



**Environmental
Planning
Commission**

**Agenda Item Number: 9
Project Number: 1007076
Case #: 08EPC 40082
September 18, 2008**

Appeal Report

Agent	Mark J. Riley, Esq.
Appellants	OSO DE OSUNA, L.L.C.
Request	Appeal of an Impact Fee Assessment on a Building Permit
Legal Description	Tract 3A1B, Block A, Interstate Industrial Tract Unit 2 , zoned IP, located on the south side of OSUNA RD. NW, between ACADEMY PARKWAY NE and GULTON COURT NE, containing approximately .75 acre. (E-17)

Staff Recommendation

DENIAL of 1007076/ 08EPC40082, based on Findings 1-9 on pages 5-6.

**Jack Cloud AICP,
Impact Fees Administrator**

Summary of Analysis

The appellant is requesting that impact fees not be charged to a building permit for a new office building.

The appellants contend 1) that the impact fees were not properly calculated for the subject project; 2) that the City's impact fees are arbitrary and capricious; 3) that the City's impact fees constitute a denial of due process; 4) that the City's impact fees are a violation of the Equal Protection Clause of the U.S and NM constitutions; and, 5) that the City's impact fees "do not bear a reasonable or rational relationship to the objective sought in the Ordinance[s]". In reviewing the impact fee ordinances, however, the project does result in off-site impacts based on the rational nexus used in creating the ordinances, and is thus subject to assessment and collection of impact fees.

Appeal Report

SUMMARY OF REQUEST

Request	Appeal of an Impact Fee Assessment, or charge, on a Building Permit for an office building.
Location	3880 Osuna Road NE, south side of Osuna and west of Jefferson Street NE.

Background, History and Context

The subject of this appeal is a Building Permit (No. 0802326) for a 6,336 square foot office building (Project No.1007076) at 3880 Osuna Road NE. The building permit was issued (and Impact Fees of \$33,385.79 were paid) on July 25, 2008.

APPLICABLE ORDINANCES AND REGULATIONS

There are some definitions from the *Impact Fee Ordinances* which are pertinent to this appeal and are reprinted below from the definition section(s) of the Ordinances.

§ 14-19- (Parts 1 thru 4) -3 DEFINITIONS.

NEW DEVELOPMENT. The division of land; reconstruction, redevelopment, conversion, structural alteration, relocation or enlargement of any structure; or any use, change of use or extension of the use of land; any of which increases the number of service units.

SERVICE UNIT. A standardized measure of consumption, use, generation or discharge attributable to an individual unit of development calculated in accordance with generally accepted engineering or planning standards for a particular category of capital improvements or facility expansions.

These ordinance definitions are based on the following reprinted definitions from the New Mexico *Development Fees Act* [§ 5-8-2] which authorizes municipalities to impose impact fees:

L. "new development" means the subdivision of land; reconstruction, redevelopment, conversion, structural alteration, relocation or enlargement of any structure; or any use or extension of the use of land; any of which increases the number of service units;

P. "service unit" means a standardized measure of consumption, use, generation or discharge attributable to an individual unit of development calculated in accordance with generally accepted engineering or planning standards for a particular category of capital improvements or facility expansions.

Impact Fees were assessed on the subject building permit for a change of use from vacant land to a new office building in accordance with the *Impact Fee Ordinances*.

This appeal is being brought to the Environmental Planning Commission in accordance with the applicable *Impact Fee Ordinances* section(s) reprinted below, with the appeal action underlined:

§ 14-19- (Parts 1 thru4) -21 ADMINISTRATIVE APPEALS.

(A) *Notice of appeal; filing; fee.* An applicant who chooses to appeal the assessment or calculation of impact fees; determination of exemptions, credits, excess credits; or other decision of the impact fees administrator shall submit a notice of appeal and payment of a nonrefundable processing fee to the impact fees administrator or his/her designee within 30 days following the date of the decision or determination of the impact fees administrator giving rise to the appeal.

(B) *Bond.* If the notice of appeal is accompanied by a bond or other sufficient surety satisfactory to the City Attorney, in an amount equal to the impact fee assessed, the City Building Official or his/her duly designated agent shall issue the building permit.

(C) *Staying of impact fee collection; requirement.* The filing of a notice of appeal shall not stay the collection of the impact fee unless a bond or other sufficient surety has been filed.

(D) *Action by Environmental Planning Commission.* Appeals shall be considered by the Environmental Planning Commission in accordance with the rules and regulations of that administrative body. Upon hearing such appeals, the Environmental Planning Commission may affirm, change or modify the decision of the impact fees administrator or, in lieu thereof, make such other or additional determination as it deems proper. The decision of the Environmental Planning Commission upon the appeal shall be in writing, concurred in by a majority of the members present, which shall forthwith transmit a copy of the decision to the applicant and to the impact fees administrator.

(E) *Appeal of Environmental Planning Commission's decision.* Either the applicant or the impact fees administrator may appeal the decision of the Environmental Planning Commission to the City Council within 30 days following the decision of the Environmental Planning Commission.

(F) *Final decision by City Council.* The City Council shall consider the appeal in accordance with the rules and regulations of that governing body. The decision of the City Council shall, in all instances, be the final administrative decision and shall be subject to judicial review in accordance with applicable law.

The next section(s) of the Ordinances, § 14-19- (Parts 1 thru 4) -22, call for the **PROMULGATION OF RULES**. These rules were drafted with input from the Impact Fee Advisory Committee, and have been incorporated into the City's Development Process Manual. Subsection 4.A of the Impact Fee Rules [Volume I Chapter 18 of the *Development Process Manual*] provides the rules for determining impact fees for a project. The rule is reprinted below, with the applicable assessment procedure underlined:

Section 4. DETERMINATION OF AN IMPACT FEE BASED ON FEE SCHEDULES

A. Payment from Schedule

The amount of the impact fee shall be determined from the fee schedule attached as Exhibit E and utilizing Exhibit B, Impact Fee Calculation Form:

If the type of land use is not specified in the fee schedule or in the City's Comprehensive Zone Code, the Impact Fees Administrator shall apply the fee of the most nearly equivalent type of land use on the fee schedule.

The Impact Fees Administrator shall be guided in the selection of a comparable land use type by the City of Albuquerque Comprehensive Plan and the land development regulations of the City of Albuquerque, including but not limited to the Comprehensive Zone Code and Subdivision Ordinance.

If a feepayer shall opt not to have the impact fee determined according to the fee schedule, then the feepayer shall prepare and submit an independent fee determination study in accordance with the appropriate Impact Fee Ordinance.

In the event that the sub-classification of a particular use of land into the classification established by the Ordinance is unclear, the *North American Industry Classification System, United States*, latest edition, shall be used as a guide.

BASIS FOR APPEAL/ RESPONSE TO APPEAL

The filed appeal immediately follows this report. The grounds for this appeal are reprinted below in bold, followed by the City's response.

- 1. This is an Appeal of the Impact Fees that were assessed on July 11, 2008.**
- 2. The Impact Fees were not properly calculated, specifically as to Roadway Facilities.** Impact fees, as the name suggests, are based on the *impact* of what is known as the 'service unit(s)' resulting from the use of a building. There were Public Safety Facilities, Roadway Facilities, and Drainage Facilities Impact Fees charged to this permit (see the second page of the attached Appeal, **Impact Fees Summary Sheet**). Because this permit was not considered to be for a residential use, there were NO Parks, Recreation, Trails and Open Space Impact Fees charged to this permit.

The amount of the Roadway Facilities Impact Fees for this permit are significant (\$27,954.43) but so are the increase in Roadway Service Units significant as determined by the “use, generation or discharge attributable to an individual unit of development calculated in accordance with generally accepted engineering or planning standards for a particular category of capital improvements or facility expansions.” The determination of Service Units for the City’s Roadway Facilities Impact Fees was based in part on peak hour trip generation, a generally accepted engineering standard for roadway facility expansions (see attached Table B-1, “*City of Albuquerque Trip Characteristics*” from the **2004 ROADWAY FACILITIES IMPACT COST STUDY**, Appendix B). The increase in peak hour trips constitutes an increase in off-site impacts, and thus a need to assess impact fees.

As noted in the Rules and Regulations for the determination of Impact Fees, a developer may submit an Independent Fee Determination in accordance with the appropriate Impact Fee Ordinance. Guidelines for an Independent Fee Determination are presented further on in the Impact Fee Rules (Section **5.D**) and they state that such a study “shall be prepared and presented by qualified professionals in good standing in their respective fields. The methodology shall be consistent with best professional practice and support the central claim of the study.” Independent Fee Determinations for Roadway Facilities have been used several times since the adoption of the City’s impact fees ordinances; however these studies have been for more unique uses than an office building (e.g Paint & Body Shop, Charter School) and it is unlikely that an independent determination would vary much from the adopted schedule, but it remains as an option.

3. The Impact Fees are arbitrary and capricious, specifically as to Roadway Facilities. and **7. The Impact Fees Ordinances sought to Public Safety Facility Service Areas, Roadway Facility Services Area, and the designation of sectors without Roadway Facility Services fees and Public Safety Facility Service fees are arbitrary and capricious.** See previous response to Item 2. Again, impact fees were established through professional studies in accordance with generally accepted engineering and planning standards. Unlike the Roadway Facilities Service Areas, there are no Public Safety Facilities Service Areas where the calculated impact fee is zero.

4. The Impact Fees constitute a denial of due process. and **5. The Impact Fees are a violation of the Equal Protection Clause of the US and New Mexico Constitutions.** Following this staff report is a Timetable outlining the establishment of the Impact Fees Ordinances. To date there have been no court challenges to the constitutionality of these ordinances. Across the country, impact fee ordinances have been challenged and found to be an appropriate use of a local jurisdiction’s regulatory powers for many years now.

6. The Impact Fees do not bear a reasonable or rational relationship to the objective sought in the ordinance. The appellant claims that the impact fees assessed for this permit do not comply with the concept of a “reasonable relationship” or a “rational nexus;” these are concepts resulting from two U.S. Supreme Court cases regarding land use

regulations, often referred to as the *Nollan* and *Dolan* cases. However, both concepts are addressed when one recognizes that the imposition of impact fees is based on the increase in service units from this new office building.

Conclusions

Based on generally accepted engineering standards, the proposed office building will result in a significant change in Service Units, or ‘impacts,’ that are subject to the City’s impact fees ordinances. The rational nexus of the City’s impact fee ordinances lie in the change in Service Units from a building permit.

FINDINGS – PROJECT NO. 1007076/ 08EPC 40082

1. This case is an appeal of impact fee assessments on a building permit (No. 0802326) for a new office building on previously vacant land at 3880 Osuna Road NE.
2. The Impact Fee ordinances [§ 14-19- (Parts 1 thru 4) -21, ADMINISTRATIVE APPEALS, ROA 1994] authorize the Environmental Planning Commission (EPC) to hear appeals of the assessment or calculation of impact fees; this case is such an appeal and has been duly filed in accordance with the referenced ordinances.
3. The subject office building is for non-residential development and, consistent with the Impact Fee Ordinances and Administrative Rules, no impact fees for Parks, Recreation, Trails and Open Space were charged to the subject building permit.
4. The subject office building does meet the definition of “new development” for Public Safety Facilities Impact Fees because it does increase the Public Safety Service Units, and, consistent with the Impact Fee Ordinances and Administrative Rules, a Public Safety Facilities impact fees assessment of \$633.60 was appropriately charged to the subject building permit.
5. The subject office building does meet the definition of “new development” for Roadway Facilities Impact Fees because it does increase the Roadway Service Units, and, consistent with the Impact Fee Ordinances and Administrative Rules, an assessment of \$ 27,954.43 for Roadway Facilities impact fees was appropriately charged to the subject building permit.

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6. The subject office building does meet the definition of “new development” for Drainage Facilities Impact Fees because there is an increase in Drainage Service Units, and, consistent with the Impact Fee Ordinances and Administrative Rules, an assessment of \$ 4,797.76 for Drainage Facilities impact fees was appropriately charged to the subject building permit.

 7. The Impact Fee Ordinances were established and adopted through a public hearing process consistent with the City’s legislative duties and powers, as well as New Mexico State Statutes and Constitution and the United States Constitution..

 8. The Impact Fee Ordinances and Administrative Rules were established using generally accepted engineering and/ or planning standards, which provide a reasonable relationship and rough proportionality for the City’s impact fees based on measurable off-site impacts.

 9. Based on the preceding Findings, the Impact Fees Administrator correctly applied City Impact Fee ordinances and Administrative Rules regarding assessment of impact fees on the subject building permit, and did not act arbitrarily or capriciously.

RECOMMENDATION

DENIAL of 1007076/ 08EPC 40082, an appeal of assessment and collection of impact fees on Building Permit No. 0802326, based on the preceding Findings No. 1 -9.

***Jack Cloud, AICP
Impact Fee Administrator***

cc: COA, Planning Department, 600 2nd St. NW, Albuquerque, NM 87102
Mark Riley, Oso de Osuna LLC, 4101 Indian School Rd. NE, Albuquerque, NM 87110

Attachments