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September 10, 2009

**Salt Lake City Council**  
451 South State Street  
Salt Lake City, UT 84111

Dear Salt Lake City Council Members;

WAXIE's Enterprises, Inc. (WAXIE) respectfully requests a refund of a portion of the impact fees paid to Salt Lake City in September 2008 for WAXIE's new building located at 5107 West 1730 South, Salt Lake City, Utah 84104. This request is made pursuant to Salt Lake City Code 18.98.090, Utah Code Ann. 11-36-401, which states, a city may not "impose or charge any...fees as a condition of development approval unless those fees are a reasonable charge for the service provided" (Utah Code Ann. 11-36-201(1)(b)(ii)). The basis for WAXIE's impact fee refund is based on the difference in trip generation (and the burden on the city infrastructure) assumed in Salt Lake City's adopted impact fee study versus the actual trips generated by WAXIE's new facility.

By way of background, on September 11, 2008, WAXIE paid Salt Lake City \$186,142 in impact fees for its 86,881 square foot building, of which \$137,488 was for roadway impact fees, calculated on 14,443 square feet of office space (\$3.25 per 1,000 square feet, or \$46,940) and 72,438 square feet of industrial space (\$1.25 per 1,000 square feet, or \$90,548). The building is entirely owner-occupied. Based on historic operations of a similar facility in West Valley City, Utah, coupled with anticipated business operations in the new facility, WAXIE has quantified its anticipated trip generations derived from constructing the new building.

On February 18, 2009, WAXIE submitted a request to the Salt Lake City Council for a recalculation and refund of its transportation impact fees as allowed under Salt Lake City code 18.98.090 (B)(2). On March 2, 2009, at the advice of Salt Lake City's legal counsel, WAXIE temporarily withdrew this request in an effort to address their request with the city's staff through an exploration and discussion with Mr. Frank Gray, Community and Economic Development Director for Salt Lake City. WAXIE's representative met with Mr. Gray in person in March 2009 but was summarily dismissed from Mr. Gray's office without an opportunity to present WAXIE's independent data as provided for in Salt Lake City code. The Community and Economic Development Director stated that he would provide his written analysis of the WAXIE impact within one week of WAXIE being dismissed from his office. WAXIE has been waiting for this written response from the city since March 2009. The response was never delivered. Why does Salt Lake City adopt an ordinance that specifically defines a process for impact fee appeals but then will not allow the property owner to present its independent data as defined as its right within the code?

Salt Lake City code 18.98.010 states that the Council finds that "... persons responsible for growth and development activity should pay a proportionate share of the cost of such planned facilities needed to serve the growth and development activity". In light of this finding by the Council, why is WAXIE



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Boise ■ Denver ■ El Centro ■ Idaho Falls ■ Las Vegas ■ Los Angeles ■ Ontario ■ Palm Springs ■ Phoenix ■ Portland ■ Salt Lake City ■ San Diego ■ San Francisco ■ Santa Ana ■ St. George ■ Tucson

denied an opportunity to present its independent impact fee calculations which provide empirical evidence that its development burden is not responsible for the assumed burden on the planned facilities?

Salt Lake City Code defines “Independent Impact Fee Calculation” as “...the impact calculation or economic documentation prepared by a fee payer to support the assessment of an impact fee other than by the use of the schedule in section 18.98.190, ‘Appendix A’, of this chapter.” The city code further defines “Independent Impact Fee Calculation” as the “...impact fee calculation or economic documentation prepared by a fee payer to support the assessment of an impact fee other than by the use of the schedule in section 18.98.190, ‘Appendix A’”. WAXIE was (and still is) prepared to provide this data to the Community and Economic Development Director but was denied an opportunity to do so. WAXIE has met the spirit and letter of both the city and state codes by attempting to provide its independent calculations. WAXIE’s calculations of trip generation data are derived from historical operations of a similar WAXIE facility in West Valley City in 2007 and 2008, coupled with a highly reliable schedule of shipping/receiving schedules for its new, stabilized facility in Salt Lake City. WAXIE is very confident in the accuracy of its trip generation from its new facility. Please note that as an additional effort to resolve this circumstance, WAXIE is currently willing to record the trip generation from the facility during PM Peak hours and the transportation impact fee currently under appeal can be recalculated off of this empirical data.

A summary of WAXIE’s trip generation associated with its new Salt Lake City property is attached as Exhibit “A”. Salt Lake City’s industrial roadway impact fees are based on trip generation averages as determined by the Institute of Transportation Engineers (ITE). WAXIE’s actual trip generation numbers, due to its unique operating standards, are significantly less than the averages of the ITE. The ITE’s Trip Generation, 7<sup>th</sup> Edition shows an average trip generation rate for industrial use, at the P.M. peak hour, per 1,000 square feet of gross floor area, of 1.08. Using this average trip generation, WAXIE should be expected to generate 78 trips ( $72.4 \times 1.08$ ) during the P.M. peak. WAXIE’s actual trip generation during the P.M. peak, attributed to the industrial square footage of the building, is only 21 trips, or 27%, of the anticipated traffic demand assumed in the Salt Lake City impact fee study. Conversely, WAXIE requests a 73% reimbursement of its industrial traffic impact fees, or \$66,100.

Salt Lake City’s office roadway impact fees are based on trip generation averages as determined by the Institute of Transportation Engineers (ITE). WAXIE’s actual trip generation numbers, due to its unique operating standards, are significantly less than the averages of the ITE. The ITE’s Trip Generation, 7<sup>th</sup> Edition shows an average trip generation rate for office use, at the P.M. peak hour, per 1,000 square feet of gross floor area, of 1.49. Using this average trip generation, WAXIE should be expected to generate 21.5 trips ( $14.4 \times 1.49$ ) during the P.M. peak. WAXIE’s actual trip generation during the P.M. peak, attributed to the office square footage of the building, is only 5 trips, or 23%, of the anticipated traffic demand assumed in the Salt Lake City impact fee study. Conversely, WAXIE requests a 77% reimbursement of its office traffic impact fees, or \$36,144.

In summary, Salt Lake City imposed a roadway impact fee on WAXIE’s Enterprises, Inc.’s new building that exceeds the actual impact of the building on the city’s roadway infrastructure and WAXIE has been denied its right to present to its own independent calculations that define its true impact on the infrastructure as allowed for in Salt Lake City and State of Utah code. WAXIE is willing to resolve this request by providing to the Salt Lake City Council the following items: 1) full documentation of its

historic 2007 and 2008 trip generations from its similar facility in West Valley City and 2) actual trip generation evidence from its current occupancy of the newly constructed facility. Accordingly, WAXIE hereby requests that Salt Lake City refund \$102,244 to WAXIE, which reflects the difference in the impact fees collected by Salt Lake City and WAXIE's actual impact on the city's roadway infrastructure.

WAXIE respectfully request that a hearing be scheduled in accordance with Salt Lake City Code 18.98.090(B)(2) within 14 days of receiving this appeal. We look forward to discussing this matter with you soon.

Sincerely,



Harry Babb  
VP, Corporate Operations

**Exhibit A****Waxie Industries****Anticipated PM Peak Traffic Generation Data****Salt Lake City, Utah****September 2009**

Employee	Time In	Time Out	Classification
Gilgen, Tara Daneen	7:00 AM	4:00 PM	industrial
Walker, Colleen W	7:00 AM	4:00 PM	industrial
Yack, David S.	7:00 AM	4:00 PM	industrial
Dixon, Kaitlyn	8:00 AM	5:00 PM	industrial
Lemon, Amber L	8:00 AM	5:00 PM	industrial
Ludvigson, Susan L	8:00 AM	5:00 PM	industrial
West, Emma J	8:00 AM	5:00 PM	industrial
Wood, Deneen	8:00 AM	5:00 PM	industrial
Cook, Aaron R	8:00 AM	5:00 PM	industrial
Groff, Guy	8:00 AM	5:00 PM	industrial
Hossom, Luke E	8:00 AM	5:00 PM	industrial
Shakespear, John G	7:00 AM	6:00 PM	industrial
Colledge, Jared K.	7:00 AM	6:00 PM	industrial
truck trips (4-6 pm)	8 trips		industrial
Rimann, Eunice E	8:00 AM	5:00 PM	office
Rohbock, Bohdan K	8:00 AM	5:00 PM	office
Christofferson, Lyle G	6:00 AM	6:00 PM	office
Hess, David S	8:00 AM	6:00 PM	office
Lemmon, C. Diane	8:30 AM	5:30 PM	office
Total Employee Based PM Peak Traffic Trips (Industrial)		13	
Total PM Peak Truck Traffic Trips (Industrial)		8	
<u>Total Industrial PM Peak Traffic Generated (Industrial)</u>		<u>21</u>	
Total Employee Based PM Peak Traffic Trips (Office)		5	



JON M. HUNTSMAN, JR.  
*Governor*

GARY R. HERBERT  
*Lieutenant Governor*

**State of Utah  
Department of Commerce**

**OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN**

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**SEP 01 2009**

**ADVISORY OPINION**

**CITY RECORDER**

Advisory Opinion Requested by: Waxie Enterprises, Inc,  
by Henry Babb & David Baird

Local Government Entity: Salt Lake City

Applicant for the Land Use Approval: Waxie Enterprises, Inc.

Project: Construction of Warehouse/Office Facility

Date of this Advisory Opinion: August 31, 2009

Opinion Authored By: Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

**Issue**

Is a local government's road impact fee roughly equivalent to the burden attributable to a new commercial development?

**Summary of Advisory Opinion**

Roadway impact fees are authorized by the Impact Fees Act, and are intended to help fund new roads required as new development is built. Impact fees adopted in compliance with the Impact Fees Act are entitled to a presumption of validity and constitutionality. That presumption may be overcome if a developer presents evidence showing that the fee imposes an unfair and disproportionate burden. Because of the presumption of validity allowed to properly enacted impact fees, a challenger must present strong evidence showing that the fee is unfair and inequitable. Waxie has failed to provide such strong evidence, and until they do, the City's roadway impact fee must be considered valid.

## **Review**

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

A request for an Advisory Opinion was received from David Baird, on behalf of Waxie Enterprises, Inc. on May 5, 2009. A copy of that request was sent via certified mail to Christine Meeker, City Recorder for Salt Lake City. The return certificate, indicating that the City received the copy of the request, was received by the Office of the Property Rights Ombudsman on May 11, 2009. The City submitted a response to the OPRO, which was received on June 15, 2009. Copies of the City's response were mailed to Mr. Baird and Henry Babb, Vice-President for Operations, at Waxie Enterprises' offices in California. On July 28, 2009, Waxie submitted a reply to the City's response.

## **Evidence**

The following documents and information with relevance to the issue involved in this advisory opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion, including attachments, filed May 5, 2009 with the Office of the Property Rights Ombudsman by David Baird, on behalf of Waxie Enterprises, LLC.
2. Response from Salt Lake City, including attachments submitted by Lynn Pace, Deputy City Attorney, received June 15, 2009.
3. Reply from Waxie Enterprises, received July 28, 2009.
4. "General Fund Impact Fees Update," revised draft dated November 17, 2004, prepared by BBC Research & Consulting, submitted by the City on June 15, 2009.
5. Sections from Title 18 of the Salt Lake City Code.

## **Assumed Facts**

For the purposes of this Opinion, it is assumed that the study prepared by BBC Research & Consulting followed the requirements of the Utah Impact Fees Act, and that the representations made therein are accurate and verifiable. It is further assumed that the City followed proper procedures when it adopted its impact fee ordinance.

## Background

In September, 2008, Waxie Enterprises, LLC obtained a building permit to construct a new facility in the western part of Salt Lake City. The new facility replaces an existing building located in West Valley City, which Waxie had operated for several years. The new building included 86,881 square feet (14,443 s.f. of office and 72,438 s.f. of industrial or warehouse space).

Long before Waxie submitted its application, the City adopted an ordinance charging various impact fees on new development. One of those is a “roadway impact fee,” which imposes a charge to partially fund expansion of the City’s arterial streets. Roadway impact fees only apply to new development in the Westside Industrial Area, and are imposed only on retail, office, and industrial development.<sup>1</sup>

The roadway impact fee was evidently based on a study prepared by BBC Research & Consulting. The roadway impact fee was calculated by taking the estimated costs for new arterial roads in the Westside Industrial Area, allocating those costs amongst retail, office, and industrial buildings, and dividing those numbers by the total floor areas projected for each type of building.<sup>2</sup> The study appears to have assigned only a portion of the responsibility to fund new roads to new development. The three types of properties (*i.e.*, retail, office, and industrial) were assigned different weighting factors, reflecting the differing traffic impacts of the property uses. The result was roadway impact fees for retail buildings (currently \$7.83/square foot), office buildings (\$3.81/s.f.) and industrial buildings (\$1.25/s.f.).<sup>3</sup>

The Salt Lake City Code provides for appeals of impact fees. Section 18.98.090 of the City Code provides that an impact fee may be challenged, either through arbitration or in district court. A challenge must be filed within one year after the impact fee is paid. In addition, § 18.98.160 provides for an “independent calculation” of any impact fee, based on data and analysis showing the actual impact of new development, and the cost of that impact.

Waxie paid the required impact fees when it obtained its building permit, including the roadway impact fees.<sup>4</sup> Waxie does not dispute the City’s authority to charge impact fees, nor the procedures used to adopt those fees. Waxie maintains only that the roadway impact fee is excessive, and does not accurately reflect the actual number of vehicle trips anticipated for its new facility. They claim that the new facility will generate 26 total trips (21 industrial and 5 office), because the new facility will have 18 employees (one trip per employee per afternoon) and 8 truck trips between 4-6 pm.

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<sup>1</sup> The Westside Industrial Area is located in the largely undeveloped western part of Salt Lake City. The City determined that the Westside Industrial Area is the only part of the City that will need road improvements. The roadway impact fee is not charged for development in other parts of the City. See “General Fund Impact Fees Update” at § VI, p. 3. This document was provided by Waxie as part of the materials submitted for this Opinion.

<sup>2</sup> See “General Fund Impact Fees Update,” § VI. This Opinion does not attempt to fully analyze the impact fee analysis.

<sup>3</sup> SALT LAKE CITY CODE, ch. 18.98, app. A.

<sup>4</sup> Waxie paid the other required impact fees, but only challenges the roadway impact fee. The City Code allows payment of an impact fee under protest, so that a fee payer may pursue an appeal. SALT LAKE CITY CODE, § 18.98.090(B).

Waxie only states afternoon trips because the City's impact fee analysis referred to "PM peak period conditions" (*i.e.*, afternoon rush hour) as an "emphasis" which determined the trip generation weighting factors for each building type.<sup>5</sup> Waxie explains its analysis as follows: Using the industrial trip generation factor of .9 trips/1,000 s.f., the new facility should generate 65 trips during each afternoon peak. Since the facility will only have 21 industrial trips per day, or 68% fewer trips, the impact fee attributed to the industrial portion of the building should be reduced by 68%. A similar analysis reduces the number of office trips 84%, and so Waxie requests an 84% reduction in the office portion of the impact fee.<sup>6</sup>

The City maintains that the roadway impact fee was correctly calculated, and was based on reliable estimates of costs, future needs, and the impacts of new development. Waxie filed an appeal to the Salt Lake City Council, as provided in the City's Code, but that appeal has been "on hold" while the parties attempted to negotiate a resolution. The City contends that Waxie has not challenged the correctness of the roadway impact fee, but only requests a refund because it feels the new facility will generate fewer vehicle trips than was used in the analysis. The City notes that Waxie may still request that the roadway impact fee be independently calculated using reliable data.

## Analysis

### **I. The City May Charge Impact Fees to Help Fund New Roads Needed to Accommodate New Development.**

The City may charge impact fees on new development. The Utah Impact Fees Act, found in Chapter 11-36 of the Utah Code, authorizes certain types of impact fees to help fund new infrastructure, including roads. Waxie does not question the City's authority to charge the roadway impact fee, and also does not dispute that the City properly enacted the fee as provided in the Impact Fees Act.<sup>7</sup>

Impact Fees are intended to provide partial funding for new infrastructure, based on the need, or impact, caused by new development. The City's roadway impact fee appears to fulfill the need for new arterial roads by first identifying which new roads will be needed, and then allocating a portion of the projected construction costs to new development. This recognizes that existing businesses will also benefit from the new roads, and so a portion of the road's cost should be borne by those businesses, through taxes or other assessments.

The Impact Fees Act requires that fees be justified by analysis using the factors listed in the Act, beginning with a capital facilities plan, which assesses public facilities and determines future needs. From this plan, impact fees can be determined, based on projected growth, the impact

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<sup>5</sup> The consultants explained that the data was based on afternoon rush hour because that is "the period of greatest congestion in Salt Lake City." "General Fund Impact Fees Update" at § VI, p. 2.

<sup>6</sup> Waxie paid \$46,940 as the impact fee attributed to the office portion of the building, and \$90,548 for the industrial portion. Waxie proposes reducing the fees to \$7,408 and \$29,184 respectively.

<sup>7</sup> The Impact Fees Act outlines the procedures that local governments must follow when enacting impact fees.

attributed to new development, and estimated construction costs for new facilities.<sup>8</sup> According to the information provided for this Opinion, the City developed a capital facilities plan, and based its impact fee upon an analysis of its road needs. For the purposes of this Opinion, therefore, it is presumed that the City's roadway impact fee was validly enacted.

## II. An Impact Fee May be Challenged as Excessive or Unreasonable.

### A. An Impact Fee is an Exaction, and Must Satisfy "Rough Proportionality" Analysis.

Impact fees are exactions, because they are "contributions to a governmental entity imposed as a condition precedent to approving the developer's project." *B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 4, 128 P.3d 1161, 1164 ("B.A.M. I"). All exactions, including impact fees, must satisfy the "rough proportionality" analysis of § 10-9a-508(1). *Id.*, 2006 UT 2, ¶ 46, 128 P.3d at 1171. If an impact fee is adopted using the procedures outlined in the Impact Fees Act, it is presumed to be constitutional. "That presumption, however, may be overcome if fees require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred." *Home Builders Association v. City of North Logan*, 1999 UT 63, ¶ 9, 983 P.2d 561, 564 (citation omitted).

A property owner or developer subject to an impact fee may challenge the fee, as provided in the Impact Fees Act and the Salt Lake City Code. "Any fee payer may pay the impact fee imposed by this chapter under protest in order to obtain a building permit, and thereafter may appeal the validity or amount of such payment to the [city] council." SALT LAKE CITY CODE, § 18.98.090(B).<sup>9</sup> The City is obligated to provide the basis of its impact fee, and then "[t]he burden . . . falls upon the challenger to show failure to comply with the constitutional standard of reasonableness." *Home Builders Ass'n v. North Logan*, 1999 UT 63, ¶ 8, 983 P.2d at 563-64 (citation omitted).

The Utah Supreme Court further explained that the reasonableness standard meant that

where the fee charged [on new development] exceeds the direct costs incident thereto (as a means of sharing the costs of common facilities), the excess must survive measure against the standard that the total costs fall equitably upon those who are similarly situated and in just proportion to benefits conferred.

*Id.* (citation omitted).

This language is similar to the "*Nollan/Dolan* rough proportionality" test adopted by both the U.S. Supreme Court and the Utah Supreme Court.<sup>10</sup> That test has also been codified in the Utah Code. At its heart, the rough proportionality test requires that the costs imposed on new development be fair. An exaction is valid if "(1) an essential link exists between a legitimate governmental interest and [the] exaction; and (2) [the] exaction is roughly proportionate, both in

<sup>8</sup> See UTAH CODE ANN. §§ 11-36-201 and -202.

<sup>9</sup> See also UTAH CODE ANN. § 11-36-401.

<sup>10</sup> See *Dolan v. Tigard*, 512 U.S. 374 (1994); *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, 196 P.3d 601.

nature and extent, to the impact of the proposed development.” UTAH CODE ANN. § 10-9a-508(1).

The Utah Supreme Court further honed the “rough proportionality” rule in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, 196 P.3d 601 (“*B.A.M. II*”). The court explained that rough proportionality analysis “has two aspects: first, the exaction and impact must be related in nature; second, they must be related in extent.” *B.A.M. II*, 2008 UT 74, ¶ 9, 196 P.3d at 603. The “nature” aspect focuses on the relationship between the purported impact and proposed exaction. The court stated that the approach should be expressed “in terms of a solution and a problem . . . . [T]he impact is the problem, or the burden which the community will bear because of the development. The exaction should address the problem. If it does, then the nature component has been satisfied.” *Id.*, 2008 UT 74, ¶ 10, 196 P.3d at 603-04. The “extent” aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost:

The most appropriate measure is cost—specifically, the cost of the exaction and the impact to the developer and the municipality, respectively. The impact of the development can be measured as the cost to the municipality of assuaging the impact. Likewise, the exaction can be measured as the value of the land to be dedicated by the developer at the time of the exaction.

*Id.*, 2008 UT 74, ¶ 11, 196 P.3d at 604. Thus, in order to be valid, the cost of an exaction must be roughly equivalent to the cost that a local government would incur to address (or “assuage”) the impact attributable to a new development. Applying that rule to impact fees means that the fee must be roughly equivalent to the costs necessary to offset the impact on system improvements.<sup>11</sup>

#### *B. Applying Rough Proportionality Analysis to Impact Fees.*

There is no question that an efficient road system is a legitimate public interest. *See Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117. The Impact Fees Act specifically authorizes fees for roadways. *See* UTAH CODE ANN. § 11-36-102(13) (“Public Facilities” includes roadways). There is thus an essential link between the roadway impact fee and the City’s legitimate interest in providing adequate roads. The first aspect of the rough proportionality test is therefore met.

The second aspect analyzes the impact fee for rough proportionality, both in nature and extent. Since the City’s roadway impact fee is intended to be based upon the impact that new development will have on the City’s road system, the fee is related in nature to the impact. Secondly, the fee must be “roughly proportionate” in extent to the impact caused by the new development. The Utah Supreme Court has defined “roughly proportionate” as meaning

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<sup>11</sup> The burdens, or impacts, on system improvements is also a measure of the “benefits conferred” by a local government. Publicly owned capital facilities, like roads, water systems, etc. enhance the value of property, and make productive development possible. Impact fees are intended to help fund system improvements, by assigning a fair portion of the costs based on the increased burden on the system improvements caused by new development. *See* UTAH CODE ANN. § 11-36-102(8)(a) (definition of “impact fee”). Because the impact of a new development is measured by the “benefit conferred,” the rough proportionality analysis stated in *B.A.M. II* is effectively the same as the reasonableness standard expressed in *Home Builders Ass’n v. North Logan*.

“roughly equivalent.” If the costs to the developer roughly equal the expense of assuaging the impact, the exaction (or fee) is valid.

The cost to the developer is the fee itself. Using the formula established by its impact fee study, the City charged Waxie \$137,488.00 as a roadway impact fee. The expense to the City, or the benefit provided to the developer, is more difficult to ascertain. The number of vehicle trips is important, but is not the only measure of a development’s impact. The Utah Supreme Court identified several factors that a local government should consider when determining the reasonable of an impact fee:

- (i) the cost of existing public facilities;
- (ii) the financing of existing public facilities: user charges, special assessments, etc.
- (iii) the relative contribution of newly developed and other properties to the cost of existing public facilities: user charges, special assessments, or general taxes;
- (iv) the relative future contribution of newly developed and other properties to the cost of existing public facilities;
- (v) any credit to which newly developed properties are entitled for providing common facilities provided by the local government (or a private entity) elsewhere in the service area;
- (vi) any extraordinary costs in servicing newly developed properties; and
- (vii) the time-price differential inherent in fair comparisons of amounts paid at different times.

*Banberry v. South Jordan City.*, 631 P.2d 899, 903-04 (Utah 1981). These factors have been codified as part of the Impact Fees Act, and are critical to the analysis of how “the proportionate share of the costs of public facilities are reasonably related to . . . new development activity.” UTAH CODE ANN. § 11-36-201(5)(c).

The objective of the complicated comparison in *Banberry* is to assure that municipal fees pertaining to newly developed properties do not require them to bear more than their equitable share of the capital costs (in comparison to other properties) in relation to benefits conferred. If properly applied, those seven factors should put [new development] on essentially the same basis as [existing development] with respect to costs borne in the past and to be borne in the future, in comparison with benefits already received and yet to be received.

*Lafferty v. Payson City*, 642 P.2d 376, 379 (Utah 1982). The *Banberry* factors, however, are not exclusive, and “should not be read as limiting the ability to deal with differing circumstances.” *Home Builders Ass’n v. American Fork*, 1999 UT 7, ¶ 6, 973 P.2d 425, 427. A local government should incorporate consideration of these factors into a determination of whether a fee is roughly proportional, both in nature and extent, to the impact created by new development.

The City commissioned impact fee studies that proposed roadway impact fees, based upon the data provided by the City. This Opinion does not attempt a review of that study or the data used to generate the City's impact fees. As explained by the Utah Supreme Court, once the City has provided the basis of its fee (*i.e.*, its Impact Fee Study), the burden shifts to Waxie to demonstrate that the fee is does not satisfy the constitutional standard of reasonableness.<sup>12</sup>

Waxie argues that its impact on the City's roadway system is not roughly equal to the City's impact fee. According to Waxie, it will generate 26 vehicle trips each afternoon, based on the number of employees and truck shipments. However, this evidence is scant at best, and does not appear sufficient to overcome the presumption of validity and constitutionality enjoyed by the City's fee.<sup>13</sup> Waxie provided no traffic study, historical study, or other documentation to show that the 26 afternoon trips are the maximum number of vehicle trips associated with the new facility. Waxie also failed to submit any financial analysis showing how the roadway impact fee compares to the expenses incurred by the City to assuage the impacts caused by the new facility.

The City's impact fee is based on more than simply the number of potential vehicle trips. The benefits of the City's roadway system are more than just convenience for employees. All properties and businesses in the area benefit because the City maintains its arterial roadway system. Waxie's new facility will impact that system. As stated above, the purpose of an impact fee is to place new development and existing development on "essentially the same basis," including costs borne in the past and in the future. It is only fair that Waxie contribute a share of the costs of the arterial road system. Based on the benefit provided, that share is more than simply the number of daily vehicle trips.

Waxie's conclusion that the City's impact fee is based on afternoon vehicle trips only is mistaken. According to the Impact Fee Update Study provided for this Opinion, afternoon trips were used to determine the weighting factors assigned to each building type (retail, office, or industrial). The consultants used afternoon trips for the weighting factors because the highest traffic volumes are in the afternoon. The fee was not based on afternoon vehicle trips, but on the usage, measured by the size of the building, not the number of employees or vehicle trips. The projected traffic usage associated with each type of building was evidently derived using industry standards.

Waxie is in a unique position to request an independent calculation of its impact fee. The City's ordinance provides for independent calculation of an impact fee, provided the fee payer provides sufficient documentation. *See SALT LAKE CITY CODE, § 18.98.160.* Since Waxie has moved from a nearby facility, evidence of the traffic usage from that building can be used as evidence of the estimated traffic usage at the new facility. As has been discussed, however, traffic usage is only part of the information used to determine the impact fee. Future roadway needs, construction costs, financial analysis etc. must also be factored in.

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<sup>12</sup> *See Home Builders Ass'n v. North Logan*, 1999 UT 63, ¶ 8, 983 P.2d 561, 563-64.

<sup>13</sup> *See id.*, 1999 UT 63, ¶ 9, 983 P.2d at 564. It is assumed for the purposes of this Opinion that the City's Roadway Impact Fee was properly enacted, and warranted by a capital facilities plan and impact fee study that followed the Impact Fees Act.

## Conclusion

Roadway or transportation impact fees are authorized by the Impact Fees Act, and may be charged to new development as a means of sharing the costs of new roads. As with all impact fees, roadway fees must be fair, and not impose a disproportionate burden upon new development. Impact fees adopted following the procedures and standards of the Impact Fees Act are entitled to a presumption of validity and constitutionality, but that presumption may be overcome if the fees are inequitable or disproportionate to the benefits conferred by the local government.

Impact fees are exactions, and must therefore satisfy the “rough proportionality” analysis codified at § 10-9a-508 of the Utah Code. The “reasonableness” language used in *Home Builders Ass’n v. American Fork* conveys the same meaning as the “rough proportionality” test used by the Utah Code and the *B.A.M. Development* cases. Therefore, any impact fee must satisfy the “rough proportionality” test, although compliance with the Impact Fees Act entitles the fee to a presumption of validity.

A developer may challenge an impact fee as disproportionate. If the local government provides the analysis upon which the fee is based, the burden shifts to the developer to show how the fee is unfair or inequitable. Given the presumption allowed to properly enacted impact fees, a developer must provide strong evidence that the challenged fee imposes an unfair burden.

Waxie’s argument that its actual afternoon vehicle trips show a lessened impact than that calculated by the City’s impact fee study is unsupported, because the evidence is not sufficient enough to overcome the presumption that the impact fee is valid. The number of trips claimed by Waxie is not supported by documentary or scientific evidence, and does not necessarily reflect the maximum number of trips associated with the facility. Waxie also did not submit any financial analysis comparing the fee to the City’s costs to address the impacts attributed to the new facility. The City’s fee is not based solely on afternoon vehicle trips, but on traffic usage derived from industry standards, as well as the estimated costs for new arterial roads. Waxie will need to provide more information and analysis showing that the impact fee imposes a disproportionate burden upon their new facility.



Brent N. Bateman, Lead Attorney  
Office of the Property Rights Ombudsman

**NOTE:**

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

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

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

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

## MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Christine Meeker, City Recorder  
Salt Lake City  
451 S. State, Room 415  
Salt Lake City, Utah 84111

On this 1<sup>st</sup> Day of September, 2009, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

  
\_\_\_\_\_  
Cynthia Nelson  
Office of the Property Rights Ombudsman



JON M. HUNTSMAN, JR.  
*Governor*

GARY R. HERBERT  
*Lieutenant Governor*

State of Utah  
Department of Commerce

Office of the Property

MAY 05 2009

Property Ombudsman

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

### Request for an Advisory Opinion:

Street Address:

160 East 300 South, Second Floor  
Salt Lake City, UT 84111

Mailing Address:

PO Box 146702  
Salt Lake City, UT 84114

(801) 530-6391  
1-877-882-4662 (Toll-free statewide)  
(801) 530-6338-Fax

Person Requesting the Advisory Opinion: Harry Babb

Mailing Address: 9353 Waxie Way

City, State, Zip: San Diego, CA 92123

Telephone: (800) 544-8054 Email (if available) \_\_\_\_\_

The person making the Request is:

Municipality  Applicant  Other (Specify) \_\_\_\_\_

Property: Where is the property located? (complete street address, if available)

5107 West 1730 South, Salt Lake City, UT 84104

Briefly state the question to be examined by this Advisory Opinion:

To review the legal merits of and issue a non-binding advisory opinion on the appropriateness of Waxie's Enterprises Inc.'s pending appeal of transportation impact fees previously paid to Salt Lake City Corporation on September 11, 2008. Waxie's Enterprises Inc. has provided to Salt Lake City its own calculations of anticipated trip generation resulting from their new building on the city's infrastructure. Waxie's calculations significantly differ from Salt Lake City's assumptions incorporated into the city's adopted impact fee study which was subsequently used to establish and justify Salt Lake City's impact fees.

**Facts:** Attach an additional sheet describing the facts involved in the issues that are the subject of this request. What action has been taken by the government entity or may be contemplated by the government entity that has given rise to the issues?

**Municipality or County Involved:**

Salt Lake City Corporation

Mailing Address: 451 South State Street

City, State, Zip: Salt Lake City, UT 84111

Telephone: (801) 535-6230 Email (if available) frank.gray@slcgov.com

**Local Contact:** What official at that government entity should be contacted about this matter? (Provide title and contact information)

Telephone: (801) 535-6230 Email (if available) frank.gray@slcgov.com

**Name of Property Owner** as Shown at the County Recorder's Office. (Be sure to be specific and note exact name of trust, partnership, corporation, multiple owners, etc.)

Waxie's Enterprises, Inc.

Mailing Address: 9353 Waxie Way San Diego, CA 92123

City, State, Zip: San Diego, CA 92123

Telephone: (800) 544-8054 Email (if available)                   

**Other Essential Parties** (attach additional sheets if necessary):

David Baird, local representative for Waxie

Mailing Address: 2825 E. Cottonwood Pkwy, Suite 500

City, State, Zip: Salt Lake City, UT 84121

Telephone: 801-831-7943 Email (if available)

**Issues:** An advisory opinion is requested for the issue(s) indicated:

- Impact Fees Act
- Application for a Conditional Use Permit.
- Conditions and exactions on development.
- Whether an applicant is entitled to approval of a land use application because the application conforms to the local land use maps, zoning maps, and land use ordinances.
- Whether a local government entity has imposed on the holder of an issued land use permit a requirement that is not expressed in the land use permit, documents on which the land use permit is based, the state land use statutes, or the local ordinances.
- Whether a local government entity has withheld issuance of a certificate of occupancy because of the applicant's failure to comply with a requirement that is not expressed in the land use permit, documents on which the land use permit is based, the state land use statutes, or the local ordinances.
- Whether a municipality is complying with the mandatory provisions of applicable land use ordinances.
- Review of land use applications within a reasonable time.
- Limits on fees for review and approving building plans.
- Nonconforming uses and noncomplying structures.

**Process:** At what stage is the local government entity in the process of reviewing this application or issue? Check all that apply:

- Staff or other local government officials are discussing the issue.
- A formal application has been filed and the staff is reviewing it.
- We have had a meeting before a planning commission.
- We have had a meeting before the city council, county commission, or county council.
- A final decision has been made by the final decision maker prior to an appeal.
- We are considering filing a local land use appeal from the final decision.
- We have filed an appeal but no hearing has been held.
- An appeals authority has announced a final decision, but has not reduced it to writing.
- The appeals authority has issued a final decision in writing.

**NOTE:** An advisory opinion cannot be requested after a local appeals authority has issued a final decision in writing. It cannot be requested if no one filed a necessary appeal before the deadline to file and the local decision is therefore final and cannot be appealed to an appeal authority or court. Those involved in requesting an advisory opinion must be sure to file timely appeals or the issues involved will be rendered moot. Please call the ombudsman for more information. Local government officials should also be knowledgeable about the deadlines and processes for filing appeals, but one should also verify what he or she is told by checking the ordinance.

**Who is to Provide the Opinion:** If applicable please provide the name(s) and address(es) of professionals who are acceptable to the person making the request and who could prepare the advisory opinion.

Name: Property Rights Ombudsman legal counsel

Mailing Address: \_\_\_\_\_

City, State, Zip: \_\_\_\_\_

Telephone: \_\_\_\_\_ Email (if available) \_\_\_\_\_

As the person making this request, I hereby understand and agree as follows:

- The ombudsman's office will work to mediate a solution to this dispute in lieu of issuing an advisory opinion, but the opinion will be issued if the party requesting it prefers that the opinion be issued.
- If the ombudsman's office appoints a professional to provide the opinion, I will pay an equal share of the cost of professional services with the other parties to the dispute and provide financial assurances of the payment.
- If the ombudsman's office determines that the issue is not appropriate for an advisory opinion, then none will be provided.
- This form is to be completed and submitted to the Office of the Property Rights Ombudsman, along with application payment in the amount of \$150.00, made payable to the Office of the Property Rights Ombudsman. The fee paid to initiate this opinion is non-refundable.
- This form and all submissions accompanying this form will be considered a public record and provided to all other parties listed. If any party desires that any information provided to the ombudsman office be kept confidential, that party must notify the staff attorneys at the ombudsman office before providing such information.

I/we hereby request that the Office of the Property Rights Ombudsman provide mediation and/or arbitration of the matter(s) described in this request.

Date this form completed: 5/5/2009

Signed:

Nancy Bass  
Person making request



May 6, 2009

Property Rights Ombudsman  
State of Utah Department of Commerce  
160 East 300 South  
Salt Lake City, UT 84111

Dear Ombudsman Office Representatives,

Waxie's Enterprises Inc. (Waxie) respectfully requests the Property Rights Ombudsman to review and issue a non-binding Advisory Opinion regarding Waxie's pending appeal of transportation impact fees previously paid to Salt Lake City Corporation on September 11, 2008. Waxie has requested a refund of a portion of the impact fees paid to Salt Lake City in September 2008 for Waxie's new building located at 5107 West 1730 South, Salt Lake City, Utah 84104. This request is made pursuant to Salt Lake City Code 18.98.090, Utah Code Ann. 11-36-401, which states, a city may not "impose or charge any...fees as a condition of development approval unless those fees are a reasonable charge for the service provided" (Utah Code Ann. 11-36-201(1)(b)(ii)). This objective is further defined in Salt Lake City's adopted impact fee study from BBC Research & Consulting/Galena Consulting dated November 17, 2004, Section 1, Page 2 which states "Impact fees are levied only against new development projects as a condition of permit approval to support infrastructure needed to serve the proposed development." The basis for Waxie's impact fee refund is based on the difference in trip generation assumed in Salt Lake City's adopted impact fee study versus the actual trips generated by Waxie's new facility.

By way of background, on February 18, 2009, Waxie submitted a request to the Council for a recalculation and refund of a portion of its impact fees based on Waxie's predictable knowledge of the direct traffic generated by its new building. On March 2, 2009, Waxie temporarily withdrew this request to the Salt Lake City Council in an effort to explore an amicable resolution with the Salt Lake City staff instead of the City Council. Waxie reserved the right to appeal directly to the Council. Subsequent to Waxie's good faith withdrawal of the previous request, Waxie's representatives have attempted to resolve Salt Lake City's incorrect conclusions regarding the traffic impact from the new building with Mr. Frank Gray, Community and Economic Development Director for Salt Lake City. These efforts have proven fruitless in that Mr. Gray's response was contradictory and inconsistent with various sections of the city code and the city's adopted impact fee study (as detailed below).

On September 11, 2008, Waxie paid Salt Lake City \$186,142 in impact fees for its 86,881 square foot building, of which \$137,488 was for roadway impact fees, calculated on 14,443 square feet of office space (\$3.25 per 1,000 square feet; or \$46,940) and 72,438 square feet of industrial space (\$1.25 per 1,000 square feet, or \$90,548). The building will be entirely owner-occupied. Based on historic operations of a similar facility in West Valley City, Utah, coupled with anticipated business operations in the new facility, Waxie has quantified its anticipated trip generations derived from constructing the new building.



Corporate Headquarters ■ 9853 Waxie Way ■ San Diego, CA 92123-1036  
(800) 544-8054 ■ (858) 292-8111 ■ FAX (858) 279-6311 ■ [www.waxie.com](http://www.waxie.com)

Boise ■ Denver ■ El Centro ■ Idaho Falls ■ Las Vegas ■ Los Angeles ■ Ontario ■ Palm Springs ■ Phoenix ■ Portland ■ Salt Lake City ■ San Diego ■ San Francisco ■ Santa Ana ■ St. George ■ Tucson

Salt Lake City's industrial roadway impact fees are based on trip generation averages as determined by the Institute of Transportation Engineers (ITE). Waxie's actual trip generation numbers, due to its unique operating standards, are significantly less than the averages of the ITE. As shown on Exhibit VI-2 of Salt Lake City's adopted impact fee study, the ITE Trip Generation estimate suggests an average trip generation rate for industrial use, at the P.M. peak hour, per 1,000 square feet of gross floor area, of 0.9. Using this average trip generation, Waxie should be expected to generate 65.16 trips ( $72.4 \times 0.9$ ) during the P.M. peak. Waxie's actual trip generation during the P.M. peak, attributed to the industrial square footage of the building, is only 21 trips, or 32%, of the anticipated traffic demand assumed in the Salt Lake City impact fee study. Conversely, Waxie requests a 68% reimbursement of its industrial traffic impact fees, or \$61,364.

Salt Lake City's office roadway impact fees are based on trip generation averages as determined by the Institute of Transportation Engineers (ITE). Waxie's actual trip generation numbers, due to its unique operating standards, are significantly less than the averages of the ITE. As shown on Exhibit VI-2 of Salt Lake City's adopted impact fee study, the ITE Trip Generation estimate suggests an average trip generation rate for office use, at the P.M. peak hour, per 1,000 square feet of gross floor area, of 2.2. Using this average trip generation, Waxie should be expected to generate 31.68 trips ( $14.4 \times 2.2$ ) during the P.M. peak. Waxie's actual trip generation during the P.M. peak, attributed to the office square footage of the building, is only 5 trips, or 16%, of the anticipated traffic demand assumed in the Salt Lake City impact fee study. Conversely, Waxie requests an 84% reimbursement of its office traffic impact fees, or \$39,532.

In early March 2009, Mr. Frank Gray, acting in his capacity as Community and Economic Development Director for Salt Lake City, issued a verbal opinion on Waxie's pending request to Mr. David Baird, local representative for Waxie. Mr. Gray summarily dismissed Waxie's request and refused to consider Waxie's independent calculations as can be provided to the city per Utah State Code Ann. 11.36.202(2)(B)(iii-iv) and Salt Lake City Code 18.98.090 and 18.98.160. Mr. Gray remarked that even though the city has no proof that the proposed building will generate the city's assumed traffic trip generation thresholds for any reasonable time in the future, the building might hypothetically produce greater traffic on some undetermined date "... in the next 70 years." Therefore, the city is justified in collecting an impact fee today for unsubstantiated traffic that may never be generated from this building. Waxie believes that Mr. Gray's logic is contradictory to state and city laws that specifically require Salt Lake City to justify and proportionately collect impact fees based on actual burdens of new development on the city's infrastructure system, as is included in their adopted impact fee analysis. Furthermore, Mr. Gray's logic of the city's right to collect impact fees for anticipated but unjustified traffic demands for up to 70 years in the future is directly contradictory to Salt Lake City's adopted impact fee study which only anticipates and funds traffic generation needs for the next 20 years (as is evidenced in the Salt Lake City 20-Year Capital Improvement Need Inventory (the "CIP") which is incorporated into the city's adopted impact fee study). This city's 20-year impact study horizon was subsequently halved by the Revised Impact Fee Memorandum from BBC Research & Consulting/Galena Consulting dated November 29, 2005 which explicitly revised the CIP to only collect impact fees for projects immediately needed within the next ten (10) years. The city's adopted impact fee study cites a timeframe that is only 14% of Mr. Gray's assertion of the seventy (70) year needs for the city. In addition, The State of Utah Impact Fees Act section 11.36.302(2)(a) requires the local political subdivision to expend the collected impact fee revenue within six (6) years of its receipt or otherwise to refund the fee. This very short time frame of six (6) years is also directly contradictory

to Mr. Gray's 70 year infrastructure justifications. Waxie is highly confident in the accuracy of their anticipated traffic generation in the next 20 years, 10 years and 6 years (depending on which time horizon the city refers to in its adopted ordinance) as they are constructing and occupying this new building to meet their long term business objectives and are not operating or designing the building on a short term occupancy basis. Thus, Waxie respectfully disagrees with Mr. Gray's assertion on the justified impact fee based on anticipated traffic generation as Waxie intends to remain stable throughout the entire time period outlined in the city's adopted impact fee study.

Waxie has also researched the assumptions Salt Lake City has made on justifying the storm water, sewer, police and fire impact fees and concludes that these fees are justified, fair and correct. Waxie has paid these impact fees in full and are not included in the scope of this appeal.

For your reference, Waxie has provided the following documents as background information:

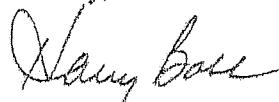
1. A copy of Waxie's impact fee calculation as created by Salt Lake City.
2. A summary of Waxie's staffing levels of the new facility immediately upon completion of the building and remaining constant for the foreseeable future.
3. A copy of Salt Lake City's General Fund Impact Fees Update dated November 17, 2004 and a copy of the Revised Impact Fee Study Memorandum dated November 29, 2005 from BBC Research & Galena Consulting.

In summary, Salt Lake City imposed a roadway impact fee on Waxie's Enterprises, Inc.'s new building that exceeds the actual impact of the building on the city's roadway infrastructure for the timeframes defined in the city's adopted impact fee study. Accordingly, Waxie requests that Salt Lake City refund \$100,896 to Waxie, which reflects the difference in the impact fees collected by Salt Lake City and Waxie's actual impact on the city's roadway infrastructure. We respectfully request the State of Utah Property Rights Ombudsman to issue a non-binding Advisory Opinion on this matter.

We appreciate the time and attention that has been provided to this point as Waxie is only seeking a fair impact fee assessment that accurately reflects Waxie's true impact on the City's infrastructure, as is required by city and state law.

We look forward to discussing this matter with you soon.

Sincerely,



Harry Babb  
VP, Operations



3773 Cherry Creek North Drive  
Suite 850  
Denver, Colorado 80209-3827  
303.321.2547 fax 303.399.0448  
[www.bbcresearch.com](http://www.bbcresearch.com) [bbc@bbcresearch.com](mailto:bbc@bbcresearch.com)



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## MEMORANDUM

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To: Mr. Louis Zunguze, Community Development Director  
Ms. LuAnn Clark, Housing and Neighborhood Development Division Director

From: BBC Research & Consulting and Anne Wescott, Galena Consulting

Re: Salt Lake City Revised Impact Fees

Date: November 29, 2005

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This memo recommends the maximum allowable impact fees for Salt Lake City based on a revised 10-year, fiscally-constrained Capital Improvement Plan (CIP). The methodology for constraining the CIP was detailed in a November 14<sup>th</sup> memo entitled, "Draft 10-Year CIP (Fiscally Constrained) and Impact Fee Next Steps."

Initial fees were calculated in a November 2004 report that was based on the City's 20-Year Inventory of Capital Needs. However, the Council expressed concerns about adopting impact fees based on a CIP that the City may not be able to fund. The City requested that BBC/Galena be retained to develop a 10-Year CIP Plan that was fiscally constrained to reflect an ongoing General Fund appropriation to the CIP Fund of 7.9 percent of General Fund revenues.

The November 2004 report and model serve as the basis for the demographic information used to calculate the revised fees.<sup>1</sup> As mentioned above, the initial fee report covered a 20-year timeframe. In order to recalculate fees, BBC/Galena adjusted the demographic figures to reflect the ten-year period encompassing the newly constrained 10-Year CIP.

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<sup>1</sup> Please also see the November 17, 2004, report for a detailed analysis and explanation of the impact fee methodology.

Exhibit 1 presents \$5.3 million in fire infrastructure needed over the next 10 years and the resultant impact fee.

**Exhibit 1.**  
**Revised Fire Impact Fees**

Source:  
*General Fund Impact Fee Update*, November 17, 2005, Salt Lake City, Galena Consulting and BBC Research & Consulting.

<i>Fee Calculation</i>	
<i>Total Costs for Fire Infrastructure</i>	\$5,340,400
<i>Allocation for Impact Fees</i>	
Residential	59%
Commercial/Industrial/Other	41%
<i>Allocated Costs by Category</i>	
Residential	\$3,154,208
Commercial/Industrial/Other	\$2,186,192
<i>New Development</i>	
Residential (in dwelling units)	7,900
Commercial/Industrial (in square feet)	8,224,225
<i>Impact Fee by Unit of Development (rounded)</i>	
Residential (per dwelling unit)	\$399
Commercial/Industrial (per square feet)	\$0.27

The maximum allowable impact fee for fire infrastructure is \$399 for a residential unit and \$0.27 per commercial/industrial square foot.

Exhibit 2 below depicts the revised police impact fees. Almost \$5 million in police infrastructure is identified over the next 10 years.

**Exhibit 2.**  
**Revised Police Impact Fees**

Source:  
*General Fund Impact Fee Update*, November 17, 2005, Salt Lake City, Galena Consulting and BBC Research & Consulting.

<i>Fee Calculation</i>	
<i>Total Costs for Police Infrastructure</i>	\$4,977,375
<i>Allocation for Impact Fees</i>	
Residential	59%
Commercial/Industrial/Other	41%
<i>Allocated Costs by Category</i>	
Residential	\$2,939,794
Commercial/Industrial/Other	\$2,037,581
<i>New Development</i>	
Residential (in dwelling units)	7,900
Commercial/Industrial (in square feet)	8,224,225
<i>Impact Fee by Unit of Development (rounded)</i>	
Residential (per dwelling unit)	\$372
Commercial/Industrial (per square feet)	\$0.25

The maximum allowable impact fee for police infrastructure is \$372 for a residential unit and \$0.25 per commercial/industrial square foot.

Exhibit 3 below calculates the revised impact fees for roadways in Salt Lake City. Over the next 10 years, the City's constrained CIP identifies \$11.2 million in roadway infrastructure needed to serve growth. It is important to note that roadways fees are only applied to development in the Westside Industrial Area, where all of the growth-related road improvements are expected to occur. Single family and multifamily units are not assessed a roadway impact fee because residential development is not projected for the Westside Industrial Area.

**Exhibit 3.**  
**Revised Roadway Impact Fees**

Source:  
*General Fund Impact Fee Update*, November 17, 2005, Salt Lake City, Galena Consulting and BBC Research & Consulting.

<i>Fee Calculation</i>	
<i>Total Costs for Roadway Infrastructure</i>	\$ 11,218,125
<i>Allocation for Impact Fees</i>	
Single Family Residential	0%
Multifamily Residential	0%
Retail	4%
Office	44%
Industrial	51%
<i>Allocated Costs by Category</i>	
Single Family Residential	\$0
Multifamily Residential	\$0
Retail	\$486,959
Office	\$4,962,796
Industrial	\$5,768,370
<i>Projected Development</i>	
Single Family Residential	0
Multifamily Residential	0
Retail	74,800
Office	1,701,600
Industrial	5,151,500
<i>Impact Fee by Unit of Development (rounded)</i>	
Single Family Residential (per dwelling unit)	\$0
Multifamily Residential (per dwelling unit)	\$0
Retail (per square foot)	\$6.51
Office (per square foot)	\$2.92
Industrial (per square foot)	\$1.12

The maximum allowable impact fee for roadways is \$6.51 per retail square foot, \$2.92 per office square foot and \$1.12 per industrial square foot.

Exhibit 4 below shows that \$3.5 million of parks infrastructure is eligible for inclusion into the impact fee calculation for parks, recreation, open space and trails.

**Exhibit 4.**  
**Revised Parks Impact Fees**

<i>Fee Calculation</i>		
<i>Total Costs for Parks Infrastructure</i>		<i>\$3,448,125</i>
<i>Allocation for Impact Fees</i>		
Residential		100%
Commercial		0%
<i>Allocated Costs by Category</i>		
Residential		\$3,448,125
Commercial		\$0
<i>Projected Development</i>		
Residential (indwelling units)		7,900
Commercial (in square feet)		0
<i>Impact Fee by Unit of Development (rounded)</i>		
Residential (per dwelling unit)		\$436
Commercial/Industrial (per square foot)		\$0.00

BBC/Galena recommend charging up to \$436 per residential unit for parks, recreation, open space and trail impact fees.

The following exhibit summarizes the revised fees for Salt Lake City.

**Exhibit 5.**  
**Summary of Revised Impact Fees**

Note:

(1) Residential units are specified by single family and multifamily; commercial development is specified by retail, office and industrial.

(2) Roadway Fees for infill development are only assessed in the Westside Industrial Area.

Source:

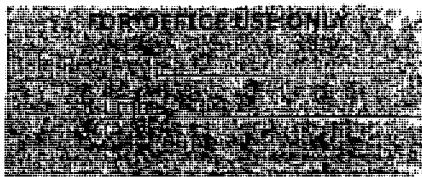
Galena Consulting and BBC Research & Consulting.

<i>Description</i>	<i>Impact Fee</i>
<i>Fire Fees</i>	
Residential (per dwelling unit) <sup>(1)</sup>	\$399
Commercial/Industrial (per square foot) <sup>(1)</sup>	\$0.27
<i>Police Fees</i>	
Residential (per dwelling unit)	\$372
Commercial/Industrial (per square foot)	\$0.25
<i>Roadway Fees<sup>(2)</sup></i>	
Residential (per single family dwelling unit)	\$0.00
Residential (per multifamily dwelling unit)	\$0.00
Retail (per square foot)	\$6.51
Office (per square foot)	\$2.92
Industrial (per square foot)	\$1.12
<i>Parks Fees</i>	
Residential (per dwelling unit)	\$436
Commercial/Industrial (per square foot)	\$0.00
<i>Total Fees</i>	
Residential (per single family dwelling unit)	\$1,207
Residential (per multifamily dwelling unit)	\$1,207
Retail (per square foot)	\$7.03
Office (per square foot)	\$3.44
Industrial (per square foot)	\$1.64

The total revised fees for Salt Lake City include \$1,207 per single family and multifamily unit; \$7.03 per retail square foot; \$3.44 per office square foot; and \$1.64 per industrial square foot.



# APPLICATION FOR DETERMINATION OF IMPACT FEES



**SALT LAKE CITY CORPORATION**

Certified Address of the Development: \_\_\_\_\_

Property Sidewall Number: \_\_\_\_\_ Telephone Number: \_\_\_\_\_

Applicant Name: \_\_\_\_\_

Type of Development     Residential     Commercial

If Residential, the number of dwelling units: \_\_\_\_\_

If Commercial, is it:  Retail SqFt \_\_\_\_\_  Office SqFt \_\_\_\_\_  Industrial SqFt \_\_\_\_\_

(Square footage shall be measured in terms of gross floor area, which is the area included within the exterior walls of a building or portion thereof, exclusive of vent shafts and courts. The floor area of a building or portion thereof, not provided with surrounding exterior walls shall be the usable area under the horizontal projection of the roof or floor above.)

## IMPACT FEE SCHEDULE BY UNIT OF DEVELOPMENT

DEVELOPMENT DESCRIPTION	INFILL DEVELOPMENT	WEST SIDE	NORTHWEST QUADRANT
<b>PUBLIC SAFETY - FIRE FEES</b>			
Residential (per dwelling unit)	\$440.00	\$440.00	\$440.00
Commercial/Industrial (per sq.ft.)	\$0.29	\$0.29	\$0.29
<b>PUBLIC SAFETY - POLICE FEES</b>			
Residential (per dwelling unit)	\$410.00	\$410.00	\$410.00
Commercial/Industrial (per sq.ft.)	\$0.27	\$0.27	\$0.27
<b>ROADWAY FEES</b>			
Residential (per s/f dwelling unit)		\$0.00	
Residential (per multi-family dwelling unit)		\$0.00	
Retail (per square foot)		\$7.27	
Office (per square foot)		\$3.25	
Industrial (per square foot)		\$1.25	
<b>PARK FEES</b>			
Residential (per dwelling unit)	\$618.00	\$618.00	\$618.00
Commercial/Industrial (per sq. ft.)			
<b>TOTAL FEES</b>			
Residential (per s/f dwelling unit)	\$1,468.00	\$1,468.00	\$1,468.00
Residential (per multi-family dwelling unit)	\$1,468.00	\$1,468.00	\$1,468.00
Retail (per square foot)	\$0.56	\$7.83	\$0.56
Office (per square foot)	\$0.56	\$3.81	\$0.56
Industrial (per square foot)	\$0.56	\$1.81	\$0.56

NOTE: Refer to Salt Lake City Ordinance 18.98 for exemptions or offsets of the Impact Fees.

The collection of Impact fees shall apply to all new development activity in Salt Lake City Corporation, unless otherwise provided. Until any Impact fees required by SLC Ordinance has been paid in full, no building permit for the development activity shall be issued. A stop work order shall be issued on any development activity for which the applicable Impact fee has not been paid in full.

6/2007

Signature

Date

**IMPACT FEE WORKSHEET**

	Infill	West Side X	N.W. Quad	<b>EXEMPTIONS</b> <Negatives>
<b>Public Safety - Fire</b>				
Residential per unit	\$440 X _____ = _____	\$440 X _____ = _____	\$440 X _____ = _____	
X Commercial	\$0.29 X _____ = _____	\$0.29 X <del>\$6,881</del> = <del>25,196</del>	\$0.29 X _____ = _____	
<b>Public Safety - Police</b>				
Residential per unit	\$410 X _____ = _____	\$410 X _____ = _____	\$410 X _____ = _____	
X Commercial	\$0.27 X _____ = _____	\$0.27 X <del>\$6,881</del> = <del>23,458</del>	\$0.27 X _____ = _____	
<b>Roadway Fees</b>				
Residential				
Residential - Multifamily				
X Retail	\$7.27 X _____ = _____			
X Office	\$3.25 X <del>\$4,443</del> = <del>14,440</del>			
X Industrial	\$1.25 X <del>72,138</del> = <del>90,518</del>			
<b>Park Fees</b>				
Residential	\$618.00 X _____ = _____	\$618.00 X _____ = _____	\$618.00 X _____ = _____	
	<b>TOTAL =</b>	<b>TOTAL = \$186,142</b>	<b>TOTAL =</b>	<b>TOTAL =</b>

IMPACT FEE TOTAL = \$ 186,142 MINUS (-) EXEMPTIONS \$ \_\_\_\_\_ EQUALS (=) TOTAL DUE \$ 186,142

*Waxie Industries*

*Anticipated PM Peak Traffic Generation Data  
Salt Lake City, Utah (2009)*

Employee	Time In	Time Out	Classification
Gilgen, Tara	7:00 a.m.	4:00 p.m.	Industrial
Walker, Colleen	7:00 a.m.	4:00 p.m.	Industrial
Yack, David	7:00 a.m.	4:00 p.m.	Industrial
Dixon, Kaitlyn	8:00 a.m.	5:00 p.m.	Industrial
Lemon, Amber	8:00 a.m.	5:00 p.m.	Industrial
Ludvigson, Susan	8:00 a.m.	5:00 p.m.	Industrial
West, Emma	8:00 a.m.	5:00 p.m.	Industrial
Wood, Deneen	8:00 a.m.	5:00 p.m.	Industrial
Cook, Aaron	8:00 a.m.	5:00 p.m.	Industrial
Groff, Guy	8:00 a.m.	5:00 p.m.	Industrial
Hossom, Luke	8:00 a.m.	5:00 p.m.	Industrial
Shakespeare, John	7:00 a.m.	6:00 p.m.	Industrial
Colledge, Jared	7:00 a.m.	6:00 p.m.	Industrial
Truck Trips (4-6 pm)	8 trips		Industrial
Rimann, Eunice	8:00 a.m.	5:00 p.m.	Office
Rohbock, Bohdan	8:00 a.m.	5:00 p.m.	Office
Lemmon, Diane	8:30 a.m.	5:30 p.m.	Office
Christofferson, Lyle	6:00 a.m.	6:00 p.m.	Office
Hess, David	8:00 a.m.	6:00 p.m.	Office
Total Employee Based PM Peak Traffic Trips (Industrial)		13	
Total PM Peak Truck Traffic Trips (Industrial)		8	
<hr/>		21	
Total Employee Based PM Peak Traffic Trips (Office)		5	



JON M. HUNTSMAN, JR.  
*Governor*

GARY R. HERBERT  
*Lieutenant Governor*

State of Utah  
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

Received

MAY - 7 2009

CITY ATTORNEY'S OFFICE

May 6, 2009

RECEIVED

Christine Meeker, City Recorder  
Salt Lake City  
City & County Bldg  
451 S State Street, Rm 415  
Salt Lake City, Utah 84111

MAY 07 2009

CITY RECORDER

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

RE: ADVISORY OPINION REQUEST - HARRY BABB/WAXIE'S ENTERPRISES, INC.

PROPERTY ADDRESS: 5107 WEST 1730 SOUTH, SALT LAKE CITY, UTAH, 84104

Dear Ms. Meeker:

Our Office has received the enclosed Request for an Advisory Opinion from Mr. Harry Babb of Waxie's Enterprises Inc., which relates to issues involving the City of Salt Lake. Under state law, Utah Code § 13-43-206, the Office of the Property Rights Ombudsman (OPRO) is to provide for a process that will result in the issuance of an advisory opinion if requested by a party who might be adversely affected by certain decisions made under the local land use ordinances. Upon receipt of a request for an advisory opinion, the law requires that the OPRO deliver the request to the governmental entity by sending this letter to the person shown on the records at the Department of Commerce, Division of Corporations and Commercial Code, as designated by the governmental entity for the service of a notice of claim under the Governmental Immunity Act. This letter is to satisfy this requirement.

According to the information we have received, Mr. Babb states the City of Salt Lake imposed traffic, and industrial traffic, impact fees based on trip generation averages as determined by the Institute of Transportation Engineers (ITE). Mr. Babb claims Waxie's trip generation numbers are significantly lower than the averages of ITE. Mr. Babb feels he is entitled to reimbursement for the difference in the impact fees collected by Salt Lake City and Waxie's actual impact on the

Christine Meeker  
May 6, 2009  
Page 2 of 3

city's roadway infrastructure. The purpose of the Advisory Opinion will examine whether or not Mr. Babb is entitled to reimbursement and whether or not the City of Salt Lake complied with legal standards governing Impact Fees in Utah.

Within four business days of your receipt of this letter, the governmental entity and the person requesting the advisory opinion should contact this office to discuss the issues. You may contact the person making the request directly about the issues - the contact information is on the request form. Please advise us as soon as possible if you are aware of any other necessary parties to this potential dispute.

The opinion may be prepared by an attorney in this office at no additional cost to the parties or an approved neutral from the enclosed list may be appointed by this office. We would prefer that you make that choice together, so please review the list and consider the names, choosing a person that you would both agree to be neutral and credible. Let me know of your choice, if you will, within a week.

If the parties elect to have the opinion prepared by someone other than an attorney in this office, each party to the dispute would pay half of the cost of preparing the opinion. If the person requesting the opinion does not wish to pay any costs associated with its preparation, then we will consider the request as being withdrawn.

I have also enclosed a short summary of the process related to advisory opinions. If you have questions, please let me know. If you would like to provide a written statement of the City of Salt Lake's position with regard to the law and the facts in the request, please do so as quickly as possible.

The advisory opinion, once completed, will include conclusions as to the issues raised, and state conclusions as to the legality of local land use decisions. The opinion is not binding, and is intended to lead to the settlement of issues. If the issues addressed in the opinion become the subject of a legal action, however, and a court should reach the same conclusion as the person preparing the opinion, on the same facts and circumstances, then the substantially prevailing party in that legal action may recover some attorney's fees and costs from the entity who argued a position contrary to the opinion. The opinion will not be available to the court prior to its reaching a decision in the matter, but only for the purpose of determining if attorney's fees and costs are to be paid.

Christine Meeker  
May 6, 2009  
Page 3 of 3

This request for an advisory opinion does not delay any land use process now underway, including any pending appeals or other review of the land use decisions that are the subject of this request. The City of Salt Lake may proceed as they wish to process applications and appeals related to this request. The OPRO can also work with the City of Salt Lake and the person making this request to see if some solution to the issues raised can be resolved through mediation or other means. Our goal will be to resolve any disputes fairly without the need for unnecessary costs, hassles and delays that may otherwise occur.

Please contact our office with any questions or concerns. Our common email is propertyrights@utah.gov. Thanks for your assistance.

Sincerely,



Brent N. Bateman  
Lead Attorney  
Office of the Property Rights Ombudsman

cc. Harry Babb, Waxie's Enterprises, Inc.  
David Baird  
Lynn H. Pace, Esq.

Encl: Advisory Opinion Summary,  
Advisory Opinion Request and Property Owners Statement,  
Approved Neutrals List

# SALT LAKE CITY CORPORATION

LYNN H. PACE  
DEPUTY CITY ATTORNEY

LAW DEPARTMENT

RALPH BECKER  
MAYOR

June 9, 2009

Office of the Property Rights Ombudsman  
State of Utah Department of Commerce  
P.O. Box 146702  
Salt Lake City, Utah 84114

Harry Babb  
VP Operations Waxie Sanitary Supply  
9353 Waxie Way  
San Diego, CA 92123-1036

Re: Advisory Opinion Requested by Waxie Sanitary Supply

To Whom It May Concern:

This letter is in response to the request for an advisory opinion filed with the office of the Property Rights Ombudsman on or about May 5, 2009 by Harry Babb of Waxie Sanitary Supply ("Waxie"). In that request Waxie asks the Property Rights Ombudsman to issue an advisory opinion as to the legality of certain transportation impact fees imposed by Salt Lake City Corporation (the "City"). Specifically, Waxie seeks a refund of transportation impact fees paid to Salt Lake City in connection with the issuance of a building permit.

For the reasons discussed herein, the City asserts that the transportation impact fees assessed to Waxie in connection with issuance of its building permit were reasonable and appropriate in every respect under Utah State Law and City Ordinance. For that reason, the City also asserts that Waxie is not entitled to any refund of the impact fees paid.

## Background Facts

1. Waxie is the owner of certain real property located at 5107 West 1730 South in Salt Lake City, Utah.

2. In 2008, Waxie filed an application for authorization to construct certain improvements on that property.

3. Pursuant to that building permit application, the City calculated the amount of impact fees required under Salt Lake City Ordinances.

4. On or about September 11, 2008 Waxie paid the impact fees and a building permit was issued.

5. Waxie has protested the amount of the roadway impact fees imposed by the City.<sup>1</sup>

6. Salt Lake City's impact fee ordinance is set forth in Chapter 18.98 of the City Code.

a. Section 18.95.050 of the City Code states:

Impact fees shall be calculated as follows:

A. unless an applicant request and independent impact fee calculation as set forth in Section 18.98.160 of this chapter, the impact fees shall be calculated for the proposed development activity based upon the permit allowing the use, according to the fee schedule set in appendix A of this chapter, less any applicable off sets under Section 18.98.070 of this Chapter.

b. Appendix A to the impact fee ordinance indicates that roadway fees are imposed based upon the square footage of proposed office and industrial space.

c. Section 18.98.090 of the City Code addresses challenges and appeals to impact fees, stating as follows:

1. Any fee payer that has paid an impact fee may challenge the impact fee by filing:

a. an appeal pursuant to subsection B of this section; ...

2. The sole remedy for a challenge under subsection a.1 of this section shall be a refund of the difference between what the fee payer paid as an impact fee and the amount the impact fee should have been if it had been correctly calculated.

d. Finally, Section 18.98.160A of the Salt Lake City Code states:

If a fee payer desires not to have the impact fees determined according to the schedule set forth in Appendix A of this chapter then the fee payer shall prepare and submit to the director an independent impact fee calculation

---

<sup>1</sup> Waxie has acknowledged that it has no objection to the impact fees imposed for storm water, sewer, police and fire service.

for the development activity for which a building permit is sought.<sup>2</sup>

7. The transportation impact fees imposed in Appendix A to the ordinance are based upon averages of office and industrial traffic, based upon certain industry standards.

8. Waxie claims that the actual amount of traffic generated by its facility, based upon a similar facility already in use in West Valley City, will be lower than the average traffic counts used by the City to calculate the transportation impact fees.

9. For that reason, Waxie had requested a refund of a significant portion of the transportation impact fee.

10. Consistent with City ordinance, Waxie has filed an appeal with the Salt Lake City Council, but that appeal was withdrawn to facilitate further discussions on this matter.

11. On or about May 6, 2009, Waxie filed its request for an advisory opinion with the Private Property Right Ombudsman's office.

### Argument

#### **I. Assessing Impact Fees Based Upon Averages or Estimates is Authorized Under Utah Law.**

The crux of Waxie's argument is that the transportation impact fees assessed by the City are excessive because they are based upon nation wide averages derived from the square footage of the buildings in question. However, Waxie has failed to present any evidence to show that the assessment of impact fees based upon such averages is inappropriate. To the contrary, Utah law clearly indicates that the assessment of impact fees based upon averages or estimates of the amount of anticipated impact is permissible.

Utah Code Annotated Section 11-36-201(5)(a) states that:

“Each local political subdivision and private entity intending to impose an impact fee shall prepare a written analysis of each impact fee that: ... (iii) estimates the proportionate share of the costs of impacts on system improvements that are reasonably related to the new development activity; ...” (emphasis added)

Likewise, Utah Code Section 11-36-202(1)(e) states “in calculating an impact fee, each local political subdivision shall base amounts calculated under subsection (1)(c) on realistic

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<sup>2</sup> A copy of the City's complete impact fee ordinance is attached.

estimates and the assumption underlying those estimates shall be disclosed in the impact fee analysis.” (emphasis added)

Thus, the State statute itself indicates that impact fees may be based upon estimates (or averages) of the amount an anticipated impact. Indeed, in most instances, where new development is anticipated, it would be very difficult, if not impossible to accurately determine the actual amount of traffic impact since the development has not yet occurred. For that reason, the State statute specifically contemplates the enactment and imposition of impact fees based upon estimates or averages of the anticipated impact. Salt Lake City’s impact fee ordinance, and the roadway impact fees assessed therein is specifically based upon the “reasonable estimate” referred to in the State statute.

In the case of Home Builders Association of Utah v. City of American Fork, 973 P.2 425 1999 UT 7, the Home Builders challenged the City’s impact fees. In its decision the court discussed this issue as follows:

The fact that “no mathematical formulae” were employed in calculating the fees is not dispositive. The law does not make reasonableness turn on a formula, given the variety of factual circumstance in each case and the necessary elasticity of such words as “reasonable” and “equitable.” No mathematical formula can be stated that it would allow for the necessarily discretionary judgment. American Fork’s obligation under *Banberry* is to provide reasonable estimates of the cost of existing facilities and projections of future capital costs and to describe other factors relevant in establishing equitable impact fees.

Id. at ¶ 18. For all of these reasons, the City asserts that its impact fee ordinance based upon estimates or averages of the anticipated traffic impact is both reasonable and legal under the State statute.

## **II. Waxie has Failed to Demonstrate That the Amount of the City’s Transportation Impact Fee was Improperly Calculated.**

Waxies’ challenge to the City’s transportation impact fee is made pursuant to Utah Code Section 11-36-401 and Salt Lake City Code Section 18.98.090. Under both of those provisions, however, the “sole remedy” for a challenge “is a refund of the difference 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.” See Utah Code Section 11-36-401(4)(d)(iii) and Salt Lake City Code Section 18.98.090a2.

In the present case, Waxie does not contend that the City miscalculated the impact fees, that it used the wrong standard, or that the impact fee was otherwise invalid. Rather, it contends

that “Waxie’s actual trip generation numbers, due to its unique operating standards, are significantly less than the averages of the ITE.” Nevertheless, Waxie has not contended that the transportation impact fee assessed by the City was incorrectly calculated or that it was invalid because it did not meet the requirements Utah law. Indeed, Waxie’s own letter confirms that the transportation impact fee assessed was accurately calculated based upon the formula set forth in the City’s impact fee ordinance. Waxie has failed to present any evidence that the amount of the transportation impact fee were improperly calculated.

As such, Waxie’s request to the Ombudsman’s Office fails to establish any claim for a refund, because, as discussed above, under both the State statute and the City ordinance the “sole remedy” for an challenge of the impact fees is a refund of the amount between what Waxie actually paid and what Waxie should have paid if the impact fees had been calculated correctly. Since in this case Waxie has failed to demonstrate any inaccuracy in the calculation in the impact fee, it has also failed to demonstrate any entitlement to a refund of the amounts paid.

### **III. Waxie has Failed to Request an Independent Impact Fee Calculation as Required Under City Code.**

Even if Waxie believes that its actual traffic count will be lower than the averages contemplated in the City’s ordinance, it has failed to avail its self of the remedies authorized and required under the City Code.

Waxie contends that its transportation impact fees should be based upon its actual traffic impact rather than upon the estimates contemplated in the City Code. However, it is important to note that Waxie does not in fact have actual traffic counts for this new facility. Indeed, the new facility has not even been built. In its letter Waxie states that “based upon historic operations of a similar facility in West Valley City, Utah, coupled with anticipated business operation in the new facility, Waxie has quantified it anticipated trip generations derived from constructing the new building.” (emphasis added) The City contends that this proffered “actual” traffic impact is nothing more than Waxie’s own estimate of the amount of traffic that will be generated by its new facility. Indeed, until the facility is actually built, and traffic counts are conducted, no accurate actual traffic count can be obtained.

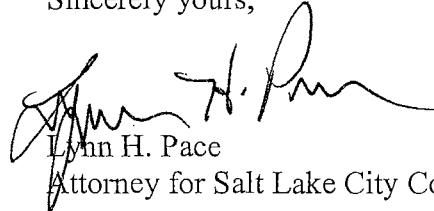
Nevertheless, if Waxie feels that the amount of transportation fees imposed are inappropriate, it has failed to avail itself of the remedies available and required under the City Code. Specifically, Section 18.98.160A of the City Code state: “if a fee payer desires not to have the impact fees determine according to the schedule set forth in Appendix A of this chapter then the fee payer shall prepare and submit to the director an independent impact fee calculation for the development activity for which a building permit is sought.” A \$150 dollar fee is required for that independent impact calculation. In the present case Waxie has failed to submit any request for an independent impact fee calculation. The City contends that Waxie cannot simultaneously complain to the Office of the Property Rights Ombudsman about the amount of

the City's assessed impact fees, while at the same time failing to avail itself of remedies which are available to Waxie under the provisions of the City Code.

Conclusion

For all of the reasons set forth above, Waxies's request for a refund of a portion of the transportation impact fees assessed by the City should be denied. If you have any further questions or need any additional information concerning this matter, please let me know.

Sincerely yours,



Lynn H. Pace  
Attorney for Salt Lake City Corporation

Cc: Frank Grey  
Brent Beck

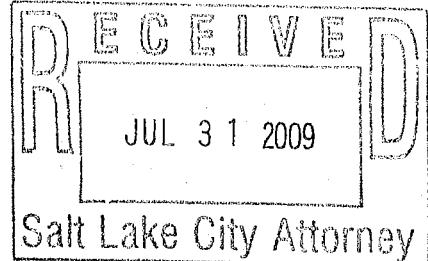


JON M. HUNTSMAN, JR.  
*Governor*

GARY R. HERBERT  
*Lieutenant Governor*

State of Utah  
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN



July 28, 2009

Lynn H. Pace  
Salt Lake City Attorney's Office  
451 S State St, Room 505  
PO Box 145478  
Salt Lake City, Utah 84114-5478

RE: Advisory Opinion Request – Waxie Enterprises, Inc.

Dear Mr. Pace,

The Office of the Property Rights Ombudsman has received a submission dated July 28, 2009 from Mr. Harry Babb of Waxie Enterprises, Inc., in response to your letter dated June 9, 2009

If you would like to respond to any of the statements or arguments in Mr. Babb's letter, please let me know. If you feel that no response is necessary, please let me know that as well. If you have any questions or would like to discuss this matter further, feel free to call anytime.

Sincerely,

Brent N. Bateman  
Lead Attorney  
Office of the Property Rights Ombudsman

cc. Harry Babb (w/o enclosures)  
David Baird

Encl.



July 28, 2009

**Office of the Property**

JUL 28 2009

**Rights Ombudsman**

Brent N. Bateman

**Office of the Property Rights Ombudsman**  
160 E. 300 S., Box 146702  
Salt Lake City, UT 84114

Dear Mr. Bateman,

Thank you for the opportunity to respond to Mr. Pace's submission. My response will address the three main arguments in Mr. Pace's letter dated June 9, 2009.

**I. Assessing Impact Fees Based Upon Averages or Estimates is Authorized Under Utah Law.**

Waxie agrees that cities should have the authority to assess impact fees to pay for necessary system improvements based on actual benefits derived from users of the system improvements. That logic parallels Waxie's decision to not formally appeal the other impact fees separate from the transportation impact fees.

Mr. Pace's emphasis added to the word "estimates" within Section 11-36-201(5)(a)(iii) refers to the fair and proportionate method of allocating the costs of impact on system improvements, not the use of estimates for traffic trip generation. Mr. Pace furthers this incorrect interpretation of Utah Code Section 11-36-202(1)(e) by stating that "in calculating an impact fee, each local political subdivision shall base amounts calculated under subsection (1)(c) on realistic estimates and the assumption underlying those estimates shall be disclosed in the impact fee analysis." Mr. Pace is correct in stating that the city needs to disclose its realistic estimates, but once again, this section of the state code refers to the costs used to justify the impact fee (as referred to in Subsection (1)(c)) and in no way does it imply that the state condones cities using estimates for all assessments of impact fees.

If Mr. Pace's logic is accurate, then why do both the city code and the state code contain specific sections outlining appeal procedures allowing independent impact fee calculations? If cities were to be able to perpetually hide behind their "estimates" as Mr. Pace stated, why even adopt these appeal sections of the code? Why does the state require cities to formally adopt an appeal procedure when development requests for an independent impact fee calculation are summarily dismissed despite this dismissal being in conflict with their own city (and state) ordinances?

Mr. Pace's citation of Home Builders Association of Utah v. City of American Fork, 973 P.2d 425 1999 UT 7, follows the same incorrect logic. In Mr. Pace's own citation of this



Corporate Headquarters ■ 9353 Waxie Way ■ San Diego, CA 92123-1036  
(800) 544-8054 ■ (858) 292-8111 ■ FAX (858) 279-6311 ■ [www.waxie.com](http://www.waxie.com)

Boise ■ Denver ■ El Centro ■ Idaho Falls ■ Las Vegas ■ Los Angeles ■ Ontario ■ Palm Springs ■ Phoenix ■ Portland ■ Salt Lake City ■ San Diego ■ San Francisco ■ Santa Ana ■ St. George ■ Tucson

case, he states “American Fork’s obligation under *Banberry* is to provide reasonable estimates of the cost of existing facilities and projections of future capital costs and to describe other factors relevant in establishing equitable impact fees.” [emphasis added] Once again, Mr. Pace cites an example of the court finding in favor of a city who was sued over the estimates of costs of the facilities and the future capital costs. Waxie does not dispute the costs of the city’s system infrastructure plans or its future capital costs. It disputes its impact on the system, not the cost of the system.

Waxie agrees that Salt Lake City can base its impact fees on estimates as provided for under Utah law. The use of estimates is appropriate for most situations in allocating the costs of the city infrastructure based on benefit and use of the improvements. However, the State Legislature wisely recognized that estimates made by cities may not always accurately reflect every development’s true impact, thus a provision was included in state code that permits adjustment of the amount of the fee “based upon studies and data submitted by the developer” (Utah Code Ann. 11-36-202(2)(a)(iv)).

## **II. Waxie has Failed to Demonstrate that the Amount of the City’s Transportation Impact Fee was Improperly Assessed.**

Waxie contends that the fee was improperly calculated because the City failed to consider (or even review) specific data provided by the developer, as provided for in State of Utah and Salt Lake City codes. The economic documentation prepared by Waxie would have calculated a different fee amount. After paying the fee, Waxie attempted to file a formal appeal and was directed to multiple city offices, none of which were able to accept the fee for the appeal. However, the City Council office accepted the written correspondence from Waxie. At the direction and advice contained in an email dated February 24, 2009 from the Salt Lake City Senior Attorney, Mr. Paul Nielson, (who, by his response to Waxie, essentially acknowledged Salt Lake City’s receipt and acceptance of the request), Waxie agreed to meet with the Salt Lake City Community and Economic Development Director. The Director, after being asked if he would review the independent impact fee calculation studies and data submitted by the developer that defined the true impact of the Waxie development (as allowed by state code), determined that no refund was in order and refused to consider the independent impact fee calculations. The Community and Economic Development Director also failed to provide a written response to Waxie’s request, which precipitated investigating other appeal channels, including this Advisory Opinion from the Property Rights Ombudsman. Waxie is under the belief that the Ombudsman’s Advisory Opinion is only relevant before the City’s final administrative authority issues a final decision. Therefore, Waxie had no choice but to file a request for an Advisory Opinion before the City’s final opinion on the appeal was rendered. What else could Waxie do? Waxie attempted to amicably provide the independent impact fee calculation to the City (as noted in Mr. Pace’s letter referencing City Code section 18.98.160A) but Waxie’s independent calculations were summarily dismissed by the City’s Community and Economic Development Director. Waxie was (and still is) willing to provide the impact calculation and economic documentation prepared by Waxie to support the assessment of an impact fee other than by the use of the schedule in section 18.98.190, “Appendix A”, of the city ordinance.

Salt Lake City code section 18.98.010 explicitly states that "...persons responsible for growth and development activity should pay a proportionate share of the cost of such planned facilities needed to serve the growth and development activity." Furthermore, "Development Activity" is defined as "...change in use of land that creates additional demand and need for public streets and roads..." Waxie agrees with these admirable sections of the city code and Salt Lake City's authority, but Waxie simply does not create nearly as much additional demand and associated burden on the city's system improvements due to its significant deviation from the assumptions espoused in the city's impact fee study.

### **III. Waxie has Failed to Request an Independent Impact Fee Calculation as Required Under City Code.**

The Salt Lake City code defines "Independent fee calculation" as "the impact calculation or economic documentation prepared by a fee payer to support the assessment of an impact fee other than by the use of the schedule in section 18.98.190." Waxie intended to provide the independent fee calculation when it met with the City's Community and Economic Development Director, who determined that no adjustment to the assessed fee would be approved, and reaffirmed his unwillingness to take the \$150 fee or review the data provided by Waxie under its rights under State Code 11-36-202 (iv). Prior to this meeting, the City was unable to provide Waxie with an appeal form and could not even process the payment of the fee for the appeal since no one knew how to process it. Waxie should not be penalized by the City's failure to know how to process an appeal, especially in light of Waxie being willing to pay the fee and provide its evidence of the development's true impact on the City infrastructure.

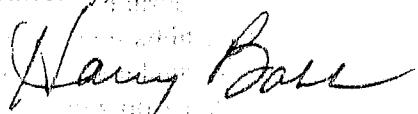
Mr. Pace failed to address the details of Waxie's independent fee calculations by stating "Indeed, until the facility is actually built, and traffic counts are conducted, no accurate actual traffic count can be obtained." Waxie asserts that, similarly, indeed, Salt Lake City has not met its burden of obtaining and providing accurate actual traffic counts of the Waxie development.

Waxie has built this building with a specific, full capacity use from the start of its existence. Waxie feels very comfortable in delaying the refund of the appeal amount to be based on actual trip generation estimates once the facility is built. Waxie is very confident that its numbers are accurate in its estimates of peak PM trip generation and will oblige this potential solution for the recalculation; under the explicit agreement between Salt Lake City and Waxie that final adjustments to the appeal's refund will be based solely on the trip generation numbers provided by Waxie upon the occupancy of the new development.

In conclusion, why do both state and city codes provide for appeals wherein a developer can provide independent calculations, but are summarily denied when they approach the city to present the data? Waxie will simply apply for an appeal to the City Council as provided for

under Salt Lake City Code Section 18.98.090B(1), but would greatly appreciate your office's Advisory Opinion prior to submitting its appeal.

Sincerely,



Harry Babb  
Waxie's Enterprises Inc.