a. *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.[52] 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.[53] 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.[54]

b. *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.[55] 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.[56] 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.[57] The public notice requirements for municipalities, counties, and districts are governed by separate statute and are generally treated as a "land-use regulation" for public notice purposes. Notwithstanding the "land-use regulation" nature of public notices for IFFPs, a planning commission is not required to be involved in the IFFP planning and adoption process.

c. *Notice of Intent to Prepare an IFA*

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.[58] The notice of intent to prepare an IFA should

[50] In *Call III* (*Call v. City of West Jordan*, 727 P.2d 180, 183 (Utah 1986)), the Utah Supreme Court ruled that the City's ordinance requiring a dedication of land was void ab initio because the City failed to follow important procedural requirements in passing the ordinance.

[51] Because public notice requirements are ever-changing as technology advances and traditional means of public notice are less efficient, each local government that is providing notice under the Impact Fees Act should consult with its legal counsel (or recorder/clerk/secretary) to ensure that proper public notice is provided.

[52] UTAH CODE ANN. § 11-36a-501(1).

[53] UTAH CODE ANN. § 11-36a-501(2)(a-b).

[54] UTAH CODE ANN. § 11-36a-501(2)(c).

[55] UTAH CODE ANN. § 11-36a-502(1)(a).

[56] UTAH CODE ANN. § 11-36a-502(2)(a).

[57] UTAH CODE ANN. § 11-36a-502(1)(b-c).

[58] See UTAH CODE ANN. § 11-36a-503.

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.[59]

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 impact fee analysis designed to be understood by a lay person must still be prepared and be made available for public review[60] by posting it on the local government's website OR providing copies to each public library within the local political subdivision.[61]

d. *Notice of Intent to adopt an Impact Fee Enactment.*

Once an IFFP and IFA have been *prepared*,[62] 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).[63] Local districts who are intending to adopt an impact fee enactment should follow the notice and hearing requirements of Utah Code Ann. § 17B-1-111.

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.[64] 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[65] 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.[66] The public hearings for an enactment may also be held the same night as the public hearings for the adoption of an IFFP.

[59] UTAH CODE ANN. § 11-36a-503.

[60] *Id*.

[61] UTAH CODE ANN. § 11-36a-504(1)(e).

[62] Note: the IFFP does not need to be ADOPTED prior to the notice for the adoption of an Impact Fee Enactment.

[63] UTAH CODE ANN. § 11-36a-504(a, b).

[64] UTAH CODE ANN. § 11-36a-504(1)(d). This may be achieved by posting a copy of the enactment on the local government's website OR by providing a copy of the proposed enactment in each library within the local governments' jurisdiction.

[65] "Affected Entity" is defined as a "county, municipality, special district, special service district under Title 17D, Chapter 1, Special Service District Act, school district, interlocal cooperation entity established under Title 11, Chapter 13, Interlocal Cooperation Act, specified public utility, property owner, property owners association, or the Department of Transportation if: (a) the entity's services or facilities are likely to require expansion or significant modification because of an intended use of land; (b) the entity has filed with the municipality a copy of the entity's general or long-range plan; or (c) the entity has filed with the municipality a request for notice during the same calendar year and before the municipality provides notice to an affected entity in compliance with a requirement imposed under this chapter. See UTAH CODE ANN. § 10-9a-103(3) (2023).

[66] UTAH CODE ANN. § 11-36a-401(2).

2. Preparation of IFFP and IFA.

a. *The IFFP.*

The IFFP is the local government's resource to: (1) identify the existing level of service for public facilities; (2) establish a proposed level of service; (3) identify excess capacity that can be used to accommodate future growth; (4) identify future demands on public facilities attributable to new developments; and (5) to identify the means by which the local government will meet those growth demands.[67]

Once the public notices of the local government's intent to prepare an IFFP has been sent out (as detailed in the previous section), the IFFP may be prepared. Not all local governments are required to prepare an individual IFFP before enacting an impact fee. Specifically, the two cases in which a local government are exempted from preparing an individual IFFP are: (1) when the local government's general plan contains the IFFP requirements set forth in UTAH CODE ANN. § 11-36a-302;[68] or (2) when the local government has a population of less than 5,000 and charges less than $250,000 annually for impact fees.[69] With option (2), however, such local governments must still provide the necessary notices while also ensuring that any impact fees collected are reasonable and otherwise comply with common law and the Impact Fees Act.[70]

Regarding the identification of a level of service: it is important to note that a local government may not propose a level of service that is greater than the existing level of service identified in the IFFP.[71] This principle, which was recognized by the Utah Supreme Court in *Banberry*, is built upon the idea that the capital costs to be borne by new development should be equalized in light of the capital costs borne by existing/previous development.[72] That said, local governments may propose an increase to the existing level of service *only* if "independent of the use of impact fees, the political subdivision or private entity provides, implements, and maintains the means to increase the existing level of service for existing demand within six years of the date on which new growth is charged for the proposed level of service."[73]

Each IFFP must include a certification from the person or entity that prepared the IFFP.[74] A sample certification is provided in Chapter 4 below.

b. *The IFA.*

The IFA 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.

Unlike the exceptions for certain local governments regarding the preparation of an IFFP, any local government which intends to impose an impact fee must prepare an IFA.[75] In addition, local governments must also prepare a summary of the IFA that is designed to be understood by a lay person.[76] The IFA

[67] UTAH CODE ANN. § 11-36a-302 for the specific requirements of an IFFP.

[68] UTAH CODE ANN. § 11-36a-301(2).

[69] UTAH CODE ANN. § 11-36a-301(3).

[70] UTAH CODE ANN. § 11-36a-301(3)(a-b).

[71] UTAH CODE ANN. § 11-36a-302(b).

[72] See *Banberry Development Corp. v. South Jordan City*, 631 P.2d 899, 905 (Utah 1981).

[73] UTAH CODE ANN. § 11-36a-302(1)(c)(i).

[74] UTAH CODE ANN. § 11-36a-306(1).

[75] UTAH CODE ANN. § 11-36a-303(1).

[76] UTAH CODE ANN. § 11-36a-303(2).

must include the following: (1) the anticipated impact on or consumption of any existing capacity of a public facility by anticipated development activity; (2) the anticipated impact on system improvements required by the anticipated development activity to maintain the established level of service for each public facility; (3) a description of how the anticipated impacts are reasonably related to the anticipated development activity; (4) an estimate of the proportionate share of the costs for existing capacity that will be recouped and the costs of impacts on system improvements that are reasonably related to the new development activity; and (5) a summary of how the impact fee was calculated.[77]

Each IFA must include a certification from the person or entity that prepared the IFA.[78] A sample certification is provided in Chapter 4 below.

c. *Enactment*

Once proper notice has been provided for the preparation of the IFFP/IFA, and a public hearing for the adoption of the IFFP has taken place,[79] a local government may adopt a proposed impact fee by means of the enactment. For Cities and Counties, the "enactment" is synonymous with ordinance. For local districts or private entities, the "enactment" means a governing board resolution. Once adopted, the enactment cannot take effect for 90 days.

Each impact fee enactment *must* contain certain provisions and *may* contain others. The following are required to be included in each enactment.[80]

- A provision establishing one or more service areas in which impact fees will be assessed for various land use categories.
- A schedule of impact fees for each type of development activity which specifies the amount of the impact fee to be imposed for each type of system improvement OR the formula that each local government will use to calculate the impact fee.
- A provision allowing for the adjustment of an impact fee to respond to unusual circumstances, to address a request from the state or a school for an offset or credit, or to ensure that impact fees are imposed fairly.
- A provision that allows an adjustment to the impact fee for a particular development based upon studies and data submitted by the developer.
- A provision ensuring that credits or reimbursement will be provided if certain land is dedicated for system improvements, some or all of a system improvement is built and dedicated by a developer, or other public facilities are dedicated to the local government to reduce the need for other system improvements.
- A provision that requires credits against future impact fees for any dedication of land or improvements so long as the dedication is a system improvement or is otherwise dedicated to the public and offset the need for a future system improvement.

[77] UTAH CODE ANN. § 11-36a-304(1).

[78] UTAH CODE ANN. § 11-36a-306(2).

[79] Which public hearing may occur on the same day as the public hearing for the adoption of an impact fee enactment.

[80] UTAH CODE ANN. § 11-36a-402.

The following provisions *may* be included in an enactment.[81]

- An impact fee exemption for development activity attributable to: (1) low-income housing; (2) the state; (3) a school districts and charter schools;[82] or (4) other development activity with a broad public purpose.
- A provision that establishes one or more sources of funds other than impact fees to pay for development activity for the state, school district, or other broad public-purpose (but not low-income housing) development activities.

A sample enactment is provided in Chapter 4 below.

C. Managing and Spending Impact Fee Proceeds

While much of the impact fee case law deals with a local government's authority to impose impact fees and the reasonableness of such fees, it cannot be overlooked that some of the challenges to early impact fees focused on local governments' management of such fees. For this reason, the Impact Fees Act imposes strict financial accounting requirements that local governments are to follow when collecting impact fees.

First, each local government that collects an impact fee must create unique and separate interest-bearing accounts for each type of impact fee that is collected.[83] As an example, impact fees for culinary water cannot be co-mingled with impact fees for a sewer system. Additionally, each deposit of impact fees must be accompanied by a receipt. The receipt, which will assist in the preparation of the annual report required by UTAH CODE ANN. § 11-36a-601(4), should identify the following information: (1) the source and amount of impact fees paid; (2) the date on which the impact fees were paid; (3) the project from which the impact fees were collected; (4) the name and address of the individual (the "original owner"[84] or "claimant"[85]) paying the impact fees. Any interest that is earned on each account must be retained within that account and cannot be transferred to another general account for the local government (including another impact fee account).[86]

Within 180 days of the end of the local government's fiscal year, a report must be prepared, certified by the local government's chief financial officer, and sent to the state auditor that shows: (1) the source and amount of all money received for each impact fee account during the fiscal year; (2) all expenditures from each account; and (3) balances for all impact fees that the local government has on hand at the end of the fiscal year.[87] The state auditor provides a form that complies with the reporting requirements of the Impact Fees Act. A sample annual report is provided in Chapter 4 below.

Once it has collected an impact fee, a local government must spend or encumber that impact fee on a system improvement identified in an impact fee facilities plan within six years from the date the fee was collected.[88] A local government may hold fees for longer than six years if, prior to the expiration of the six-year period, it identifies in writing: (1) "an extraordinary and compelling reason why the fees should

[81] UTAH CODE ANN. § 11-36a-403.

[82] If a local government elects to provide an exemption to a school district, the local government must also allow a charter school to qualify for an exemption on the same basis as the school district. See UTAH CODE ANN. § 11-36a-403(2).

[83] UTAH CODE ANN. § 11-36a-601(1).

[84] UTAH CODE ANN. § 11-36a-603(2)(a)(iii).

[85] UTAH CODE ANN. § 11-36a-603(2)(a)(ii).

[86] UTAH CODE ANN. § 11-36a-601(3).

[87] UTAH CODE ANN. § 11-36a-601(4).

[88] UTAH CODE ANN. § 11-36a-602(1-2).

be held longer than six years; and (2) an absolute date by which the fees will be expended."[89] If a local government fails to spend the impact fee on a system improvement within that period, it must issue a refund of the portion of the impact fee that was not spent (including interest) to the person who paid the impact fee.[90] If the person who paid the impact fee cannot be identified, the local government must post notice on its website for period of one year that it intends to refund the impact fee to the originally payor. If no claim is made for the unspent impact fee, the local government may retain it so long as it expends the unclaimed refund on capital facilities identified in the local government's capital facilities plan and for a public facility for which the original impact fee was collected.[91]

D. Challenges to Impact Fees

In light of the various challenges to impact fees prior to the adoption of the Impact Fees Act, the Utah legislature adopted procedures and established criteria under which an impact fee could be challenged. Any person or entity (or their agent) who owns property within a service area may bring a challenge to an impact fee.[92] The Impact Fees Act contemplates various types of challenges, timeframes in which to file a challenge, remedies, and procedures for alternative dispute resolution. It is worth exploring these details in order to gain a better understanding of the rights of property owners with regard to impact fee challenges and the defenses a local government may invoke in response to such challenges.

1. Requests for Impact Fee-Related Information.

Any person or entity that is required to pay an impact fee may file a written request with the local government for information related to the impact fee. Within two weeks of receipt of such a request, the local government must provide the person or entity with the appropriate impact fee analysis, impact fee facilities plan, and any other relevant information relating to the impact fee at issue.[93]

It is worth noting that the disclosure requirements of this section of the Impact Fees Act are distinct from a records request under the Government Records Access and Management Act (UTAH CODE ANN. § 63G-2-101 et seq. ("GRAMA")). More specifically, GRAMA requires detailed information be provided by the individual requesting records and that a payment be made (or request to be waived) in order for the records to be provided. Under GRAMA, the local government has ten business days to respond to the request. If supported by the language of the statute, a GRAMA request may be denied by the local government. With a request for information under the Impact Fees Act, however, no such flexibility is provided to the local government where a request for impact fee information is requested. The local government must respond within two weeks, no payment may be collected from the individual making the request, and there need not be specific information provided other than a "written request" for the impact fee related information. Accordingly, local governments should treat a request for impact fee information under UTAH CODE ANN. § 11-36a-701(2) differently than a request for information submitted under GRAMA.

2. Types of Impact Fee Challenges and Timeframes in which to Bring a Challenge.

The Impact Fees Act establishes four distinct challenges to an impact fee: (1) whether a local government complied with the notice requirements of the Impact Fees Act;[94] (2) whether a local government complied

[89] UTAH CODE ANN. § 11-36a-602(2)(b).

[90] UTAH CODE ANN. § 11-36a-603(2)(b).

[91] UTAH CODE ANN. § 11-36a-603(2)(e).

[92] UTAH CODE ANN. § 11-36a-701(1).

[93] UTAH CODE ANN. § 11-36a-701(2).

[94] UTAH CODE ANN. § 11-36a-701(3)(a)(i)(A)

with procedural requirements of the Impact Fees Act;[95] (3) the impact fee itself;[96] and (4) whether the local government properly spent or encumbered impact fees for a permissible use and within six years after collection.[97]

a. *Notice Challenge – Challenge within 30 days after payment*

A property owner subject to an impact fee may challenge the imposition of the impact fee on the basis that the local government failed to comply with the notice requirements of the Impact Fees Act.[98] Any challenge brought under this section must be made within 30 days after the day on which the person or entity pays the impact fee.[99] The sole remedy for a challenge under this section is equitable and it requires that the local government correct the defective notice and repeat the process.[100] If the faulty notice was to amend an impact fee and would have resulted in an increase to the impact fee, the challenger may be entitled to a refund of the difference between the previous impact fee and what the impact fee would have been if the local government had correctly noticed up the impact fee.[101] Additionally, challenges under this section need not exhaust other administrative remedies and may seek immediate equitable relief from the District Court having jurisdiction over the local government.[102]

b. *Procedural Challenge – Challenge within 180 days after payment*

As detailed herein, the Impact Fees Act requires local governments to follow strict procedures when implementing, amending, and adopting impact fees. If a local government fails to follow those procedures with exactness, it may be subject to a challenge.[103] Any challenges to a local government's strict compliance with the procedural requirements of the Impact Fees Act must be made within 180 days after the day on which the impact fee was paid to the local government.[104] If a court determines that the process by which the impact fee was adopted was invalid, the local government may only charge an impact fee that the court establishes would have been appropriate had it been properly enacted.[105]

c. *Impact Fee Challenge – One year after payment of Impact Fee*

In addition to challenges of the notice or procedural requirements local governments are required to follow prior to adopting an impact fee, local governments may also be challenged on the impact fee itself.[106] A challenge under this section may include, among other things, a dispute regarding the methodology used in the IFA/IFFP, the calculation of the final impact fee, or the technical information incorporated (or not incorporated) into the IFA/IFFP. The sole remedy for a challenge under this section is a "refund of the

[95] UTAH CODE ANN. § 11-36a-701(3)(a)(i)(B)

[96] UTAH CODE ANN. § 11-36a-701(3)(a)(ii)

[97] UTAH CODE ANN. § 11-36a-701(5).

[98] See UTAH CODE ANN. § 11-36a-701(3)(a)(i)(A). See also *Call III* (*Call v. City of West Jordan*, 727 P.2d 180, 183 (Utah 1986)) where the court held that because West Jordan City failed to properly notice up a public hearing prior to adopting an impact fee, the fees were void ab initio.

[99] UTAH CODE ANN. § 11-36a-702(a).

[100] UTAH CODE ANN. § 11-36a-701(3)(b)(i).

[101] This is distinguishable from *Call v. City of West Jordan*, 727 P.2d 180, 183 (Utah 1986) where prior to the adoption of the ordinance at issue in that case, there was no requirement that developers dedicate land or pay a fee in lieu. Accordingly, the court ruled the ordinance (and thereby, the fee) void ab initio.

[102] UTAH CODE ANN. § 11-36a-701(3)(b)(ii). See also UTAH CODE ANN. § 10-9a-801 regarding exhaustion of administrative remedies prior to district court review.

[103] UTAH CODE ANN. § 11-36a-701(3)(a)(i)(B).

[104] UTAH CODE ANN. § 11-36a-702(1)(b).

[105] UTAH CODE ANN. § 11-36a-703(3).

[106] UTAH CODE ANN. § 11-36a-701(3)(a)(ii).

difference between what the person or entity paid as an impact fee and the amount the impact fee should have been if it had been correctly calculated."[107]

d. *Impermissible/Untimely Expenditure – One or Two Years after Six-Year Period*

Local governments must spend or encumber impact fees only on permissible public facilities and within six years of the date on which those impact fees were collected.[108] An individual or entity who pays impact fees to local government may challenge whether: (1) the local government spent the impact fees on a system improvement that was identified in an impact fee facilities plan; or (2) whether the local government spent or encumbered the impact fee within the year period. If the local government has already spent the impact fee but the claimant believes the expenditure was impermissible, the claimant must bring the challenge within one year after the six-year period to spend or encumber expires.[109] If the local government has failed to spend or encumber the impact fee within the six-year period (or has otherwise failed to identify in writing a compelling and extraordinary reason why the fee should be held for longer than six years), then a claimant must bring a challenge within two years after the expiration of the six-year period.[110]

3. Procedure for Initiating an Impact Fee Challenge

The Impact Fees Act contemplates administrative and judicial processes for addressing challenges to impact fees. More specifically, a local government may adopt, by ordinance or resolution, administrative procedures by which a challenge to an impact fee are to be handled.[111] 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.[112] 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.[113] Finally, reasonable attorney fees and costs may be awarded to the prevailing party in an action challenging impact fees.[114]

4. Alternative Dispute Resolution for Impact Fee Challenges

Concurrently with, or prior to, filing an action in Utah State District Court to challenge an impact fee, a claimant must also file a written request for arbitration with the local government imposing the impact fee at issue.[115] If the claimant and local government agree to binding arbitration, however, the claimant may not also bring a case in district court.[116] Once the claimant files a written request for arbitration with the local government, the claimant and local government shall decide on a single arbitrator within 10 days or a panel arbitrator shall be selected within 20 days.[117] Once the single or panel arbitrator have been

[107] UTAH CODE ANN. § 11-36a-701(3)(c).

[108] UTAH CODE ANN. § 11-36a-602(2)(a).

[109] UTAH CODE ANN. § 11-36a-702(1)(c)(i).

[110] UTAH CODE ANN. § 11-36a-702(1)(c)(ii).

[111] UTAH CODE ANN. § 11-36a-703(1)(a).

[112] UTAH CODE ANN. § 11-36a-703(1)(b).

[113] UTAH CODE ANN. § 11-36a-703(4).

[114] UTAH CODE ANN. § 11-36a-703(5).

[115] UTAH CODE ANN. § 11-36a-705(1).

[116] UTAH CODE ANN. § 11-36a-705(7)(d).

[117] UTAH CODE ANN. § 11-36a-705(2).

selected, a hearing must be held within 30 days and a written decision must be issued by the arbitrator(s) no later than ten days thereafter.[118] The claimant and local government may agree to: (1) binding arbitration; (2) formal, nonbinding arbitration; or (3) informal, nonbinding arbitration.[119] If the parties agree to formal, nonbinding arbitration, then the arbitration shall be governed by the Administrative Procedures Act (Utah Code Title 63G, Chapter 4).[120] Otherwise, the arbitration is subject to the Utah Uniform Arbitration Act.[121]

If the party challenging an impact fee is a "specified public agency" (the state, a school district, or a charter school), then the specified public agency may require that the local government imposing an impact fee participate in mediation.[122] In order to initiate the mediation, the specified public agency must send a written request to mediate within 30 days of paying the impact fee at issue.[123] Nothing in the Impact Fees Act precludes a specified public agency from proceeding with other available remedies or challenges available to other individuals or entities. The statutory option to mediate an impact fee challenge is unique to specified public agencies. However, other individuals and entities subject to an impact fee may request the assistance of the Utah Property Rights Ombudsman to negotiate, mediate, arbitrate, or issue an advisory opinion related to any challenge of an impact fee.

It should be noted that there is no requirement to involve the Property Rights Ombudsman in any challenge to an impact fee. The Office of the Property Rights Ombudsman is organized to "assist citizens and government agencies in understanding and complying with property rights law, resolve disputes, and advocate fairness and balance when private rights conflict with public needs."[124] However, a judicial challenge to an impact fee that is also the subject of an advisory opinion issued by the Property Rights Ombudsman may allow the prevailing party to collect reasonable attorney fees and court costs related to the litigation of the case after the issuance of the advisory opinion.[125]

E. Special Provisions.

While the Impact Fees Act includes unique provisions applicable (or inapplicable, as the case may be) to certain types of development activity, it is worth mentioning two special circumstances of current political significance highlighted in the Impact Fees Act: schools and internal accessory dwelling units.

1. School Districts and Charter Schools.

The Impact Fees Act explicitly prohibits the collection of impacts from school districts and charter schools except under certain conditions. More specifically, local governments may not collect impact fees from school districts or charter schools unless "the development resulting from the school district's or charter schools' development activity directly results in a need for additional system improvements…and 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."[126] Notwithstanding, local governments may not collect impact fees from school districts or charter schools for parks, recreation facilities, open space, or trails.[127]

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[118] UTAH CODE ANN. § 11-36a-705(3-4).

[119] UTAH CODE ANN. § 11-36a-705(6).

[120] UTAH CODE ANN. § 11-36a-705(8)(a).

[121] UTAH CODE ANN. § 11-36a-705(5).

[122] UTAH CODE ANN. § 11-36a-704(1).

[123] UTAH CODE ANN. § 11-36a-704(2-3).

[124] https://propertyrights.utah.gov/about-the-ombudsman/

[125] UTAH CODE ANN. § 11-36a-701(4).

[126] UTAH CODE ANN. § 11-36a-202 (2)(a)(iii) (2022).

[127] UTAH CODE ANN. § 11-36a-202 (2)(a)(ii) (2022).

Additionally, local governments may not impose impact fees on school related development activity under the following circumstances: (1) the development activity is designed to replace one school with another (same or different locations);[128] (2) the school related development activity creates no increased demand for public facilities;[129]and (3) the new and replacement schools are located within the same boundary of the local government.[130] 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.[131]

After limiting, and in some instances neutering, local governments' ability to collect impact fees from school districts or charter schools for school related development activity, the Utah legislature expressly prohibited the imposition of "school impact fees" on new development.[132] A "school impact fee" is a charge on new development as a means to generate revenue "for funding or recouping the costs of capital improvements for schools or school facility expansions necessitated by and attributable to the new development."[133] In other words, local governments are prohibited from charging new development a school impact fee in order to offset the costs related to the capital improvements for schools (which capital costs are necessitated by the new development). Not only are local governments prohibited – in some instances – from collecting impact fees from school districts and charter schools to offset the increased need for public facilities to serve the schools, they are also prohibited from imposing "school impact fees" on new development to offset those same costs.

Local governments should work closely with school districts and charter schools to locate and time the construction of new schools within their boundaries. This will allow for effective planning and financing of the public facilities needed to serve the school and the surrounding community.

2. Internal Accessory Dwelling Units

With the passage of House Bill 82 in the Utah 2021 general legislative session,[134] Internal Accessory dwelling units are a permitted use in any area primarily zoned for residential use (with only minor exceptions and conditions).[135] In the wake of House Bill 82, the legislature also amended the Impact Fees Act to explicitly prohibit the collection of impact fees for internal accessory dwelling units.[136] While not explicitly addressed within the Impact Fees Act, it stands to reason that this prohibition is applicable to construction of an internal accessory dwelling unit within a new primary structure (new construction), as well as for the construction of an internal accessory dwelling unit within an existing primary structure.

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 appears that local governments may impose impact fees for external (detached) accessory dwelling units where such uses are permitted or conditional.[137] 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.

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[128] UTAH CODE ANN. § 11-36a-202 (2)(b)(i)(A) (2022).

[129] UTAH CODE ANN. § 11-36a-202 (2)(b)(i)(B) (2022).

[130] UTAH CODE ANN. § 11-36a-202 (2)(b)(i)(C) (2022).

[131] UTAH CODE ANN. § 11-36a-202 (2)(b)(ii) (2022).

[132] See UTAH CODE ANN Ann. § 11-36a-206 (2018).

[133] UTAH CODE ANN. § 11-36a-206(1) (2018).

[134] H.B. 82 (2021) is now codified as UTAH CODE ANN. § 10-9a-530 (2021).

[135] See UTAH CODE ANN. § 10-9a-530 (2021).

[136] UTAH CODE ANN. § 11-36a-202 (2)(a)(vi)

[137] The authors are not aware of any such challenges to impact fees imposed on an external/detached accessory dwelling unit. Local governments should consult their own legal counsel regarding the imposition of such impact fees.

CHAPTER 3: UTAH CASE LAW IN THE WAKE OF THE IMPACT FEES ACT

After the passage of the Impact Fees Act, the authority of local governments to impose and collect impact fees became clearer. However, legal challenges to the reasonableness, scope, and applicability of that authority as established by the Impact Fees Act remained. Accordingly, there have been a number of notable cases that have arisen in the wake of the Impact Fees Act that have continued to support, shape, and refine the language and application of the Impact Fees Act.

A. That BAM Persistence: *B.A.M. Development, LLC v. Salt Lake County*.

The *BAM* series of cases (referred to individually as *BAM I*, *BAM II*, *BAM III,* and *BAM IV*) chronicles the almost 15-year long history of one developer's challenge to the propriety of Salt Lake County's exaction of 13 additional feet of the developer's land for construction of a future road. These cases, though largely focused on takings and exaction criteria (discussed above), help illustrate the analysis local governments must go through when balancing the impacts of new development and the measures those local governments take to offset them. As such, the BAM cases are helpful in understanding impact fees.

In 1997, BAM Development received approval to develop a residential subdivision in Salt Lake County. As part of the approval, the County required BAM to dedicate a 40-foot strip of its property adjacent to 3500 South in anticipation of future road expansion. After the property had been subdivided and plats recorded, the County informed BAM that it would require an additional 13 feet of BAM's property (total of 53 feet) for the widening of 3500 South. BAM challenged the demand for the additional 13 feet by first filing a notice of claim with the County Board of Commissioners. Without holding a hearing or receiving evidence, the Board of Commissioners upheld the County Planning Commission's requirement to dedicate the additional 13 feet. BAM then brought action in district which ultimately upheld the county's decision and ruled that the rough proportionality test[138] did not apply. BAM appeals that decision which is the substance of the following cases.

1. BAM I (2004) – Arbitrary/Capricious Review Without Record; Applicability of Nollan/Dolan.

After an initial trial in District Court, BAM appealed to the court of appeals. The Court of Appeals determined that the district court erred when it received evidence on whether the County's requirement that BAM donate an additional 13 feet was a taking. The plain language of the applicable statute made it clear that the district court was not authorized to take evidence and must rely on the record established at the County level to determine whether the County's decision was "arbitrary, capricious, or illegal."[139] Accordingly, the court of appeals remanded the case to the district court with direction to enter judgment that the County acted arbitrarily and capriciously by failing to conduct a hearing on BAM's taking claim.

In anticipation of the future hearing at the County level, however, the court of appeals reiterated the rough proportionality analysis and held that the County's requirements "constitutes a developmental exaction as described in *Nollan/Dolan*" and that the rough proportionality test applies in this case.[140]

While this appeal does not generally get lumped into the BAM I-III string of cases, it is helpful in understanding the procedural and substantive review of the appeals that follow.

2. BAM II (2006) – Legislative Changes to Justify Previous Judicial Decisions.

After some statutory changes that affected the scope of judicial review in this case, BAM I made its way to the Utah Supreme Court for review of the District's Court's decision to accept evidence in addition to

[138] See *Nollan/Dolan* analysis above.

[139] See UTAH CODE ANN. § 17-27a-801(3)(b) (2023).

[140] *BAM Development v. Salt Lake County*, 87 P.3d 710, 716, 2004 UT App 34 ¶ 16 (Utah App. 2004).

the administrative record made by the County. In addition to the procedural issues under review, the Utah Supreme Court also decided to review whether (and if so, then why) the *Nollan/Dolan* rough proportionality test applies to the County's exaction requirement of BAM.

More specifically, after the initial 2004 BAM case was decided, the Utah Legislature adopted new language affecting the district court review of a land-use decision. That language specified that "if there is no record, the [district] court may call witnesses and take evidence."[141] In light of that language, the Utah Supreme Court ruled that while the court of appeals correctly applied the applicable scope of review at the time, the recent changes to the law (which could be applied retroactively in this case), substantiated the District Court's decision to accept evidence when it reviewed the County's additional exaction requirement of BAM.

In BAM I, the Utah Supreme Court also took on the issue of whether "the *Nollan/Dolan* rough proportionality test applies to a development exaction that results from a uniform land-use scheme rather than an ad hoc site-specific adjudicative decision…."[142] This question, however, was more easily decided because like the procedural issue in this case, the legislature adopted statutory language to codify the rough proportionality test after the court of appeals' initial decision.[143] The Utah Supreme Court ruled that the rough proportionality test did apply and, in an effort to beat an already dead horse, "provid[ed] a brief review of the genesis of the rough proportionality test to better understand the contours of the debate over its application that continues in jurisdictions that, unlike Utah, [had] not achieved resolution through statutory enactments."[144]

After it's lengthy synopsis of the rough proportionality test, the Utah Supreme Court concluded that "knowing as we do that the legislature intended to apply the rough proportionality test to all exactions, irrespective of their source…we are hard pressed to find a reason to assume that the legislative view of the property scope of the rough proportionality test [in this case] would have been different" before adoption of the new statute.[145]

Accordingly, the relevance of BAM I to this book's review of Impact Fees is that even though the Court of Appeals correctly determined that the rough proportionality test applied to the County's exaction requirement to BAM, newly adopted statutory language which codified the applicability of the rough proportionality to all exactions now governs how impact fees are to be adopted and applied.

3. <u>BAM III (2008) – Rough Proportionality vs. Rough Equivalence</u>

With a newly paved path for the District Court to review the County's exaction requirements in this matter, BAM made its way back to the District Court for what it hoped would be a favorable ruling. Instead, the District Court denied BAM's takings claims and BAM appealed to the Utah Supreme Court arguing, in part, that the District Court applied the wrong analysis in deciding its claims.

The Utah Supreme Court's review and subsequent analysis focused on what "proportionality" actually means in terms of exactions and development impacts. To verbalize this quandary of what "proportionality" represents, the Utah Supreme Court stated that "[w]hile 1 to 1 is a proportion, so it 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

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[141] See *BAM Development v. Salt Lake County*, 128 P.3d 1161, 1166, 2006 UT 2, ¶ 19 (Utah 2006) (quoting UTAH CODE ANN. § 17-27a-801 (2005)).

[142] *Id*. at 1167, ¶ 28.

[143] See UTAH CODE ANN. § 17-27a-507 (2005).

[144] *BAM Development v. Salt Lake County*, 128 P.3d at 1168, 2006 UT 2, ¶ 30 (Utah 2006).

[145] *Id.* at 1171, ¶ 46.

roughly equivalent…."[146] The Utah Supreme Court went on to say that "[i]n 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."[147]

To expand on this "rough equivalence" analysis, the Utah Supreme Court reiterated the *Dolan* two-step approach to weighing exactions. First, the exaction and the impact it is trying to mitigate must be related in *nature*. Second, the exaction and the impact it is trying to mitigate must be related in *extent*. On the nature prong, the analysis is more easily conducted when viewing the impact as a problem and the exaction as the solution. On the extent prong, the analysis requires that the exaction and the impact be measured in the same manner or standard (with the most appropriate measure being cost) and then the extent analysis turns to whether costs to each party are roughly equivalent.

The Utah Supreme Court sums up this analysis (and the District Court's failure to properly apply it) by stating:

> *With this framework in mind, applying the Dolan analysis becomes a relatively straightforward task. First, the trial court must determine whether the exaction and impact are related in nature — or whether the solution (the exaction) directly addresses the specific problem (the impact). Second, the trial court must determine what the cost of dealing with the impact would be to the County, absent any exaction; what the cost of the exaction would be to the developer; and whether the two costs are roughly equivalent. The trial court, despite a valiant effort to divine the application of Dolan's "rough proportionality" test, did not correctly apply the Dolan analysis because it failed to compare respective costs of the exaction and impact to the parties.*[148]

In that light, the Utah Supreme Court reversed the District Court's decision and remanded the case back to the District court for additional proceedings consistent with the Utah Supreme Court's opinion.

4. <u>BAM IV (2012) – Scope of Costs that may be Considered in Weighing Equivalence.</u>

In the final chapter of the BAM saga, BAM appeals (for a third time) its case to the Utah Supreme Court. At the third trial, the District court received evidence that the County's cost to improve the road was nearly seven million dollars and that the portion attributable to BAM's subdivision was approximately $337,500. However, the cost to BAM for the additional 13 ft of right-of-way dedication was found to only be $83,997.29. Despite the actual cost to BAM being much lower than what the evidence showed BAM's actual impact to be, BAM appealed on grounds that the District Court's third judgment erred because it calculated the County's costs too broadly and BAM's too narrowly.

On the broadness issue, the Utah Supreme Court ruled that even though the County's costs to widen the road were much less than the actual costs to other government agencies (UDOT and Wasatch Front Regional Council), the County's exaction "was to alleviate [BAM's] impact on a state-funded road" so the state's costs (and not just the County's) for improving the road are a proper measure of the development's impact.[149]

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[146] *BAM Development v. Salt Lake County*, 196 P.3d 601, 603, 2008 UT 74 ¶ 8 (Utah 2008).

[147] *Id.*

[148] *Id.* at 604, ¶ 13.

[149] *BAM Development v. Salt Lake County*, 282 P.3d 41, 47, 2012 UT 26, ¶ 29 (Utah 2012).

BAM also argues that the District Court should have considered the full 53-foot dedication required by the County, and not just the additional 13 feet requested after initial approval. The Utah Supreme Court refused to consider this issue because BAM did not raise it in its initial case and did not otherwise preserve the argument for review by Utah Supreme Court. Given the findings of the District Court's third trial, however, it is unlikely that BAM's argument would have won the day because the additional 13 feet of roadway the County required to be dedicated only amount to 25% of the actual impact of BAM's development.

5. Summary of BAM v. Salt Lake County.

The BAM series of cases help paint a better picture of the applicability of the *Nollan/Dolan* rough proportionality factors to local exactions (including impact fees). Additionally, these cases should assist local governments and developers in weighing how land dedications may be used to offset or otherwise negate the need for impact fees when such dedications (and their accompanying costs) are used to offset the impacts of development that impact fees would have otherwise been used to mitigate.

B. *Washington Townhomes v. Washington County Water Conservancy District*.

Washington Townhomes challenged the legitimacy of certain impact fees charged by the Washington County Water Conservancy District. The District argued that their fees were based on a minimum level of service established by the Utah Division of Drinking Water and that because the fees were based on that level of service, they were appropriate. The trial court entered a motion for partial summary judgment in favor of the District. The parties then mutually requested that the trail court's ruling be certified for an immediate appeal on grounds that "a determination of this critical threshold issue at the appellate level would be the most efficient use of judicial resources…."[150]

While the Utah Supreme Court dismissed on jurisdictional grounds,[151] it did provide some commentary on the issue in this case. The Utah Supreme Court acknowledged that "[t]he statutory and constitutional standards of relevance to this dispute are less than a model of clarity. And appellate clarification of the operative legal standards could conceivably advance the ultimate disposition of this case."[152] So, despite dismissing the appeal on jurisdictional grounds, the Utah Supreme Court recognized that there still exist shortcomings and flaws in the Utah Impact Fees Act (at least as applied to this case, but reasonably to others as well).

The issue in this case rests on whether the impact fee should have been calculated on the minimum level of service standard adopted by the District as imposed by the Utah Division of Drinking Water, or whether the impact fee should have been measured against the actual impact a new home would have on the District's system. Washington Townhomes acknowledged that the District was required to build their system according to the standards established by the Division of Drinking water, however, they argued that they should only have to pay an impact fee to offset its *actual* water usage.[153] The District argued, however, that the minimum level of service established by the Division of Drinking Water should be the basis for the impact fee because it established a "safe and reliable public water supply system…."[154]

Additionally, the parties in this case dispute whether the District's impact fee regime is subject to *Dolan* review or whether the court should weigh the evidence on a rational basis standard. The District argues

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[150] *Wash. Townhomes, LLC v. Wash. Cnty. Water Conservancy Dist.*, 388 P.3d 753, 754, 2016 UT 43 ¶ 3 (Utah 2016) (citing Order Granting Defendant's Motion for Partial Summary Judgment and Certification Pursuant to Rule 54(b) at 2 (Feb. 12, 2015)).

[151] The Utah Supreme Court ruled that the case was not property certified under Rule 54(b) and it otherwise refused to take up the appeal on an interlocutory basis.

[152] *Wash. Townhomes, LLC v. Wash. Cnty. Water Conservancy Dist.*, 388 P.3d at 755, 2016 UT 43 ¶ 8 (Utah 2016).

[153] *Id.* at 757, ¶ 22.

[154] *Id*. at 757, ¶ 21.

that because the impact fees were legislatively adopted, they should only be subject to rational basis review.[155] On the other hand, Washington Townhomes argues that the District's impact fee regime should be considered adjudicative rather than legislative and, as such, should be subject to a *Dolan* review.[156]

While the Utah Supreme Court's ruling in this matter does little to help further the topics addressed in this publication, it does highlight the fact that despite the case law history and language of the Impact Fees Act, there still exists significant issues related to the imposition of impact fees. This matter is pending in the Utah Court of Appeals, and it is likely that a decision on the procedural matters in this case will be handed down by the end of 2023 or early 2024. This section will be updated accordingly.

C. *Alpine Homes, Inc. v. City of West Jordan*

This action was brought in 2012 by a number of developers that had paid impact fees to the City of West Jordan between 2003 and 2006. The developers claimed that the City failed to spend or encumber all of the impact fees within the six years after collection as set forth in the Impact Fees Act. The developers also challenged the City's expenditure of other fees as being spent on impermissible uses. According to the developers, this constituted a taking of private property for public use without just compensation and the developers sought reimbursement of the previously paid impact fees. The District Court denied the City's motion to dismiss, and the City filed an interlocutory appeal (which is the subject of this review).

While the developers argue substantive takings and equitable claims, the threshold issue before the Utah Supreme Court was really whether the developers had standing to bring the takings claim and the equitable claims against the City. The Utah Supreme Court found that the developers had standing to bring the taking claims but ruled that the developers failed to state a takings claim for which relief could be granted.[157] More specifically, the Utah Supreme Court ruled that the Impact Fees Act establishes specific time periods and procedures by which a challenge to an impact fee may be made. The developer's challenge to the City's imposition and use of the impact fees were not filed timely and, as such, were no longer available as a remedy.[158] More specifically:

> *That the fees were not spent within six years does not affect the analysis of whether there was a nexus or whether the impact fees were roughly proportional at the time they were exacted. The developers may not expect to be the beneficiaries of any unspent funds after six years, just as the city cannot retroactively demand payment from the developers for expenditures that exceed the impact fees revenue for necessary improvements. The developers have not cited any cases that have applied a Nollan-Dolan analysis to a municipality's expenditure of impact fees. And because this analysis examines the relationship between the government's demand for property and the anticipated social costs of a proposed land use, there is no logical basis for this court to expand the Nollan-Dolan test to a time frame other than when the impact fees were exacted.*[159]

As to the equitable claims, the Utah Supreme Court recognized that the Impact Fees Act does not provide any statutory equitable relief. As such, the developers must establish standing under separate legal theories. However, because the developers "do not argue that there was a constitutional violation in the

[155] *Id.* at 757, ¶ 24.

[156] *Id*. at 757, ¶ 23.

[157] *Alpine Homes, Inc. v. City of W. Jordan*, 424 P.3d 95, 106, 2017 UT 45, ¶ 3 (Utah 2017).

[158] *Id*. at 101, ¶ 12.

[159] Id. at 105, ¶ 29.

assessment of the impact fees, and without a violation of a legal right when the fees were collected, there is no compensable loss to the developers."[160] The Utah Supreme Court went on to state that:

> *The only expectation the developers could reasonably have for paying the constitutionally levied impact fees was approval for their development, which they received. After the payment of the impact fees, the residents of West Jordan retain the interest in having those fees used as designed, not the developers. Any injury from misuse of impact fees would be to the residents, either from being underserviced or from increased taxes to cover costs of additional development that should be paid from the impact fees.*[161]

On its face, this case appears to be an exploration into the timing and standing of challenges to impact fees. And while those procedural issues are informative for the purposes of this publication, they do not fully capture the important implications of this case for both local governments and those who pay (and may subsequently challenge) impact fees.

More specifically, the Utah Supreme Court recognized that because West Jordan City had adhered to constitutional principles when it adopted impact fees, it was subject to certain protections both under the Impact Fees Act as well as other statutory and case law theories.[162] As for those paying/challenging impact fees, the statute of limitations for the various challenges as set forth in the Impact Fees Act should be strictly followed. Additionally, judicial challenges to impact fees must be properly plead because, as the developers in this case came to learn, a violation of the Impact Fees Act does not rise to a *per se* constitutional violation.[163] Accordingly, challenges to impact fees should narrowly focus on the criteria established in Part 7 of the Impact Fees Acts and the constitutional takings and exaction principles discussed in the cases provided herein. And while equitable arguments may be plead in connection with such challenges, they are not explicitly authorized under the Impact Fees Act and must therefore contain separate supporting facts and bases.

[160] *Id*. at 107, ¶ 37.

[161] *Id*. at 107, ¶ 38.

[162] *Id*. at 107, ¶ 37 ("The impact fees, if constitutional at the time of exaction, are part of the price of doing business in real estate development, and the developers assume the risk that they might not be recouped when individual lots are sold." "Here, West Jordan lawfully exercised its police powers to impose an impact fee on the developers. If the owner of a property through a lawful exercise of police power suffers inconvenience, injury, or a loss, it is regarded as damnum absque injuria." (quoting *Colman v. Utah State Land Bd.*, 795 P.2d 622, 628 (Utah 1990)).

[163] *Id.* at 104. ("[T]his attempt to constitutionalize all the provisions of the Impact Fees Act fails." "The key inquiry is whether the condition imposed by the government is constitutional. The demand for property is either permissible or forbidden under the takings clause at the time the demand is made….") (citing *Dolan*, 512 U.S. at 388, 114 S.Ct. 2309)).

CHAPTER 4: HELPFUL GUIDES AND SAMPLE FORMS

The following materials are provided to assist local government in preparing to adopt, adopting, and managing impact fees.

A. A Guide to Enacting or Amending an Impact Fee
B. A Guide to Reviewing Existing Impact Fee Enactments
C. Challenging an Impact Fee
D. Certification of Impact Fee Facilities Plan
E. Certification of Impact Fee Analysis by Consultant
F. Certification of Impact Fee Report
G. Sample Impact Fee Enactment

A. A GUIDE TO ENACTING OR AMENDING AN IMPACT FEE

This guide is provided as a general summary of the steps local governments should follow when enacting a new impact fee or amending an existing one. These steps are not equally applicable to all local governments. Accordingly, local governments should consult legal counsel for more focused direction on how to enact or amend an impact fee.

1. Establish Necessity for Impact Fee. Local governments should ensure that the impact fee demonstrates that the impact fee is necessary to achieve an equitable allocation to the costs borne in the past and to be borne in the future (in comparison to the benefits already received and yet to be received.

2. Identify Permitted/Restricted Use of Impact Fee. Impact Fees may only be used for certain public improvements. Other uses are specifically prohibited in the Impact Fees Act. Identify which of the permitted uses the proposed impact fee will benefit.

    a. Permitted uses 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, recreational facilities, open space, and trails

        (7) Public safety facilities

        (8) Environmental mitigation

        (9) Municipal natural gas facilities

    b. Prohibited uses of impact fee funds:

        (1) Jails, prisons, places of involuntary incarceration

        (2) Fire suppression vehicles costing less than $500,000

        (3) Curing existing deficiencies

        (4) Increasing the level of service of a public facility serving existing development

        (5) Fund the operation and maintenance[164] of public facilities

        (6) Serve as a general revenue measure by collecting more than the local government's actual costs for excess capacity in an existing system improvement.

    c. Additional Restriction on Impact Fees:

        (1) Fire suppression vehicles may not be funded with residential impact fees

[164] Operation and maintenance does not include "treatment" as identified in UTAH CODE ANN. § 11-36a-102(17).

(2) Parks may not be funded with school district or charter school impact fees

(3) No impact fees for public safety / law enforcement for institutions that have their own police force (Utah National Guard, Utah Highway Patrol, state institutions of higher learning).

(4) Roads that are funded by the state or federal government cannot be the subject of an impact fee for a new state facility.

(5) Schools that replace schools on the same or different parcel within the same jurisdiction may only be charged an impact fee that accounts for the increase in demand of the new facility when compared to the existing school.

3. Preparation of Notice of *Intent to Prepare* an Impact Fee Facilities Plan (IFFP).[165] Before preparing or amending an IFFP, each local government must provide a written notice that:

   a. Indicates that the local government intends to prepare or amend an IFFP.

   b. Describes the area or provides maps where the proposed impact fee facilities will be located.

4. Publication of Notices. The Notice described in Section 3 must be provided for the intended service area for at least 10 days (prior to the actual preparation of the IFFP) as a Class A notice under Utah Code Ann. § 63G-30-102. Private entities that are preparing an IFFP must give the Notice to the local city/town/county who will post the Notices to the State Public Notice Website and the local government's website (if available).

5. Prepare the Impact Fee Facilities Plan (IFFP). A municipality or county need not prepare a separate IFFP if the general plan contains the elements required by Utah Code Ann. § 11-36a-302. Additionally, a local political subdivision with a population of less than 5,000 (or a private entity servicing fewer than 5,000 individuals) that charges impact fees of less than $250,000 annually need not prepare a full IFFP. However, such local political subdivisions and private entities shall ensure that the impact fees charged are based upon a reasonable plan that complies with common law and the Act while also providing applicable notice. For political subdivisions and private entities required to prepare an IFFP, the proposed IFFP shall:

   a. Identify the existing level of service.

   b. Establish a proposed level of service.

      (1) A proposed level of service may diminish or equal the existing level of service. Notwithstanding, a proposed level of service may exceed the existing level of service, or establish a new public facility, if the political subdivision or private entity provides, implements, and maintains the means to increase the existing level of service for existing demand within six years of the date on which new growth is charged for the proposed level of service.

   c. Identify excess capacity to accommodate future growth at the proposed level of service.

   d. Identify demands placed upon existing public facilities by new development activity at the proposed level of service.

[165] As it relates to an IFFP, the Utah Impact Fees Act requires that local governments provide notice of: (1) the *INTENT* to prepare; and (2) the actual *ADOPTION* or *AMENDMENT* of the IFFP. With an IFA, however, the Utah Impact Fees Act only requires that local governments provide notice of the *PREPARATION* of an IFA. An IFA is not required to be adopted under the Utah Impact Fees Act.

e. Identify the means by which the political subdivision or private entity will meet those growing demands.

f. Consider all revenue sources to finance the impact on system improvements (including grants, bonds, interfund loans, impact fees, anticipated dedications of system improvements).

(1) After considering all revenue sources, the local political subdivision or private entity may only impose impact fees on development activities when the financing plan for constructing system improvements establishes that impact fees are necessary to maintain a proposed level of service.

g. 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.

h. Certification of the IFFP.

6. Notice of Preparation of an Impact Fee Analysis (IFA). Before preparing (or contracting to prepare an IFA) each local government must provide notice of the preparation of the IFA as a Class A Notice under Utah Code Ann. § 63G-30-102. Private entities that are preparing an IFA must give the Notice to the local city/town/county who will post the Notices to the State Public Notice Website and the local government's website (if available).

7. Prepare the Impact Fee Analysis (IFA). Prior to enacting an impact fee, each political subdivision and private entity shall prepare an IFA that:

a. Identifies the impact anticipated development activity will have on any existing capacity of a public facility.

b. Identifies the impact anticipated impact on system improvements required by the anticipated development activity to maintain the level of service for each public facility.

c. Describes how the impacts from anticipated development activity are reasonably related to that anticipated development activity.

d. 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.[166]

e. Identifies how the impact fee was calculated.

(1) Costs that may be included:

(i) The construction contract price

(ii) Cost of acquiring land, improvements, materials, and fixtures

(iii) Construction related services that are tied directly to the system improvements including the costs for planning, surveying, and engineering fees.

(iv) 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.

[166] To help identify the reasonableness of the proportionate share, local governments should review the factors set forth in UTAH CODE ANN. § 11-36a-304(2).

(v) Expenses for overhead.

f. Certification of the IFA.

8. Preparation of Notice to *ADOPT* or *AMEND* an IFFP.[167] Once an IFFP has been prepared or amended, it must be formally adopted by the local government. Prior to the adoption/amendment, the local government must provide notice of a public hearing where the local government will receive public comment on the plan or amendment. In order to properly notice up the hearing on the adoption/amendment of an IFFP, each local government must:

   a. Make a copy of the IFFP, together with a summary designed to be understood by a lay person, available: (1) to the public (on the local government's website or at the local government's offices); and (2) in each public library within the boundaries of the local government.

   b. Prepare a notice that provides the date, time, and place of the public hearing on the adoption/amendment of the IFFP along with the date, time, and place of each public meeting where the IFFP will be discussed.

   c. 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.

9. Preparing to Adopt an Impact Fee – Copies of Documents and Notice of Public Hearings. Prior to actually adopting a new or amended impact fee, local governments must make copies of relevant documents available to the public and provide notice of a public hearing and public meeting where a decision on the new/amended impact fees may be made.

   a. Copies of Documents.

      (1) After the IFFP and IFA have been prepared, the local government must provide copies of each along with a written summary of each that is designed to be understood by a lay person.

      (2) These documents should be on file with the local government prior to the enactment and they should be made available on the local government's website or in each public library within the local government's jurisdiction.

      (3) Additionally, the documents should be posted on the Utah Public Notice Website consistent with Utah Code Ann. § 63G-30-102.

      (4) They should be made available as soon as they are prepared in their final form but in no case later than ten days before the day on which the public hearing (for the adoption/amendment to the IFFP and the Enactment) will be held.

[167] The notice and public hearing requirements for adopting/amending an IFFP (UTAH CODE ANN. § 11-36a-502) are nearly identical to the notice and hearing requirements for adopting an impact fee enactment (UTAH CODE ANN. § 11-36a-504). Accordingly, if local governments hold the public hearing for the adoption/amendment of the IFFP at the same time as the adoption of the enactment, and they notice up the hearings for both according to the notice requirements for the adoption/amendment of the IFFP, they will have sufficiently complied with the applicable notice and hearing requirements for both. In that light, once an IFFP and IFA have been prepared, most local governments will prepare an Impact Fee Enactment and schedule and provide notice of the required public hearings (IFFP adoption/amendment and the adoption of the impact fee enactment) all for the same public meeting. Note, however, that the public hearing for the adoption/amendment of the IFFP may not be combined with the amendment for the adoption of the enactment. Each should be handled independently of the other. And, as appropriate, the public comment received from the public hearing on the adoption/amendment of the IFFP may be used to adjust the final language of the enactment.

b. Notice of Public Hearing and Public Meeting.

(1) Before an impact fee can be imposed, the local government must hold a public hearing and receive feedback on the new or amended impact fees.

(2) Notice must be provided before each public hearing is held. The notice must contain:

(i) A statement regarding the local government's intent to enact (or otherwise modify) a specific type of impact fee;

(ii) Contain the date, time, and place of the public hearing and public meeting where the enactment will be discussed;

(iii) Be mailed to each affected entity[168] at least 10 days before the public hearing; and

(iv) Be posted as a "Class B Notice" in compliance with Utah Code Ann. § 63G-30-102 for at least 10 days before the public hearing.

10. Preparation of Impact Fee 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.

a. The following items ***must*** be included in the enactment:

(1) The service area within which impact fees will be imposed and for what types of land use categories they apply;

(2) A schedule of impact fees that specifies the amount of the impact fee for each type of system improvement;

(3) The formula used to calculate each impact fee;

(4) 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.

(5) A provision allowing for the adjustment of the impact fee based upon studies and data submitted by the developer.

(6) 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.

[168] "Affected Entity" is defined as a "county, municipality, special district, special service district under Title 17D, Chapter 1, Special Service District Act, school district, interlocal cooperation entity established under Title 11, Chapter 13, Interlocal Cooperation Act, specified public utility, property owner, property owners association, or the Department of Transportation if: (a) the entity's services or facilities are likely to require expansion or significant modification because of an intended use of land; (b) the entity has filed with the municipality a copy of the entity's general or long-range plan; or (c) the entity has filed with the municipality a request for notice during the same calendar year and before the municipality provides notice to an affected entity in compliance with a requirement imposed under this chapter." See UTAH CODE ANN. § 10-9a-103(3) (2023).

(7) 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.

b. The following ***may*** be included in the enactment:

(1) A provision that provides an exemption for:

(i) Development activity attributable to low-income housing, the state, a school district, or a charter school;[169] OR

(ii) Other development activity with a broad public purpose.

(2) A provision that establishes other sources of funds to pay for development activity.

11. Notice of Intent to Adopt an Impact Fee Enactment. Prior to enacting an impact fee, local governments must notice up and hold a public hearing on the proposed enactment. The notice of public hearing must be sent 10 days before the hearing and comply with the following:

a. Include a statement regarding the local government's intent to enact (or otherwise modify) a specific type of impact fee;

b. Contain the date, time, and place of the public hearing and public meeting where the enactment will be discussed;

c. Be mailed to each affected entity[170] at least 10 days before the public hearing; and

d. 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.

12. Copies of Impact Fee Materials Available to Public.[171] At least 10 days before the public hearing on an impact fee enactment, the local government must make copies of the following documents available for the public:

a. The IFFP and a summary of the IFFP designed to be understood by a lay person (which must be published;

b. The IFA and a written analysis designed to be understood by a lay person;[172]

c. A copy of the proposed impact fee enactment;

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[169] An 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.

[170] "Affected Entity" is defined as a "county, municipality, special district, special service district under Title 17D, Chapter 1, Special Service District Act, school district, interlocal cooperation entity established under Title 11, Chapter 13, Interlocal Cooperation Act, specified public utility, property owner, property owners association, or the Department of Transportation if: (a) the entity's services or facilities are likely to require expansion or significant modification because of an intended use of land; (b) the entity has filed with the municipality a copy of the entity's general or long-range plan; or (c) the entity has filed with the municipality a request for notice during the same calendar year and before the municipality provides notice to an affected entity in compliance with a requirement imposed under this chapter. See UTAH CODE ANN. § 10-9a-103(3) (2023).

[171] These materials should be made available on the local government's website, in a public location within the municipality (City/Town Hall) that is likely to be seen by residents of the municipality, and in each public library within the local government's jurisdiction. Additionally, the documents should be posted on the Utah Public Notice Website consistent with UTAH CODE ANN. § 63G-30-102.

[172] A copy of the IFA and a copy of the summary of the IFA must be posted on the local government's website OR placed in each public library within the boundaries of the local political subdivision. See UTAH CODE ANN. § 11-36a-504(1)(e) (2023).

13. Adoption of Impact Fee Enactment. After providing the required notice and holding the appropriate public hearings, a local government may enact and impose an impact fee only if the plan for financing system improvements establishes that impact fees are necessary to maintain the level of service established in the IFFP.

14. Effective Date. Once adopted, the impact fee is not effective (and may not be imposed) for 90 days. If, however, the newly adopted impact fee is less than a current impact fee, the local government may (but need not) charge less than the current fee to reflect the amount of the newly adopted impact fee.[173]

[173] In other words, if an existing traffic impact fee is $1200 but the newly adopted traffic impact fee is only $900, the local government may reduce the then-existing impact fee down by any amount until the newly adopted impact fee goes into effect. Contrariwise, if a newly adopted traffic impact fee increases by $300 (from $1200 to $1500), the local government may not collect more than the then-existing ($1200) impact fee. The golden rule is that the local government can always charge LESS than the highest fee justified by the IFA as adopted in the enactment…but it can never charge more.

B. A GUIDE TO REVIEWING EXISTING IMPACT FEE ENACTMENTS

This guide is provided as a general summary of the steps developers, legal counsel, and the general public may follow when reviewing an impact fee. This guide is general and is not a substitute for a thorough review of any impact fee enactment.

1. Notice. Does the entity have documentation that the required notices were provided when the impact fee was originally enacted or amended?

2. Purpose. Are impact fees imposed only for the types of infrastructure allowed by state statute?

3. Documentation of Project Costs. Did the entity prepare an impact fee facilities plan (IFFP), or, for small municipalities only, an analysis of project costs? Does the entity have copies of the IFFP or cost analysis which:

    a. Identify demands placed upon existing public facilities by new development activity;

        (1) Is the demand calculated from reliable consumption or use data related to actual demand by the entity's own users?

        (2) Is the demand not simply an industry estimate, state guideline, or rough "rule of thumb"?

    b. Identify the proposed projects by which the municipality will meet those demands? Are the projects qualified for impact fee funding because:

        (1) The projects are eligible for impact fee funding under the Impact Fee Act;

        (2) The projects have a useful life of more than ten years;

        (3) The projects will offset the burdens imposed on the municipality by the development activities which will be required to pay the impact fees; or

        (4) The projects will be completed or under contract within six years of the payment of the fees which will be used to fund them.

    c. Accurately calculate the cost of needed improvements. Including only:

        (1) The construction contract price?

        (2) The cost of acquiring land, improvements, materials, and fixtures?

        (3) The cost for planning, surveying, and engineering fees for services provided for and directly related to the construction of the system improvements.

        (4) Debt service charges, if the municipality might use impact fees as a revenue stream to pay the principal and interest on bonds, notes, or other obligations issues to finance the cost of the system improvements?

        (5) Overhead calculated pursuant to a methodology that is consistent with generally accepted cost accounting practices.

        (6) Where excess capacity in existing facilities exists, and impact fees are to recover the cost of that excess capacity, is the recovery based only on the actual cost of the excess capacity, and not on replacement cost or some other adjusted cost?

    d. Has the IFFP been updated recently to reflect changes in the projected cost of facilities, the ability to complete a functional portion of the facilities within the six-year maximum time frame, and other factors that would otherwise make the IFFP obsolete or impractical?

e. Is the IFFP otherwise fair and reasonable?

4. Impact Fee Analysis. Does the entity have a written impact fee analysis (IFA) of each Impact fee that:

   a. Identifies an existing level of service for each public facility based on data about use and consumption by the existing users of the facility, and not based on industry estimates, rough approximations, or state guidelines?

   b. Identifies the assumptions underlying the cost of proposed and existing system improvements that will serve new development and maintain the existing level of service?

   c. Identifies the manner of financing each public facility other than impact fees, such as user charges, special assessments, bonded indebtedness, general taxes, interest income, or federal grants?

   d. Identifies the relative extent to which development activity will contribute to financing the excess capacity of and system improvements for each existing public facility, by such means as user charges, special assessments, or payment from the proceeds of general taxes?

   e. Identifies the time-price differential inherent in fair comparisons of amounts paid at different times?

   f. Based upon those factors and the requirements of this chapter, identifies how the impact fee was calculated?

   g. Avoids using an impact fee to cure deficiencies in public facilities serving existing development?

   h. Avoids using an impact fee to enhance the existing level of service at the time the fee was enacted?

   i. Has the IFA been updated recently to reflect changes in the projected cost of facilities, the ability to complete a functional portion of the facilities within the six-year maximum time frame, and other factors that would otherwise make the IFA obsolete or impractical?

   j. Is the IFA otherwise fair and reasonable?

5. Certification. Did the person or persons preparing the IFA and the IFFP sign a certification that the analysis, plan, and fees were prepared and enacted according to the law (if adopted or amended after May 12, 2009)?

6. Public Information. Before enactment,

   a. Was the impact fee analysis reduced to layman's language and placed in a public library if there is one in the community? (Does not apply to Districts).

   b. Were appropriate notices published in local newspapers and websites if required? (Districts need only have provided "reasonable notice").

7. Enactment Ordinance. Did the enactment ordinance or resolution include:

   a. A provision establishing one or more service areas within which the local political subdivision or private entity calculates and imposes impact fees for various land use categories?

   b. A schedule of impact fees for each type of development activity that specifies the amount of the impact fee to be imposed for each type of system improvement; or the formula that the local

political subdivision or private entity, as the case may be, will use to calculate each impact fee, which must be at or below the highest fee justified by the impact fee analysis?

c. A provision authorizing the local political subdivision or private entity, as the case may be, to adjust the standard impact fee at the time the fee is charged to respond to unusual circumstances in specific cases and to offset system improvements provided by a developer?

d. A provision authorizing a prompt and individualized impact fee review for the development activity of the state or a school district or charter school?

e. A provision establishing the effective date as 90 days or more after adoption?

8. Hearing/Adoption.

a. Did the entity hold the required public hearing?

b. Was the enactment ordinance adopted by a majority of the governing body at a meeting properly conducted?

9. Imposing Fees. Are fees:

a. Imposed according to the adopted schedule in the ordinance?

b. Reduced in cases where development provides system improvements that were intended to be paid for from impact fees?

c. Waived in cases where it is demonstrated that the development has no impact on a public facility, or fairness otherwise requires an adjustment?

d. Waived as required for certain state and school facilities in certain circumstances?

10. Reporting. Does the entity have proper accounting to ensure that:

a. No impact fee funds remain unexpended or unencumbered for more than six years?

b. Each type of fee collected is the subject of a separate accounting?

c. No fees are spent on any projects not included in the official Impact Fee Facilities Plan (or cost estimate for smaller municipalities)?

d. The interest earned from each separate impact fee account is credited to that account and used for those specific facilities?

e. Annual reports, certified by the CFO, are submitted to the state auditor in a form provided by that office? NOTE: *The sample forms on pages 57-58 in this handbook may be used for this purpose.*

11. Use of Funds. Are the impact fee funds collected:

a. Accounted for in separate funds?

b. Not used for operations, maintenance?

c. Not used for overhead except as permitted and provided for in the IFA?

d. Used only for the construction of facilities shown in the IFFP?

12. Refunding Funds. Are the impact fees refunded when a developer does not proceed with the development and files a written request for a refund when:

    a. The fee has not been spent or encumbered; and

    b. No impact has resulted from the development activity?

13. Funds Held Over. If any funds on hand were collected more than six years ago:,

    a. Are they specifically and legally encumbered? Or

    b. Did the entity identify in writing a compelling reason that the funds were not expended or encumbered before the six year deadline passed? And

    c. Did the entity set a specific time by which the funds are to be expended? Or

    d. Is the entity processing refunds to return the fees collected?

14. Local Appeals Process. If the political subdivision imposing an impact fee has a local appeals process:

    a. May a local appeal be initiated within 30 days on issues of notice; 180 days on issues of procedure, and one year on other issues related to the impact fee?

    b. Must the appeals be decided within 30 days?

C. CHALLENGING AN IMPACT FEE

This guide is provided as a general summary of the steps developers, legal counsel, and the general public may follow when challenging an impact fee. This guide is general and is not a substitute for a thorough review of any impact fee enactment with legal counsel.

1. Timing. Verify that the time to file a challenge has not lapsed.

    a. After paying a fee. The Impact Fee Act (the Act) provides these deadlines to make a challenge after paying the fee:

        (1) 30 days to challenge notice;

        (2) 180 days to challenge procedure; and

        (3) One year to challenge the other aspects of an impact fee.

    b. For a declaratory judgment. The Act provides that any person residing in or owning property within a service area, or an organization, association, or corporation representing the interests of persons or entities owning property within a service area, has standing to file a declaratory judgment action challenging the validity of the fee. The person or organization need not have paid an impact fee. There is no specific deadline provided for this cause of action, and experts do not agree on the timing. The deadline may be the deadlines above or the normal four-year statute of limitations. To be safe, file an action for a declaratory judgment within the time frames mentioned above in item 1.1.

2. Information. File a written request with the entity collecting the fee:

    a. For a copy of the Impact Fee Facilities Plan (IFFP), the Impact Fee Analysis (IFA), the enactment ordinance or resolution, and other documents related to the fee under the Act. The entity must provide them within two weeks; or

    b. For a copy of the same documents under the Government Records Access and Management Act (GRAMA). The entity must provide them within ten business days.

    c. Examine the documents thoroughly, perhaps using the “Checklist for Reviewing an Existing Impact Fee” provided in these materials.

3. Evaluation. Challenging an impact fee may be daunting and should only be initiated after careful consideration. Consider not only whether there may or may not be a flaw in the impact fee notice, procedure, or calculation, but also what remedies are available if a challenge is successful.

    a. No Utah court has yet ruled an enactment invalid and required the complete refund of all impact fees collected. Those familiar with the law and procedure doubt this would occur unless a challenge were made very soon after the enactment and it is shown that the procedures and/or notice were flawed. A challenge initiated years after an enactment would be very unlikely to result in a decision rendering an enactment wholly invalid. A more likely result would be a partial refund of impact fees.

    b. The Act provides that the sole remedy for a successful challenge of the calculation of the impact fee would be the refunding of the difference between the impact fee collected and what the fee should have been if the impact fee had been calculated correctly. It would be wise to carefully consider how much that dollar amount might total before investing the time, energy, and expense that even an informal challenge might require.

    c. The courts have also held that a challenge to an impact fee may not be based on vague allegations, but the person making the challenge has a duty to provide evidence that the impact

fee procedures and calculations violate the act or are otherwise illegal. It is not sufficient to demonstrate that another method of imposing or calculating the fees would also be valid; a person must demonstrate by substantial evidence that the methods used by the entity to impose the fee were improper. Local legislative bodies are granted deference in such matters, and there is a presumption that the impact fee enactment is valid until sufficient evidence is presented to the contrary to overcome that presumption. (See endnote, below).

4. Options For A Challenge – Not Mutually Exclusive.

   a. *Option 1 – File a Local Appeal with a County or Municipality*.[174]

      (1) File an appeal with sufficient formality to ensure that the entity recognizes your appeal as official, with enough information to clearly state the grounds for the appeal and the remedies requested. State that you understand that the time to file litigation is tolled during the local appeals process and demand that the entity notify you immediately if, in the opinion of the entity, that tolling has not occurred.

      (2) The local government entity is to ensure that its procedure includes a requirement that a decision be made on the appeal within 30 days from the date the appeal is filed.

      (3) Most if not all local appeals procedures do not provide for attorney fees.

   b. *Option 2 – Request an Advisory Opinion from the Ombudsman.*

      (1) File a request for an advisory opinion with the Office of the Property Rights Ombudsman (the OPRO) using the forms provided at propertyrights.utah.gov, along with a payment of $150.00.

      (2) In the request, explain in detail all of the issues raised and the grounds for the challenge (Note: the OPRO will not conduct a fishing expedition or blind audit of an impact fee). Provide the essential documents upon which your questions will be answered, such as the IFFP, the IFA, and the impact fee enactment provided by the entity imposing the fee. Follow the guidelines available at the OPRO website.

      (3) The OPRO will send your request to the entity for its response. That response will then be returned to you for your reply. Once each party has had a complete chance to respond to every issue raised, the OPRO will take the matter under advisement and render a written opinion.

      (4) If the impact fee is successfully challenged in court after an advisory opinion deems that the fee violates the Act, then the entity imposing the fee must refund the difference between the impact fee paid and what the fee should have been if the entity had correctly calculated the fee.

      (5) The refund is to be to the record title owner of the property on the day the impact fee was paid, but only if that person requests the impact fee refund within 30 days of the court decision.

      (6) If the issue goes to court, and the court resolves the issue on the same facts and circumstances as the advisory opinion was based on, in a manner that is consistent with the advisory opinion, then the substantially prevailing party may collect reasonable attorney fees and court costs.

[174] Once a local appeal is requested, the time to file litigation is tolled while the local appeals process proceeds. Make sure that any required formalities imposed by the entity imposing the impact fee are respected, so that the filing of the local appeal is official and sufficiently formal to trigger a stay in the deadline to file litigation.

c. *Option 3 – Request Arbitration.*[175]

(1) File the request for arbitration with sufficient formality to ensure that the entity recognizes your request as official, with enough information to clearly state the grounds for the appeal and the remedies requested. State that you understand that the time to file litigation is tolled during the arbitration process and demand that the entity notify you immediately if, in the opinion of the entity, that tolling has not occurred.

(2) The arbitrator or arbitrators may be chosen by the person requesting the arbitration and the entity imposing the impact fee within ten days of the date the request was filed.

(3) If the parties do not agree to an arbitrator, then each party shall pick an arbitrator and the arbitrators chosen shall select a third arbitrator to form a panel.

(4) A hearing is to be held within 30 days of the selection of the arbitrator(s).

(5) A decision by the arbitrator(s) is to be rendered within 10 days of the hearing.

(6) The arbitration is governed by the Utah Uniform Arbitration Act found at U.C.A. 78B-11-101 et seq.

(7) The parties may agree that the arbitration may be binding, formal and nonbinding, or informal and nonbinding. Formal nonbinding arbitration is governed by the Utah Administrative Procedures Act at U.C.A. 63G-4-101 et seq.

(8) Appeals from nonbinding arbitration may be filed within 30 days with the district court, which shall hear the issue de novo.

(9) If a party requests arbitration, they may not also file for a declaratory judgment, utilize the local appeal procedure, or file a separate action in district court.

(10) The costs of the arbitration are shared equally between the parties. The award may include an award for attorney fees, since the Act provides for attorneys fees in legal action. This would be up to the arbitrator(s).

(11) Arbitration may also be available under the Property Rights Ombudsman Act, since an impact fee has been deemed an exaction under Utah's takings jurisprudence. The Ombudsman may order arbitration of takings issues under that separate statute.

d. *Option 4 – Request Mediation.*

(1) A formal mediation request is only provided for in statute for disputes between an entity imposing an impact fee and the state, a school district or charter school. Of course, mediation may be requested by any other entity, but it is not provided for in statute.

(2) Submit a written request to the entity imposing the fee.

(3) Mediation under this statute must be requested within 30 days of paying the fee.

(4) Proceed with mediation as one would normally proceed. (Note: no other details are provided for in the Impact Fee Act).

[175] Note: Once arbitration is requested, the time to file litigation is tolled while the arbitration process proceeds. Make sure that any required formalities imposed by the entity imposing the impact fee are respected, so that the filing of the request for arbitration is official and sufficiently formal to trigger this stay in the deadline to file litigation.

(5) No legal fees or costs are usually provided for in mediation but could be allowed if agreed upon.

e. *Option 5 – File a complaint in District Court.*[176]

(1) The judge may award reasonable attorney fees and costs to the prevailing party in an action brought under the Act.

(2) Commencing a legal action does not preclude the use of a local appeals process, alternative dispute resolution, or an OPRO advisory opinion after the complaint is filed. If litigation is filed, however, a person may not also request arbitration under the Act.

5. Remedies.

a. Declaratory Judgment. The sole remedy for a successful request for a declaratory judgment is that the local subdivision may only charge an impact fee consistent with the declaratory judgment from the date of the judgment until the date that a new impact fee study is enacted.

b. Notice. The sole remedy for a successful challenge of proper notice is to require the local entity to correct the defective notice and repeat the process.

c. Calculations and Appropriateness. The sole remedy for a successful challenge of proper documentation, and calculation is a refund of the difference between what was paid as an impact fee and the amount the impact fee should have been if it had been correctly calculated.

d. Attorney fees and costs may be awarded to the prevailing party under options available to challenge an impact fee. See the discussion under each option above under item 4.

[176] Note: Filing litigation is the one sure way to be sure that a deadline to challenge an impact fee does not pass. Litigation may not be necessary, however, and may still be filed after using the local appeals process, after requesting an advisory opinion, or after mediation. The law specifically provides that a person does not need to file litigation to preserve the right to challenge a fee in court if the person formally and adequately files a local appeal or requests arbitration before the deadline to challenge the fee passes.

D. CERTIFICATION OF IMPACT FEE FACILITIES PLAN

As required by Utah Code Ann. § 11-36a-306(1), each IFFP shall include a written certification from the person or entity that prepares the amended or new IFFP. The certification should state the following:

"I certify that the attached impact fee facilities plan:

1. *Includes only the costs of public facilities that are:*
    a. *Allowed under the Impact Fees Act; and*
    b. *Actually incurred; or*
    c. *Projected to be incurred or encumbered within six years after the day on which each impact fee is paid;*
2. *Does not include:*
    a. *Costs of operation and maintenance of public facilities; or*
    b. *Costs for qualifying public facilities that will raise the level of service for the facilities, through impact fees, above the level of service that is supported by existing residents; and*
3. *Complies in each and every relevant respect with the Impact Fees Act."*

DATED this _____ day of _____, 2023.

[NAME OF FIRM/CONSULTANT]

_____

[Signer's Name and Title]

Although not required by the Impact Fees Act, consultants will often make certain waivers/caveats as part of the certification. Generally, those caveats address the following:

1. That all of the recommendations for implementation made in the IFFP be followed by the local government.
2. The certification is only valid to the extent that the IFFP is not amended or modified.
3. The IFFP is based on information provided to the consultant and the consultant has relied upon the validity and accuracy of the provided information in making the conclusions set forth in the IFFP.

E. CERTIFICATION OF IMPACT FEE ANALYSIS BY CONSULTANT

As required by Utah Code Ann. § 11-36a-306(2), each IFFP shall include a written certification from the person or entity that prepares the amended or new IFFP. The certification should state the following:

"I certify that the attached impact fee analysis:

1. *Includes only the costs of public facilities that are:*
    a. *Allowed under the Impact Fees Act; and*
    b. *Actually incurred; or*
    c. *Projected to be incurred or encumbered within six years after the day on which each impact fee is paid;*
2. *Does not include:*
    d. *Costs of operation and maintenance of public facilities; or*
    e. *Costs for qualifying public facilities that will raise the level of service for the facilities, through impact fees, above the level of service that is supported by existing residents; and*
3. *Complies in each and every relevant respect with the Impact Fees Act."*

DATED this _____ day of _____, 2023.

[NAME OF FIRM/CONSULTANT]

_____

[Signer's Name and Title]

Although not required by the Impact Fees Act, consultants will often make certain waivers/caveats as part of the certification. Generally, those caveats address the following:

1. That all of the recommendations for implementation made in the IFFP and IFA be followed by the local government.
2. The certification is only valid to the extent that the IFFP and IFA are not amended or modified.
3. The IFA is based on information provided to the consultant (as detailed in the IFFP) and the consultant has relied upon the validity and accuracy of the provided information in making the conclusions set forth in the IFA.

F. CERTIFICATION OF AN IMPACT FEE REPORT

The Utah Impact Fees Act requires each local government that collects an impact fee to provide an end-of-year report to account for the management and spending of such funds. The report must include the following information:

1. The source and amount of all money collected, earned, and received for each separate impact fee fund/ledger and ach expenditure from the distinct funds/ledgers.
2. Accounting for all impact fee funds that the local government has on hand at the end of each fiscal year. This accounting must identify the impact fee funds by:
    a. The year in which the impact fee funds were received.
    b. The project from which the funds were collected.
    c. The project for which the funds are budgeted.
    d. The projected schedule for expenditure.

The State Auditor has provided a publicly available form that local government must use in reporting this information. That form can be found on the "Forms, Manuals, & Guides" page at resources.autidor.utah.gov/s/. As of the date of this publication, it is listed under "Reporting Forms" and is identified as the "Impact Fee Report Example."

Each end-of-year report must be submitted to the State Auditor within 180 days after the end of the local government's fiscal year. Each submittal must also be accompanied by a certification from the local government's chief financial officer. Unlike the IFFP and IFA certifications, however, there is no form language provided in the Utah Impact Fees Act for the financial certification. The following sample letter is an example of what local governments should use to satisfy the certification requirements of Section 11-36a-601 of the Impact Fees Act. It is recommended that local governments use their own letterhead and with the following language:

[see following page]

[TO BE USED ON LOCAL GOVERNMENT'S OWN LETTERHEAD]

[Date of certification]

Office of the State Auditor
Utah State Capitol Complex
East Office Building, Suite E310
Salt Lake City, Utah 84114

Re: Certification of Impact Fee Report

Local Government:

Fiscal/Calendar Year Ending:

In compliance with UTAH CODE ANN. § 11-36a-301(4), which states, in effect, that:

> "Each local political subdivision that collects an impact fee shall, at the end of each year, prepare a report that: (a) shows the source and amount of all money collected, earned, and received for each impact fee fund during the fiscal year; (b) each expenditure from each impact fee fund; (c) identifies impact fee funds by the year in which they were received, the project from which the funds were collected, the capital projects for which the funds were budgeted, and the projected schedule for expenditure; (d) is in a format developed by the state auditor; (e) is certified by the local political subdivision's chief financial officer; and (d) is transmitted within 180 days after the end of the fiscal year to the state auditor."

I, the undersigned, certify that the attached impact fees report complies with the foregoing requirements and that such report is a true, correct, and complete copy of the report of impact fees on hand for [ENTITY NAME] for the year ending [END OF CALENDAR/FISCAL YEAR], and their scheduled intended use.

Signature: _____

Print Name: _____

Title: _____

G. SAMPLE IMPACT FEE ENACTMENT

The following is a sample enactment for a water impact fee adopted by a town, city, or County.

[see following page]

[TOWN/CITY/COUNTY], UTAH
ORDINANCE NO. _____

AN ORDINANCE ADOPTING AN IMPACT FEE FACILITIES PLAN, IMPACT FEE ANALYSIS, AND AN IMPACT FEE ENACTMENT THAT IMPOSES A WATER IMPACT FEE; PROVIDES FOR THE CALCULATION AND COLLECTION OF SUCH FEE; AND PROVIDES FOR APPEAL, ACCOUNTING, SEVERABILITY OF THE SAME, AND OTHER RELATED MATTERS

WHEREAS, the _____ City Council (the "Council") met in regular meeting on January 1, 2023, to consider, among other things, adopting an Impact Fee Enactment that imposes a Water Impact Fee; provides for the calculation of the same; and other related matters; and

WHEREAS, _____ City (the "City") is authorized to enact impact fees for certain public facilities in accordance with the Utah Impact Fees Act (the "Act") as set forth in UTAH CODE ANN. § 11-36a-101 et seq.; and

WHEREAS, [consultant name] has prepared an Impact Fee Analysis ("IFA") and Impact Fee Facilities Plan ("IFFP") for Water Impact Fees that analyzes proposed public facilities and associated impact fees as provided in the Act; and

WHEREAS, the IFFP: (i) considers all revenue sources for financing public facility system improvements necessary to accommodate future growth; (ii) analyzes statutory criteria for determining whether a proportionate share of the cost of new Public Facilities is reasonably related to new development activity as set forth in the Act; and (iii) sets forth the methodology used to calculate the impact fees proposed for the Public Facilities; and

WHEREAS, [consultant name] certified its work under UTAH CODE ANN. § 11-36a-306(2); and

WHEREAS, following the appropriate public notices as required by the Act and after providing copies of the IFFP, IFA, and the Enactment to the public, the Council met to ascertain the facts regarding this matter and receive public comment, which facts and comments are found in the public record of the Council's consideration; and

WHEREAS, after considering the facts and comments presented to the Council, the Council finds: (i) growth and development within the City is creating continuing demand for water facilities to serve such development; (ii) impact fees are necessary to fairly distribute the costs of public facilities to serve new development; (iii) impact fees established by this ordinance constitute a proper proportionate share of the cost of public facilities which are reasonably related to new development activity as set forth in the Act and the IFFP; (iv) the impact fee established by this ordinance was developed by conservative analysis and justified by the IFFP; and (v) adoption of this ordinance reasonably furthers the health, safety and general welfare of current and future residents of the City; and

WHEREAS, as provided in the Act, it is proposed that the current impact fee for Water be modified and that impact fees be enacted, all as set forth below.

NOW, THEREFORE, BE IT ORDAINED by the Council as follows:

SECTION 1
FINDINGS

The Council finds and determines as follows:

1.1. All required notices have been given and made and public hearings conducted as required by the Act with respect to the Water IFFP, the IFA, and this Impact Fee Enactment ("Ordinance").

1.2. Growth and development activities in _____ City will create additional demands on its infrastructure. The facility improvement requirements which are analyzed in the IFFP and the IFA are the direct result of the additional facility needs caused by future development activities. The persons responsible for growth and development activities should pay a proportionate share of the costs of the facilities needed to serve the growth and development activity.

1.3. Impact fees are necessary to achieve an equitable allocation to the costs borne in the past and to be borne in the future, in comparison with the benefits already received and yet to be received.

1.4. In enacting and approving the IFFP, IFA, and this Ordinance, the Council has taken into consideration, and in certain situations will consider on a case-by-case basis in the future, the future capital facilities and needs of the City, the capital financial needs of the City which are the result of the City's future facilities' needs, the distribution of the burden of costs to different properties within the City based on the demand for public facilities of the City by such properties, the financial contribution of those properties and other properties similarly situated in the City at the time of computation of the required fee and prior to the enactment of this Ordinance, all revenue sources available to the City, and the impact on future facilities that will be required by growth and new development activities in the City.

1.5. The provisions of this Ordinance shall be liberally construed in order to carry out the purpose and intent of the Council in establishing the impact fee program.

SECTION 2
DEFINITIONS

2.1. Except as provided below, words and phrases that are defined in the Act shall have the same meaning in this Ordinance.

2.2. "Service Area" shall mean the boundaries of _____ City.

2.3. "Utah Impact Fees Act" shall mean Title 11, Chapter 36a, Utah Code Annotated or its successor state statute if that title and chapter is renumbered, recodified, or amended.

SECTION 3
ADOPTION

3.1. The Council hereby approves and adopts the Water IFFP and IFA attached and the analyses reflected therein. The IFFP and the IFA are incorporated herein by reference and adopted as though fully set forth herein.

3.2. The Water Impact Fees enacted by this Ordinance shall be enacted and collected as set forth herein.

SECTION 4
IMPACT FEE CALCULATIONS

4.1. *Impact Fees.* Water Impact Fees are hereby imposed on the basis of the Impact Fee Analysis and shall be paid as a condition of issuing a building permit from the City or other developmental approval. The impact fees imposed by this Ordinance shall be added to the Master Fees Schedule and shall be as follows:

Water Impact Fee for Single Family Unit

Type of Unit	Indoor Impact Fee	Irrigated Area (acres)	Outdoor Impact Fee	Total Impact Fee
Townhome	$940	0.03	$865	$1,805
Single Family <1/4 Acre Lot	$940	0.13	$3,750	$4,690
Single Family 0.25 to 0.49 Acre Lot	$940	0.18	$5,192	$6,132
Single Family 0.5 to 0.74 Acre Lot	$940	0.22	$6,346	$7,286
Single Family 0.75 to 0.99 Acre Lot	$940	0.23	$6,634	$7,574
Single Family 1.0 Acre Lot	$940	0.26	$7,500	$8,440

Multi-Family / Non-Residential Water Impact Fee

Size of Meter (in)	AWWA Capacity Ratios	Water Impact Fee
Peak Day Demand ($/gpm)		**$5,035**
¾ and smaller	1	$4,690
1	1.67	$7,832
1.5	3.33	$15,618
2	5.33	$24,998
3	11.67	$54,732
4	20	$93,800
6	41.67	$195,432
8	60	$281,400
10	96.67	$453,382
12	143.33	$672,218

Non-Residential Water Impact Fee (Outdoor Only)

Irrigation Impact Fee	Irrigable Area (sf)	Peak Day Demand (gpm)	Impact Fee
Irrigation	1000	0.13	**$663**

4.2. *Developer Credits/Developer Reimbursements.* A developer, including a school district or charter school, may be allowed a credit against or proportionate reimbursement of impact fees if the developer dedicates land for a system improvement, builds and dedicates some or all of a system

improvement, or dedicates a public facility that the City and the developer agree will reduce the need for a system improvement. A credit against impact fees shall be granted for any dedication of land for, improvement to, or new construction of, any system improvements provided by the developer if the facilities are system improvements to the respective utilities, or are dedicated to the public and offset the need for an identified future improvement.

4.3. *Adjustment of Fees.* The Council may adjust (but not above the maximum allowable fee) the standard impact fees at the time the fee is charged in order to respond to an unusual circumstance in specific cases and to ensure that the fees are imposed fairly. The Council may adjust the amount of the fees to be imposed if the fee payer submits studies and data clearly showing that the payment of an adjusted impact fee is more consistent with the true impact being placed on the system.

4.4. *Impact Fee Accounting*. City shall establish a separate interest-bearing ledger account for the cash impact fees collected pursuant to this Ordinance. Interest earned on such account shall be allocated to that account.

4.4.1. Reporting. At the end of each fiscal year, [NAME OF CITY] shall prepare a report generally showing the source and amount of all monies collected, earned, and received by the fund or account and of each expenditure from the fund or account. The report shall also identify impact fee funds by the year in which they were received, the project from which the funds were collected, the capital projects from which the funds were budgeted, and the projected schedule for expenditure and be provided to the State Auditor on the appropriate form found on the State Auditor's Website.

4.4.2. Impact Fee Expenditures. Funds collected pursuant to the impact fees shall be deposited in such account and only be used by the City to construct and upgrade the respective facilities to adequately service development activity or used as otherwise approved by law.

4.4.3. Time of Expenditures. Cash impact fees collected pursuant to this Ordinance are to be expended, dedicated, or encumbered for a permissible use within six (6) years of receipt by [Name of City]. [Name of City] may hold previously dedicated or unencumbered fees for longer than six (6) years if it identifies in writing, before the expiration of the six-year period, (i) an extraordinary and compelling reason why the fees should be held longer than six (6) years; and (ii) an absolute date by which the fees will be expended.

4.4.4. Extension of Time. The City may hold unencumbered impact fees collected pursuant to this Enactment for longer than six (6) years if the Council identifies in writing (i) an extraordinary and compelling reason why the fees should be held longer than six (6) years; and (ii) an absolute date by which the fees will be expended.

4.5. *Refunds*. The City shall refund any impact fee collected pursuant to this Ordinance as set forth in the Act or when:

4.5.1. the fee payer has not proceeded with the development activity and has filed a written request with the Council for a refund; and

4.5.2. the fees have not been spent or encumbered within six years of the payment date; and

4.5.3. no impact has resulted.

4.6. *Additional Fees and Costs*. The Impact Fees authorized hereby are separate from and in addition to user fees and other charges lawfully imposed by the City, such as engineering and inspection fees, building permit fees, review fees, and other fees and costs that are not included as part of the Impact Fee.

4.7. *Fees Effective at Time of Payment*. Unless the City is otherwise bound by a contractual requirement, the Impact Fee shall be determined in accordance with this Ordinance.

SECTION 5
APPEAL

5.1. Any person required to pay an impact fee who believes the fee does not meet the requirements of the law may file a written request for information with the City.

5.2. Within two weeks of the receipt of a request for information the City shall provide the person or entity with a copy of the reports and with any other relevant information relating to the impact fee.

5.3. Any person or entity required to pay an impact fee imposed under this article, who believes the fee does not meet the requirements of law may request and be granted a full administrative appeal of that grievance. An appeal shall be made to the City within thirty (30) calendar days of the date of the action complained of, or the date when the complaining person reasonably should have become aware of the action.

5.4. The notice of the administrative appeal to the Council shall be filed and shall contain the following information:

5.4.1. The person's name, mailing address, and daytime telephone number; and

5.4.2. A copy of the written request for information and a brief summary of the grounds for appeal; and

5.4.3. The relief sought.

SECTION 6
EFFECTIVE DATE

This Ordinance, and the Impact Fees enacted hereunder, shall take effect _____, _____ 2021.

PASSED AND APPROVED this ____ day of _____, 2023.

[Town/City/County]

_____
, Mayor

ATTEST:

_____
,Recorder/Clerk

CHAPTER 5: CASE LAW SUMMARY

The following are brief summaries of a few relevant cases that may be used as references for preparing, enacting, challenging, or defending impact fees. This list is not exhaustive and does not represent a complete summary of relevant legal material.

A. United States Supreme Court Cases

1. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)
   - Local land use authority required property owners to dedicate a public easement as a condition of approval to construct new home on property.
   - Supreme Court held that local government could not require condition land use approval unless the condition substantially furthered government interests that would otherwise justify denial of the application.
   - Here, the public easement dedication condition was not sufficiently linked to the government interest and, as such, was an unconstitutional condition and constituted a taking in violation of the Fifth Amendment.

2. *Dolan v. City of Tigard, OR* 114 S.Ct. 2309 (1994)
   - Dolan submitted an application to the local land use body for a permit to expand the size of their retail shop.
   - The shop fronted a busy street and was near an existing floodplain.
   - The land use authority conditioned its approval on Dolan's dedication of a portion of her property as public bicycle/pedestrian path and for a storm pond in order to mitigate impact on the existing floodplain.
   - The imposed conditions were not sufficiently connected (a.k.a. roughly proportionate) to the impact of the proposed development and, as such, constituted an "unconstitutional condition" in violation of the Fifth Amendment.

3. *Koontz v. St. Johns River Water Mgt Dist.*, 570 U.S. 595 (2013)
   - The State of Florida passed legislation which required new developments to mitigate impacts on the state's water system.
   - Koontz, who had applied for a land use permit through the water management district, offered to grant a conservation easement over the remainder of his undeveloped property.
   - The land use authority told him he would have to shrink the size of his development, grant an easement over the rest of the property (including the area previously planned for development), and pay to have improvements completed on other off-site property.
   - He refused and the land use authority denied his permit.
   - The court held that the Nollan/Dolan analysis applied to demands for payment of money (and not just land) as well as when the application was denied.

B. Utah Court Cases

1. *B.A.M. Development, L.L.C. v. Salt Lake County*, 87 P.3d 710, 2004 UT App 34 (BAM I)
   - This case, the first in a line of appeals from the same matter, begins with an analysis of whether the County acted arbitrarily and capriciously in determining whether the exaction in this matter (increasing road dedication requirements from 40 feet to 53 feet) was appropriate.
   - Additionally, and in connection with its remand on the appeal, the Court directed that the Nollan/Dolan rough proportionality test did apply in this case because BAM was required to dedicate additional land before the land use authority (County) would approve its final application.

- Because the County did not conduct a hearing to determine whether the exaction in this case satisfied the Nollan/Dolan requirements, they acted arbitrarily and capriciously in deciding the takings issue.

2. *B.A.M. Development v. Salt Lake County*, 128 P.3d 1161, 2006 UT 2 (BAM II)
   - This case dealt primarily with two procedural issues arising from the BAM I: (1) whether the original district court case was limited to review of the administrative record of the County; and (2) whether state statute (enacted *after* BAM I was decided) permitted review of the case by the district court regardless of the administrative record.
   - The Utah Supreme Court also commented on the passage of a new law that applied the rough proportionality test (as described in Nollan/Dolan) to *all* exactions and held that in this case, the Utah Court of Appeals correctly concluded that the rough proportionality text correctly governs the County exaction of BAM's property.

3. *B.A.M. Development v. Salt Lake County*, 196 P.3d 601, 2008 UT 74 (BAM III)
   - After having its case remanded back to the trial court and having the trial court rule that the County's exaction was appropriate, BAM appealed that decision on the basis that the trial court didn't correctly apply the "rough proportionality" analysis from *Dolan*.
   - "The Dolan analysis, property applied, asks whether the imposition on the community of a proposed development is roughly equal to the cost being extracted to offset it."
   - The Utah Supreme Court created a three-step test to guide trial courts in engaging in a Dolan "rough proportionality" analysis.
   - First, the Court must determine whether the "nature of the exaction and impact are related" and to "look at the exaction and impact in terms of a solution and problem, respectively. [T]he impact is the problem, or the burden that the community will bear because of the development. The exaction should address the problem. If it does, then the nature component has been satisfied."
   - Second, the exaction and impact must be related in extent. "[T]he exaction and the impact should be measured in the same manner, or using the same standard. The most appropriate measure is cost…. The impact of the development can be measured as the cost to the municipality of assuring the impact. The exaction can be measured as the value of the land to be dedicated by the developer at the time of the exaction, along with any other costs required by the exaction."
   - Third, "The court must determine whether the costs to each party are roughly equivalent. Because each factor is measured in the same way, in dollars, this calculation should be very simple. If the two sums are about the same, they are roughly equivalent for this purpose."
   - Here, the trial court (on initial remand) failed to correctly apply the *Dolan* analysis because it "failed to compare respective costs of the exaction and impact to the parties." Case remanded AGAIN for additional proceedings.

4. *B.A.M. Development, L.L.C. v. Salt Lake County*, 282 P.3d 41, 2012 UT 26 (BAM IV)
   - BAM appeals from the THIRD trial in this matter where the trial court found that the "cost that is directly attributable to BAM's subdivision [for the additional 13 feet] is… $83,997.29" and that the actual cost for the road widening was $337,500.
   - Stated differently, the impact from BAM's development was $337,500, and the cost of the exaction was $83,997.29.
   - BAM's cost was significantly less than the government's costs and, as such, the County's exaction did not violate the rough-proportionality analysis of *Dolan*.

5. *Gardner v. Board of County Com'rs of Wasatch County*, 178 P.3d 893, 2008 UT 6
   - Wasatch County adopted an ordinance that required, among other things, that certain property owners could obtain a building permit in certain areas upon the successful completion of a slope stability study.

- Plaintiff's argued that the fee constituted an illegal fee but the court disagreed and reaffirmed that the County may, on a case-by-case basis, exercise its discretion in determining "whether an individual's land is suitable for construction" and such exercise of discretion does not constitute an impermissible fee.

6. *Heideman v. Washington City*, 155 P.3d 900, 2007 UT App 11
   - Plaintiff brought this case against Washington City in order to challenge the City's refusal to accept a pre-payment of his water impact fees.
   - The City appropriately adopted new water impact fees and established the effective date of the enactment for a few weeks beyond the approval date.
   - Plaintiff brought in a check and pre-paid water impact fees for "66 water impact fee permits" at the lower rate, but without having development approval for any of the 66 connections.
   - Pre-paying impact fees without having any recognized development approval (which in this case was recognized as coming in the form of a building permit), "circumvents the City's ability to manage new growth and development and adequately provide for services needed as a result of that growth."

7. *Board of Trustees of Washington County Water Conservancy Dist. v. Keystone Conversions, LLC*, 103 P.3d 686, 2004 UT 84
   - Keystone Conversions brought this action to determine whether the Water Districts "water availability fee" was, in fact, an impact fee and therefore subject to the requirements of the Impact Fee Act.
   - The Water District established rules which required property owners who were purchasing retail water from the District to pay a "water availability fee" and to "construct and install any necessary pipelines, delivery lines, or other fixtures in order to obtain water from the Water District's facilities."
   - Those same rules, however, clarified that the District "does not authorize development activities…issuance of building permits, or otherwise" and that it "does not intent to impose any payment of money upon development activity as a condition of development approval in connection with provision of water."
   - "The Impact Fees Act contemplates that if an entity with the power to permit or prevent certain development activities imposes a fee as a condition of proceeding with development in order to fund public facilities and services that will be necessitated by the development, then that entity must satisfy the various requirements of the Impact Fees Act."
   - Here, the Water District did not actually have any authority to "authorize the commencement of development activity" and, as such, the "water availability fee" does not constitute an impact fee.

8. *Board of Educ. of Jordan School Dist. v. Sandy City Corp.*, 94 P.3d 234, 2004 UT 37
   - The School District challenged Sandy's collection of a storm water service fee on the basis that the District should be exempt from such fees under state law and, inter alia, that the fee was just an "impermissibly charged impact fee."
   - Sandy City argues that it acted within its municipal authority, and exercised appropriate judgment, in deciding to create and fund its storm water utility through the imposition of periodic fees.
   - The court refused the District's "impermissible impact fee" argument and reaffirmed the definition of an impact fee as "a species of real estate development exaction [that] are generally defined as charges levied by local governments against new development in order to generate revenue for capital funding necessitated by the new development." Citing *Salt Lake County v. Board of Education of Granite School District,* 808 P.2d 1056, 1058 (Utah 1991).

9. *Home Builders Ass'n v. City of North Logan*, 983 P.2d 561, 1999 UT 63
   - Like *Home Builders Ass'n v. City of North Logan*, this case challenged the validity of fees imposed by North Logan on the basis that they didn't comply with the factors set forth in Banberry.
   - The Banberry factors cannot be applied in a "rigid and formalistic fashion."
   - "Municipalities must have sufficient flexibility to deal realistically with issues that do not admit of any kind of precise mathematical equality. Such equality is neither feasible nor constitutionally vital."
   - The Association's challenge fails because they simply attacked the underlying decision-making process that the City used to establish the fees (delegating such responsibility to city staff and/or professional firms/contractors).
   - Moreover, the Association did not provide evidence of what a correct fee would have looked like had the City applied the Banberry factors as argued by the Association.

10. *Home Builders Ass'n of Utah v. City of American Fork*, 973 P.2d 425
    - Home Builders Association challenged certain fees imposed by American Fork on the basis that such fees were arbitrary and did not account for the seven factors established in Banberry.
    - The Association deposed members of the City council, who could not provide detailed answers regarding the basis for the fee and who also admitted that they did not consider the Banberry factors.
    - "The seven factors outlined in [Banberry] are an illustrative list of factors that municipalities should consider in complying with the duty to limit impact fees to their equitable share of capital costs in relation to benefits conferred."
    - "The 'equitable share' standard is the ultimate legal standard that municipalities are obligated to meet."

11. *Home Builders Ass'n. of Greater Salt Lake v. Provo City*, 28 Utah 2d 402, 503 P.2d 451 (1972)
    - A fee that does not amount to a revenue measure (See Weber Basin Home Builders Ass'n v. Roy City), but is instead a charge for a service rendered, is not on its face discriminatory or constitutionally impermissible.
    - The fee was established by dividing the number of sewer connections into the net value of the system (thereby equalizing the cost across all users).
    - The fee was also deposited into a sewer-specific operating fund which was used to pay for new trunk lines, replacement costs of existing lines, enlargement of the sewage treatment plant, retirement of certain bonded indebtedness, and general operating expenses.

12. *American Tierra Corp. v. City of West Jordan*, 840 P.2d 757 (UT 1992)
    - This case arose out of the wake of Call I-IV.
    - Certain developers who had paid fees (or donated land in lieu of paying fees) to West Jordan City filed action against the City seeking reimbursement of those fees.
    - The Court reviewed the developers' claims for reimbursement as equitable and, as such, were exempt from the filing requirements and time limits imposed by the Utah Governmental Immunity Act.
    - The equitable claims were subject to a four-year statute of limitations.

13. *Salt Lake County v. Board of Educ. Of Granite School Dist.*, 808 P.2d 1056 (UT 1991)
    - The School District refused to pay a fee imposed by the County on grounds that it was a "local assessment" which was not applicable to the District. The County brought this action seeking declaratory judgment that the School District was not exempt from the fee.
    - The Court held that the County's fee was, by definition, an impact fee applicable to the School District.
    - "The primary difference between impact fees and local assessments is that special/local assessments represent a measure of the benefit of public improvements on new or existing

development, whereas impact fees typically measure the cost of the demand or need for public facilitis as a result of new development only."

14. *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979) (Call I)
    - In this pre-Nollan/Dolan exaction case, the Supreme Court upheld a City ordinance which required Call to donate 7% of his land (or the equivalent value in dollars) to the City for flood control measures or recreational facilities.
    - Call challenged the ordinance on grounds that, inter alia, it (1) provided benefit to the City but no recognizable benefit to the development; (2) amounted to an unconstitutional taking; and (3) was a revenue-raising scheme and, therefore, an improper levy of a tax.
    - The Court refused to accept any of the Developer's arguments and upheld the ordinance (but remanded the case for consideration on whether other sums paid by Developer to the City should satisfy the donation requirements of the Ordinance).

15. *Call v. City of West Jordan*, 614 P.2d 1257 (Utah 1980) (Call II)
    - The original case came back to the court on re-hearing to review whether the City's ordinance was constitutional.
    - The court, feebly acknowledging that it missed the mark in Call I, concluded that the ordinance was constitutional on its face but that Call should be "given the opportunity to present evidence to show that the dedication required of [him] had no reasonable relationship to the needs for flood control or parks and recreation facilities created by [his] subdivision, if any."
    - "It is only fair that the fee so collected be used in such a way as to benefit demonstrably the subdivision in question."
    - In other words, the court, while recognizing the facial constitutionality of the ordinance, determined that Call should be able to present evidence about whether the application of the ordinance, as to his circumstances, was constitutional.

16. *Call v. City of West Jordan*, 727 P.2d 180 (UT 1986) (Call III)
    - In this post-Banberry re-hearing of the same case (Call I & II), the court examines whether the ordinance had been adopted according to statutory requirements.
    - Because the City failed to notice up and hold a valid public hearing on the impact fee ordinance in question, the ordinance is invalid and void ab initio.

17. *Call v. City of West Jordan, 788 P.2d 1049* (Utah App. 1990) (Call IV)
    - In the final chapter of an eleven-year legal saga, the Court of appeals shuts down Call's appeal to the trial courts denial of the following motions: (1) judgment on Call's Section 1983 civil rights claim against the City; (2) attorney's fees; (3) joinder of other subdividers as additional parties; and (4) costs.
    - This case bears little weight on the substantive issue of impact fees but is worth mentioning so as to provide the reader with closure on what is otherwise an exhilarating string of trials, appeals, and more appeals.

18. *Weber Basin Home Builders Ass'n v. Roy City*, 26 Utah 2d 215, 487 P.2d 866 (1971)
    - A reasonable charge for a specific service is permissible, whereas a general fee that amounts to a revenue measure is not.
    - Placing a disproportionate and unfair revenue-raising burden on new development, while not placing the same burden on existing homes, is discriminatory and constitutionally impermissible.

19. *Lafferty v. Payson City*, 642 P.2d 376 (UT 1986)
    - Payson City imposed certain "impact fees" which required payment of general and specific fees to offset costs of new development on City systems.

- The fees were un-reasonable because they "fixed the entire cost of new facilities on newly developed properties without assurance that the costs were equitable (applying the Banberry factors) in relation to benefits conferred and in comparison with costs imposed on other property owners in the municipality."
- The City's determination (or calculation) of the applicable fee was incorrect because it failed "to assure that a property owner involved in a new home development is not required to buy into the capital value of existing municipal services and then pay for some portion of the same capital value a second time by future tax payments against the bonded indebtedness use to construct them originally."

20. *Patterson v. Alpine City*, 663 P.2d 95 (Utah 1983)
    - Alpine City joined other municipalities in forming the Timpanogas Special Service District which would create a wastewater treatment facility.
    - Alpine estimated that it could provide service to 540 sewer connections at a total cost of $375,000 (or approximately $700 per connection).
    - Alpine pre-sold sewer connections which were priced at $700 the first month, $1000 the second month, and $1500 thereafter.
    - Patterson purchased a sewer connection for $1500 and brought this action to challenge the validity/reasonableness of the payment.
    - The Court held that "we do not purport to know whether $700, $1000, or $1500, 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."
    - All users must be treated equally by the City and late-comers cannot be subjected to an arbitrary increase of over 100% in a period of two months.

21. *Banberry Development Corporation v. South Jordan City*, 631 P.2d 899 (Utah 1981)
    - The reasonableness of any individual fee must be resolved on the facts in each particular case but should, in all cases, be equitable in light of the relative benefits/burdens of existing properties and future development.
    - So long as a hookup fee is reasonable, it is a valid exercise of a City's authority to collect an advance payment of some portion of capital costs attributable to committing services to new development.
    - "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 property 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."
    - The court lays out seven factors (the "constitutional standards or reasonableness") that should be considered in determining the relative burden already borne and yet to be borne by newly developed properties and other properties.
    - These factors are designed to assure that municipal fees do not require new development to bear more than their equitable share of capital costs.
    - Additionally, the "reasonableness" standard applicable to impact fees is not one of "rational basis" or "reasonably debatable" but one of "legally reasonable". It hold local governments to a higher standard of rationality than the requirement that its actions not be arbitrary or capricious.
    - In BAM III, the Utah Supreme Court held that "Banberry's factor-based reasonableness analysis applies to subdivision fees, such as water connection fees and park improvement fees" but not dedication exactions.

22. *Alpine Homes, Inc. v. City of West Jordan*, 424 P.3d 95 (Utah 2017)
    - Developers brought an action against West Jordan to challenge the City's expenditure (or failure thereof within six years of collecting impact fees) of certain impact fees.
    - The Developers had standing to challenge the takings issues, but they failed to actually challenge the constitutionality of the City's assessment of the impact fees and instead challenged the City's expenditure of the impact fees. This challenge fails on the merits.
    - The Developers also brought an equitable claim for reimbursement. This fails for lack of standing because the court ruled that the residents who purchased the lots were the ones who would be entitled to bring the claim, not the developers.

23. *Washington Townhomes, LLC v. Washington County Water Conservancy District*, 2016 UT 34
    - Plaintiffs brought an action against the District challenging the validity of the impact fees assessed by the District.
    - The District adopted the state division of drinking water (DDW) standard and implemented those standards via its legally adopted IFFP/IFA.
    - The Plaintiffs argued that the impact fee should consider the actual impact of the development (or each individual home) in determining what the impact fee should be and not simply rely on a state standard that didn't provide any specificity about how the fee was calculated or how it corresponded to the actual impact of the development at hand.
    - This matter is currently up on appeal on the issue of whether the case should be heard by a trial court or a special master.