Advisory Opinion 251

Parties: Oscar Bluth / Swiss Alpine Water Company

Issued: January 20, 2022

TOPIC CATEGORIES:

Review Within a Reasonable Time

Impact Fees Act

Private water companies providing water services necessary for land development as the only realistic source of water for its members are subject to certain provisions of the County Land Use Development and Management Act ("CLUDMA"), which imposes the same procedural due process requirements on the provider as if it were a county, including timely review of applications and reasonable diligence in approving or denying service requests. Additionally, water providers may assess impact fees for eligible water-related facilities. But where a water company also acts in additional capacities, including as a homeowner's association, it is only subject to CLUDMA and the Impact Fee Act as it relates to the water services it provides, and not any other private function.

Here, a water company's prompt denial of a member's request for services met CLUDMA's requirements for timely review and finality of decision, and a road fee assessed on members was not subject to the Impact Fee Act as it was not an impact fee for water-related services. The legality of the company's service denial or fee assessment, acting in its capacity as an HOA, must otherwise be determined by other sources of law not within the purview of this opinion.

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ADVISORY OPINION

Advisory Opinion Requested By:	Oscar Bluth
Private Entity:	Swiss Alpine Water Company
Applicant for Service:	Oscar and Susan Bluth
Type of Property:	Residential
Date of this Advisory Opinion:	January 20, 2022
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUE

Is the private water company an entity subject to certain provisions of the County Land Use Development and Management Act, and the Utah Impact Fee Act, and if so, has it complied with the applicable provisions of said Acts?

SUMMARY OF ADVISORY OPINION

A private water company that assumes the role of the only realistic source of water for its members is subject to certain state regulations regarding the land use and development approval process.

Where a water company provides water services necessary for land development, the County Land Use Development and Management Act ("CLUDMA") imposes the same procedural due process requirements on the provider as if it were a county land use authority, including timely review of applications for services needed for development, and reasonable diligence in approving or denying service requests. Here, the water company has complied with applicable requirements.

Similarly, Utah's Impact Fee Act applies to certain private entities that provide water to an applicant for development approval. Private entity water providers may assess impact fees for eligible water-related facilities.

Where a water company, in addition to providing these types of water services, also acts in additional capacities, including as a homeowners association, it is only subject to CLUDMA and the Impact Fee Act as it relates to the water services it provides, and not any other private function. Since the fee here in question is not actually an impact fee, it is not subject to the requirements of the Impact Fee Act. One would need to look to other sources of law to determine the water company's authority to impose the fee. This question is therefore outside the scope of this opinion.

REVIEW

A Request for an Advisory Opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of Title 13, Chapter 43, Section 205 of the Utah Code. An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A Request for an Advisory Opinion was received from Oscar Bluth on April 8, 2021. A copy of the request was sent via certified mail to Steve Bennion, Board President, Swiss Alpine Water Company PO Box 1108, Midway, Utah 84069, on May 12, 2021.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for an Advisory Opinion, submitted by Oscar Bluth, received on April 8, 2021.
2. Written statement re: Request for an Advisory Opinion, submitted by Robert Rosing, attorney for Swiss Alpine, dated July 21, 2021.
3. Response to SAWC written statement, submitted by Oscar Bluth, received August 6, 2021.
4. SAWC's letter re: Bluth response, submitted by Robert Rosing, dated September 14, 2021.

BACKGROUND

The Swiss Mountain Estates is a group of contiguous subdivisions totaling 274 lots, sequentially platted as subdivisions "No. 1" through "No. 4," located in unincorporated area of Wasatch County.

Swiss Alpine Water Company ("SAWC") is a nonprofit mutual water company that additionally acts as the homeowner's association for the subdivisions. SAWC provides water only for the Swiss Mountain Estates subdivisions, though not every lot is serviced. SAWC has authorized a number of shares by four classes, which correspond to each numbered plat of the Swiss Mountain Estates project. SAWC's shareholders are certain lot owners within each subdivision plat specified as "wet lots." Oscar and Susan Bluth ("the Bluths") are the owners of Lots 65 and 75 in the Swiss Mountain Estates Subdivision "No. 4," which are both designated at "wet lots."

Both parties acknowledge that the Swiss Mountain Estates, as developed, created more lots than its original water rights could support, as over 200 "wet" lots were platted in 1963, while SAWC only held, and continues to hold, water rights to approximately 31 ac ft of water, which are limited to a total 100 connections for domestic use (31 full-time residential connections and 69 part-time residential connections). The parties agree that there are, at least, 100 shareholders already connected to SAWC's water system.

The source of SAWC's water rights has historically been a nearby spring. However, in 2017, as a result of requirements by the Utah Division of Water Resources (DWRe) to develop redundancies in the drinking water system and to supplement the existing system, SAWC submitted a change application and received an order allowing it to construct an underground well to meet DWRe's requirements. The change application did not increase the amount of water permitted by SAWC's water right number. At the time of the request for an advisory opinion, the well was under construction and almost complete, but not yet connected to the existing system.

The CC&R's for the Swiss Mountain Estates provide that lot owners are required to receive approval from SAWC before any building can take place within Swiss Mountain Estates. Owners must submit a written application to the SAWC board for review, and pay an architectural review fee, a water hookup fee, and bear the cost of any required pipeline extensions, which are dedicated to and maintained by SAWC upon completion. Additionally, in 2020, SAWC established a new fee that it called an "impact fee," which SAWC asserts is intended to provide funds to repair damage caused to its private roadways by construction traffic.[1]

Under Wasatch County ordinances, a complete application for a building permit includes Health Department requirements for wastewater disposal and water supply. For properties within the Swiss Mountain Estates subdivisions, the water supply form requires the approval of SAWC for a new connection to the applicant's water system.

While the parties disagree as to the cause, since approximately 2016, no building permits have been issued for lots within the Swiss Mountain Estates because of a lack of available water connections. The Bluths assert that this "moratorium" is internally imposed by SAWC, which impedes the issuance of a building permit because they are incomplete under the County's ordinances. SAWC, on the other hand, asserts that the "moratorium" is as a result of the County determining that SAWC does not have sufficient water to support new connections and refusing to issue new building permits until SAWC has enough water. SAWC asserts that it is in the process of obtaining additional water rights and believes it will soon have sufficient rights to support new connections.

In February 2021, the Bluths submitted a request to the SAWC board for water service to their two lots. SAWC responded by March 1st that the board was working out specifics on new connections, and that as a result of County mandates, a moratorium was in effect until the County clarified their requirements and SAWC is able to accommodate those requirements.

[1] As no new building permits have been issued since its enactment, SAWC has not assessed or collected this fee from any lot owner.

The Bluths have a requested an Advisory Opinion to determine whether the restrictions and fees imposed on the Bluths' property by SAWC are lawful, and whether SAWC has complied with state law regarding review for development approval and the imposition of impact fees.

ANALYSIS

I. SAWC's Dual Functions and the Limited Scope of This Opinion

The Bluths' request for an advisory opinion raises many issues, asserting that SAWC is acting in violation of several Utah statutes,[2] apparently due in part to the dual-purpose nature of SAWC, acting as both a homeowner's association and a water company. As a homeowner's association, the powers and obligations of SAWC acting in that capacity are entirely within the realm of private rights, governed by contact law and applicable statutes regulating the creation and conduct of HOA entities. As a water company, however, SAWC is involved in the land use approval process as a pass-through entity by virtue of being the provider of water—a public resource—and intrinsically gets wrapped up in the constitutional relationship between the sovereign and citizens.

The authority of the Office of the Property Rights Ombudsman to render an Advisory Opinion is limited to specific topics arising from enumerated parts of the law dealing with the government's taking or regulation of private property for some public purpose, or in the name of the public welfare. The applicable topics for an advisory opinion are found in only three Utah statutes, namely, Utah's Impact Fees Act, the Municipal Land Use, Development, and Management Act ("MLUDMA"), and the County Land Use, Development, and Management Act ("CLUDMA").[3]

Of the four stated issues raised by the Bluths, the only two falling within these specific sections are the following:

1. Is SAWC subject to Utah Code Section 17-27a-509(7) as considered a "provider of culinary or secondary water," and if so, has it complied with any applicable CLUDMA requirements found in Sections 17-27a-509 and 17-27a-509.5?
2. Is SAWC subject to Utah's Impact Fee Act as a "Private entity" (*see* Section 11-36a-102(14)), and if so, whether it has complied with applicable provisions of the Act?

These are the only two issues this Advisory Opinion will address. It is necessary, then, to distinguish by what authority SAWC is acting in performing any particular function, given that its formal processes may combine services of its two roles. For example, SAWC acknowledges that Swiss Mountain Estate lot owners "are required to receive approval from [SAWC] before any building can take place within Swiss Mountain Estates," and that "[o]ne of the purposes and powers of [SAWC] is to '[r]eview and approve building plans pertaining to new construction.'"

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[2] The statutes cited by the Bluths include Utah's Impact Fees Act, UTAH CODE §§ 11-36a-101 et seq., the County Land Use, Development, and Management Act, UTAH CODE §§ 17-27a-101 et seq., the Water and Irrigation Act, UTAH CODE §§ 73-1-1 et seq., the Utah Revised Nonprofit Corporations Act, UTAH CODE §§ 16-6a-101 et seq., and the Community Association Act, UTAH CODE §§ 57-8a-101 et seq.

[3] Specifically, a "written advisory opinion" may be requested "to determine compliance with:"

(i) Section 10-9a-505.5 and Sections 10-9a-507 through 10-9a-511 (MLUDMA);
(ii) Section 17-27a-505.5 and Sections 17-27a-506 through 17-27a-510 (CLUDMA); and
(iii) Title 11, Chapter 36a, Impact Fees Act.

However, while it may all be part of the same application, SAWC's review of the application for "evidence that [the applicant] [is] an owner of a 'wet' lot" in order to "connect their lot to [SAWC]'s water system" is clearly a function of SAWC as a water provider, while its review of the same application for architectural details and that the owners "agree to abide" by "the rules, C C Rs for Swiss Mountain Estates property owners" is a function of SAWC as a homeowners association. Similarly, Swiss Mountain Estates owners "must pay an architectural review fee and a water hookup fee when they submit their plans to Swiss Alpine for review." Fees imposed for architectural review are imposed by SAWC in its capacity as a homeowners association, while a water hookup fee is associated with SAWC's functions as a water provider.

Our only purpose is to opine on whether SAWC has complied with any applicable sections of law within our jurisdiction of review that relate to services it provides as a water provider in the land use approval context, or as an entity with authority to impose impact fees on new development. We express no opinion on SAWC's functions as a homeowners association, or whether it complies with any other state statutes governing its function and organization, outside of the two issues identified herein.

II. Substantive Land Use Review by Water Provider under CLUDMA

Utah's County Land Use, Development, and Management Act ("CLUDMA") is the statute governing a county's ability to regulate the use and development of land through land use ordinances and regulations, as a delegated exercise of the State's police power. CLUDMA imposes several substantive and procedural requirements on a county's land use authority tasked with reviewing a land use application submitted to obtain a favorable land use decision.

However, while mostly addressing public actors within the county level of government, CLUDMA does contain some substantive provisions that extend beyond county government to other entities, including private bodies.

Namely, Section 17-27a-509(7) states that "[a] provider of culinary or secondary water that commits to provide a water service required by a land use application process is subject to the following as if it were a county:

(a) Subsections (5) and (6);
(b) Section 17-27a-507; and
(c) Section 17-27a-509.5.

CLUDMA does not further define what it means to "commit to provide a water service required by a land use application process," and SAWC argues that this should only apply to water companies or special service districts that have made a broad commitment to provide water services to the public at large, as opposed to a private community water provider such as SAWC.

A. SAWC is a water provider subject to certain requirements under CLUDMA.

Regarding a question of statutory interpretation, the primary goal is to evince the true intent and purpose of the legislature,[4] which begins by first looking to the statute's plain language.[5] Courts read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.[6] When the legislature has defined statutory terms, those definitions are controlling.[7] The plain language is the best indicator of the legislature's intent and purpose in passing the statute, and courts turn to legislative history or policy considerations only if the language in question is ambiguous.[8]

The term "land use application" is a defined term under CLUDMA, and is an application that is "required by a county" and "submitted by a land use applicant to obtain a land use decision."[9] One prime example of a land use application is a landowner's request for a building permit.

Here, the Bluths seek to obtain a building permit from Wasatch County ("County"), and assert that a complete application includes Health Department requirements that include wastewater disposal and water supply. The Bluths contend that SAWC must approve all new water connections required to obtain a building permit from the County.

As the sole water provider for the Swiss Mountain Estates, there does not appear to be any dispute that SAWC "provide[s] culinary or secondary water" for Swiss Mountain Estates. Therefore, as the water services provided to Swiss Mountain Estates lot owners by SAWC are required to obtain a building permit from the County, it is clear from the statute's plain language that SAWC has "commit[ted] to provide a water service required by a land use application process."

SAWC attempts to interpret the statute as differentiating public water companies from private water companies like SAWC, which have limited service agreements. However, in doing so, SAWC is impermissibly "inferring a substantive term into the statute" not present in the text.[10] The legislature's intent, as evidenced by the statute's plain language, is that as SAWC is the "provider of culinary or secondary water" for Swiss Mountain Estates, and provides the "water service required by a land use application process" for those lot owners, SAWC is a water provider pursuant to Section 509(7), and must consider itself as it if were the county in regards to specific land use provisions.[11]

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[4] *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863.
[5] *Carrier v. Salt Lake Cty.*, 2004 UT 98, ¶ 30.
[6] *Bryner v. Cardon Outreach*, LLC, 2018 UT 52, ¶ 10, 428 P.3d 1096.
[7] *See Provo City v. Cannon*, 1999 UT App 344, ¶ 10.
[8] *Cannon*, 1999 UT App 344, at ¶ 6.
[9] UTAH CODE § 17-27a-103(33).
[10] *See Ragsdale v. Fishler*, 2021 UT 29, ¶ 29 (The court "will not infer substantive terms into the text that are not already there . . . and [has] no power to rewrite the statute to conform to an intention not expressed.") (internal citation omitted).
[11] Even giving SAWC the benefit of doubt as to any statutory ambiguity, the statute's legislative history also serves to resolve any question as to what nature of water providers the legislature intended to regulate. During a committee hearing at the time the bill was introduced to add this provision, the bill presenter commented on this provision, specifically, as follows:

B. CLUDMA requires SAWC to provide property owners due process for services provided

Having identified that SAWC is an entity subject to Section 509(7), the next question becomes what this actually obligates SAWC to do? Only three sections are expressly applied to water providers: sections 507, 509(5)-(6), and 509.5. Section 509(7)'s imposition of these sections on water providers does not subject the providers to the entirety of CLUDMA's regulations on county land use authorities.[12] Of the explicit sections made applicable to water providers, Section 507 deals with development exactions, and is not expressly referenced in the Bluths' request; therefore, it is assumed that SAWC's compliance with this section is not in question. Similarly, subsections (5) and (6) of 509 deal with the requirement to itemize fees upon an applicant's request, specifically.[13] The Bluths' do not assert that they have made any such itemization request, and it is likewise assumed that SAWC's compliance with these subsections is not at issue.

Therefore, Section 509.5 appears to be the only applicable section in dispute, as raised by the Bluths. Section 509.5 is the principal direction given to counties in receiving and reviewing land use applications, and imposes requirements on counties that ensure a level of procedural due process for land use applicants. However, certain provisions are not seemingly applicable to a private water company. In contesting that the statute applies to it, SAWC argues, for example, that Section 509.5 requires counties to review a land use application and evaluate whether "all objective ordinance-based application criteria have been met."[14] SAWC argues that if it were to stand in the place of the county, this would require it to evaluate whether an application meets applicable land use ordinances for further review by Wasatch County, something that SAWC acknowledges it would not be in a position to decide.

SAWC's point is well taken, as generally, when interpreting statutes courts seek to avoid interpretations "which render some part of a provision nonsensical or absurd."[15] An absurd result

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> *The intent of that section, those lines, is to bring in private water companies into the same type of constraints that the public water companies have when they're used as the culinary water authority in the subdivision process. One, when the local governments are giving them kind of the pressure point on a private developer in the process, we want to make certain that they abide by the same rules.*

Audio, Senate Business and Labor Committee - February 15, 2011, discussing *Developer Fees*, HB 78, 2011 Utah Laws 92 (statement from Jodi Hoffman, Utah League of City and Towns, Utah Land Use Task Force Chair, presenter) starting at minute 52:00, *available at* https://le.utah.gov/av/committeeArchive.jsp?timelineID=55661.

[12] The Bluths mistakenly reference other provisions found elsewhere in CLUDMA in citing to SAWC's alleged violations, including Section 504's limitations on a county legislative body's ability to enact temporary land use regulations (moratoria). The listed sections provided in Section 509(7), however, are the extent of CLUDMA provisions made applicable to water providers, and nothing more.

[13] *See* UTAH CODE § 17-27a-509(5)-(6). The Bluths actually argue that SAWC is in violation subsection (4) of Section 509, specifically, which provides that "[a] county may not impose or collect" either a "land use application fee" or "an inspection, regulation, or review fee" that "exceeds the reasonable cost" of processing the application, issuing the permit, or performing the inspection, regulation, or review. However, subsection (4) is not one of the provisions that Section 509(7) imposes on water providers "as if it were a county." Rather, only subsections (5) and (6) apply. These subsections only provide that "if requested by an applicant who is charged a fee or an owner of residential property upon which a fee is imposed, the county shall provide an itemized fee statement that shows the calculation method for each fee."

[14] *See* UTAH CODE § 17-27a-509.5(1)(b).

[15] *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 26.

is one that "must be so absurd that the legislative body which authored the legislation could not have intended it."[16] There are several provisions within Section 509.5, specifically, that could only apply to a county land use authority. But an absurd result from a single provision does not obfuscate applicability of the entire section. To conclude otherwise, as SAWC does, directs that Section 509(7) is entirely inapplicable to SAWC as a private water company, which only results in a further absurd result. That is, if 509.5 contains provisions that could only reasonably apply to a county land use authority, then SAWC's reading would mean that Section 509(7) could not apply to any entity other than the county, making the substantive provision of 509(7) inoperable, itself an absurd result.[17]

Instead, reading the Act as a whole and considering Section 509(7) in context with other applicable provisions, it seems clear that the applicability of 509(7) in subjecting other entities to the stated provisions as if it were the county, is limited to imposing certain procedural requirements on those entities *within the context of the particular service they provide*.

Section 509.5's substantive provisions can be broken down to two requirements, provided in subsections (1) and (2), that are applicable to water providers in the present case.[18]

Subsection (1) Review for application completeness

Subsection (1) provides that "[e]ach county shall, in a timely manner, determine whether a land use application is complete for purposes of subsequent, substantive land use authority review." Applied to a water provider, "as if it were a county," this imposes a similar requirement that a water provider timely determine whether the application it may require is "complete" for purposes of providing "a water service required by a land use application process."

Here, SAWC acknowledges that "Owners are required to receive approval from [SAWC] before any building can take place within Swiss Mountain Estates," and that SAWC requires a written application to connect to its water system as well as a connection fee. Subsection (1) of 509.5 would therefore require SAWC to timely determine that any application for water service is complete in adhering to any internal process SAWC has established to provide water services, and that any fee imposed for water services, including connection fees, is paid, for purposes of subsequent land use authority review by Wasatch County.

Subsection (2) Substantive application review

Subsection (2) of 509.5 requires a county to substantively review a complete application and approve or deny the application with reasonable diligence. Applied to a water provider, "as if it

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[16] *Id.*, at ¶ 30.

[17] *See State v. Jeffries*, 2009 UT 57, ¶ 8, 217 P.3d 265, 268 (where a statute's plain language creates an absurd, unreasonable, or inoperable result, we assume the legislature did not intend that result).

[18] Subsection (3), specifically, deals with a county's reasonable diligence in determining that performance of warranty work meets the county's adopted standards, which comes into play after a land use application is approved and work is undertaken pursuant to an issued permit. Because the Bluths' are in the pre-application phase, subsection (3) is not relevant. Subsections (4) and (5) do not impose any substantive requirements on counties, rather, they pertain to an applicant's duty to comply with applicable ordinances and a general disclaimer against money damages arising under the section, respectively. *See* UTAH CODE § 17-27a-509(3)-(5).

were a county," this would impose a similar requirement that the water provider substantively review applications for water service according to any standards it may have established, and to approve or deny the application with reasonable diligence.

According to the information provided by the Bluths, they submitted a request to the SAWC board for water service on their two lots on February 19, 2021. SAWC responded on March 1st that the board was working out specifics on new connections, and that the moratorium was in effect until the County clarified its requirements and SAWC is able to accommodate those requirements.

For all intents and purposes, SAWC's response appears to be a denial of the Bluths' application for water service connection. While the Bluths' assert that the moratorium is imposed by SAWC unlawfully or that the Bluths are otherwise entitled to water service, according to applicable homeowners documents or other statutes, we can only determine whether SAWC complied with Section 509(2). SAWC appears to have done so, having reviewed and denied the Bluths' request for water services with reasonable diligence, providing a response within two weeks of submittal.

Whether SAWC *wrongfully* denied service to the Bluths as a member shareholder pursuant to CC&R's or statute governing water service agreements is outside the scope of this opinion.

III. Impact Fees assessed by Private entity water providers

In 2020, SAWC established a new fee that it labeled an "impact fee." The fee is $3 per square foot of the proposed dwelling, and is intended to provide SAWC with funds to repair damage caused to its private roadways by construction traffic. The Bluths argue that this fee was adopted without regard to Utah's Impact Fee Act ("the Act"), as it was not accompanied by required notices, meetings, or supporting documents imposed by the Act on impact fee adoptions or enactments.

Utah's Impact Fee Act applies, at least in part, to a "Private entity," defined as follows:

"Private entity" means an entity in private ownership with at least 100 individual shareholders, customers, or connections, that is located in a first, second, third, or fourth class county and ***provides water to an applicant for development approval who is required to obtain water from the private entity*** either as a:

(a) specific condition of development approval by a local political subdivision acting pursuant to a prior agreement, whether written or unwritten, with the private entity; or
(b) functional condition of development approval because the private entity:
    i) has no reasonably equivalent competition in the immediate market; and
    ii) is the only realistic source of water for the applicant's development.[19]

Acknowledged as having at least 100 connections and being the only realistic source of water for Swiss Mountain Estates lot owners, SAWC is therefore a "private entity" that "provides water to an applicant for development approval," and has an ability to charge certain impact fees. However, whereas SAWC also provides several other functions as a homeowners association not related to water service, these latter HOA services are not subject to the Act.

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[19] UTAH CODE § 11-36a-102(14) (emphasis added).

An impact fee means "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."[20] For water providers, the applicable public facilities eligible for impact fees are limited to "water rights and water supply, treatment, storage distribution facilities."[21]

An impact fee does not include "a building permit fee, a hookup fee, a fee for project improvements, or other reasonable permit or application fees."[22]

The fee in question is to fund repair damage caused to SAWC's private roadways by construction traffic. This is unrelated to water service, and appears to be function of SAWC as a homeowners association responsible for community roadways, maintained by the association. Because the fee is not imposed by SAWC in its capacity as a private entity water provider, and is not used to mitigate impact on any water-related public facility, the $3 SAWC is not an impact fee subject to the enactment requirements of the Impact Fee Act.

CONCLUSION

Swiss Alpine Water Company, in providing water services to the Swiss Mountain Estates lot owners necessary to develop pursuant to Washington County ordinances, is subject to certain regulations aimed to ensure procedural due process for lot owners. The Bluths applied for water services needed to develop their lot. They received a prompt response from the water company denying their request. Regardless of the reason or its propriety under other sources of law, the water company has at least complied with applicable provisions of the County Land Use, Development, and Management Act.

Further, while SAWC is an entity that may assess impact fees for water-related facilities pursuant to Utah's Impact Fee Act, the water company's fee assessed on new construction to fund repairs for the community's privately-owned roads is related to its function of acting as the community's homeowners association, and not as a water provider pursuant to the Impact Fee Act. The company's self-labeled "impact fee" is therefore not an impact fee subject to the requirements of the Act.

Jordan S. Cullimore

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Office of the Property Rights Ombudsman

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[20] UTAH CODE § 11-36a-102(9)(a).
[21] UTAH CODE § 11-36a-102(17)(a). In assuming that it may be a private entity subject to the Act, SAWC appears to then incorrectly assume that the "roadway facilities" included in the Act's definition of "public facilities" includes SAWC's privately owned roadways. However, other than the fact that "private entity" is limited to water providers, and therefore only functions of a water provider, SAWC also overlooks that "roadway facilities" is also further defined by the act as "a street or road that has been designated on an officially adopted subdivision plat, roadway plan, or general plan of a political subdivision, together with all necessary appurtenances." *Id.*, at 102(17)(b). In other words, this is limited to public roads owned by cities and counties.
[22] UTAH CODE § 11-36a-102(9)(b).

NOTE:

This is an advisory opinion as defined in Section 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees and civil penalty provisions, found in Section 13-43-206 of the Utah Code, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.