Legistar ID No.: 2021-0571

AGENDA REQUEST FORM

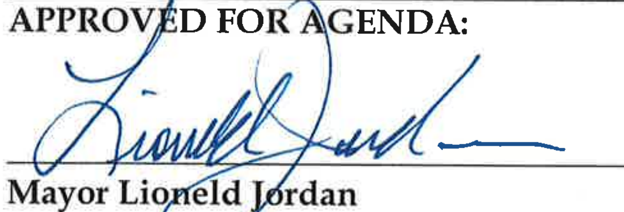
FOR: Council Meeting of August 3, 2021

FROM: Mayor Lioneld Jordan

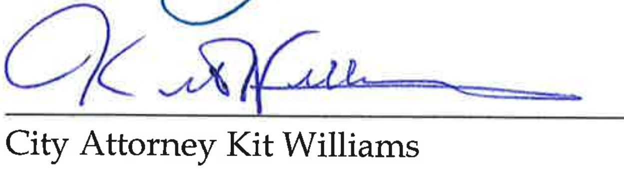
ORDINANCE OR RESOLUTION TITLE AND SUBJECT:

AN ORDINANCE TO AMEND § 158.05 **OFF-SITE IMPROVEMENTS/DELAYS** TO CONFORM THIS SECTION TO THE REQUIREMENTS OF A.C.A. §14-56-103 **DEVELOPMENT IMPACT FEES-DEFINITION**

APPROVED FOR AGENDA:



Mayor Lioneld Jordan 7/19/21 Date



City Attorney Kit Williams July 19, 2021 Date

Departmental Correspondence

Office of the
City Attorney

Kit Williams
City Attorney

Blake Pennington
Assistant City Attorney

Jodi Batker
Paralegal

TO: **Mayor Jordan**
City Council

CC: **Susan Norton,** Chief of Staff
Jonathan Curth, Development Services Director
Chris Brown, Public Works Director

FROM: **Kit Williams,** City Attorney

DATE: **July 19, 2021**

RE: Amendment Needed to §158.05 Off-Site Improvements/Delays of the *U.D.C.* to Conform Refunding Requirements to State Law

The City has consistently obeyed A.C.A. §14-56-103 **Development Impact Fees-Definitions**, subsections (f), (g) and (h) for collection, deposit into special interest-bearing accounts and refunds of unused fees, plus their accrued interest. However, §158.05 **Off-Site Improvements/Delays** of the *Unified Development Code* needs to be amended to clarify that this collection and refund procedure completely complies with state law.

This issue was brought to my attention by Development Services Director Jonathan Curth who supplied me with an attorney's claim that her client's refund amount should have included a higher amount of interest than what the deposit had actually earned in our interest-bearing account. Attached is my letter explaining that, pursuant to state law, only the actually accrued interest can be refunded to her client.

To prevent further confusion, the City Council needs to amend the current *Unified Development Code* section to precisely conform to state law. Attached is the sections of A.C.A. §14-56-103 (f), (g) and (h) with which the City must comply to continue assessing "Development/Impact Fees for Specific Infrastructure Improvements Necessitated by a Particular Development."

ORDINANCE NO. ___________

AN ORDINANCE TO AMEND § 158.05 **OFF-SITE IMPROVEMENTS/DELAYS** TO CONFORM THIS SECTION TO THE REQUIREMENTS OF A.C.A. §14-56-103 **DEVELOPMENT IMPACT FEES-DEFINITION**

WHEREAS, long before the enactment of A.C.A. §14-56-103 **Development Impact Fees – Definition**, the City of Fayetteville constitutionally collected impact fees from developers whose developments impacted the City's infrastructure needs for streets, water and sewer mains and other types of infrastructure; and

WHEREAS, when A.C.A. §14-56-103 was enacted, it provided that a city could collect a development impact fee under ordinances enacted before July 16, 2003… only if collected in compliance with subsections (f)-(h) of this section; and

WHEREAS, the City has consistently followed the requirements of A.C.A. §14-56-103 (f)(g)(h), but the *U.D.C.* needs an amendment to the old refunding Code section (158.05) so that it precisely follows state law.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, ARKANSAS:

Section 1: That the City Council of the City of Fayetteville, Arkansas hereby repeals §158.05 **Off-Site Improvement/Delay** in its entirety and enacts a replacement §158.05 as follows:

"158.05 **Development Impact Fees for Specific Infrastructure Improvements Necessitated by a Particular Development.**

A. *Determination of Need For Impact Fee*
   If the Planning Commission determines that a particular development would cause a need for a specific infrastructure development that cannot be built until future development occurs, the developer shall pay to the city a development impact fee in an amount determined by the Planning Commission in accordance with the standards prescribed in §166.04 to be the developer's constitutional proportionate share of the cost of such specific infrastructure need.

B. *Collection of Impact Fee*
   As a part of the approval of the developer's subdivision approval, the developer shall pay the amount determined appropriate, legal and constitutional by the Planning Commission. The city shall deposit these funds into a special interest-bearing account and follow all requirements of A.C.A. §14-56-103 (f) and (g).

C. *Refund of Unused Impact Fees*
   If all or a portion of the collected impact fee has not been properly expended upon the specific infrastructure project within seven (7) years from the date the fees were paid, the city shall refund all unused funds plus accrued interest to the present owner of the

property that was subject of the new development and against which the fee was assessed and collected as required by A.C.A. §14-56-103 (h).

D. *Compliance with State Law*
The section shall be interpreted to conform with A.C.A. §14-56-103 and all requirements of that law as well as any future amendments.

PASSED and **APPROVED** this 3rd day of August , 2021.

APPROVED:

By: ____________________________
LIONELD JORDAN, Mayor

ATTEST:

By: ____________________________
KARA PAXTON, City Clerk/Treasurer

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July 19, 2021

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Re: Refund of unused impact fee to owner

Dear Attorney Paul,

I need to explain why your client received the check from the City of Fayetteville for the refund of the off-site impact fee funds ($86,000.00) plus accrued interest ($6,694.57) for a total of $92,694.57. Planning Staff evidently did not realize that A.C.A. §14-56-103 **Development Impact Fees-Definition** which was passed by the Legislature in Acts 1719 and 310 of 2003 changed the requirements when impact fees had been collected, but were not used. The $86,000.00 was an impact fee based upon the rough proportionality of the traffic impact of your large Church which created a need for a left turn lane on Highway 112 (Gregg Avenue) to serve your client's church. However, this money could not be used pursuant to Arkansas Highway and Transportation Department (AHTD) guidelines. Now, AHTD will be substantial improving Highway 112 without cost to Fayetteville and so these funds must be returned to your client pursuant to A.C.A. §14-56-103 (g) and (h).

> "(g)(1) The funds collected under a development impact fee ordinance shall be deposited into a special interest-bearing account.
> (2) The interest earned on the moneys in the separate account shall be credited to the special fund and the funds deposited into the special account and the interest earned shall be expended only in accordance with this section.
> (3) No other revenues or funds shall be deposited in the special account.

(h)(1) The municipality or municipal service agency shall refund the portion of collected development impact fees, including the accrued interest, that has not been expended seven (7) years from the date the fees were paid."

The City, pursuant to state law, "shall refund the portion of collected development impact fees, **including the accrued interest**" after it is clear that the fees will not be expended with seven years. This is precisely what the City has done. The City could not earn 5% per annum so that amount of interest could not have accrued in the special fund holding the $86,000.00. Therefore only the actual amount of accrued interest that the City actually received, $6,694.57 could be refunded to your client.

State law makes it clear that only those funds in the special fund can be returned to the developer and that "No other revenues or funds shall be deposited into the special account." A.C.A. §14-56-103(g)(3). There are simply no other funds that can be legally paid to your client.

The road impact fees denoted as a "street assessment' have been part of the City's *Unified Development Code* for decades and long before the enactment of A.C.A. §14-56-103, the state impact fee statute. We are allowed to continue to use this impact fee ordinance only if "in compliance with subsections (f)-(h)." A.C.A. §14-56-103 (i)(1)(B). As pointed out earlier (g) requires that the return of unused impact fee must be accompanied by "the accrued interest" rather than any amount that would be less than or greater than the actual accrued interest.

"(i)(1)(B) Beginning January 1, 2004, a municipality or municipal service agency shall collect development impact fees under ordinances enacted before July 16, 2003, or under ordinances amended after July 16, 2003, only if collected in compliance with subsections (f)-(h) of this section."

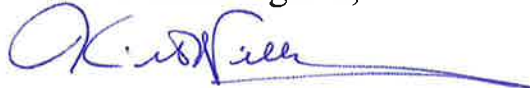
Since state law required the City of Fayetteville to refund the unused impact fees "including accrued interest," the City would be violating state law if it attempted to return more than the full amount of accrued interest in received. This would likely also be a violation of the *Arkansas Constitution, Article* 12 §5 and *Article* 16 §13 **Illegal exactions**.

Article 12 §5 (a) states: "No county, city… shall… appropriate money for… any corporation, association, institution or individual." The City can certainly pay just debts such as refunding your client's impact fee ($86,000.00) plus accrued interest ($6,694.57). However, the City cannot refund more than state law allows without committing an Illegal Exaction for which the City could properly be sued by any taxpayer.

I apologize for our Planner's mistaken reference to 5% interest which had been superseded by state law about a year earlier. We will make a concerted effort to ensure this mistake will not be made again. My City Attorney's Office has been involved in the refund of unused impact fees primarily if there is some uncertainty about who should receive the refund. This is the first time a mistake in the old Planning memo has caused a concern. Thank you for bringing this to my attention.

I hope that I have properly and fully explained to your satisfaction why the City of Fayetteville must precisely follow state law and refund your client exactly $92,694.57.

With kindest regards,



KIT WILLIAMS
Fayetteville City Attorney

Cc: Mayor Lioneld Jordan
Susan Norton, Chief of Staff
Paul Becker, Chief Financial Officer
Jonathan Curth, Development Services Director

(2) The development impact fee may be pledged to the payment of bonds issued by the municipality or municipal service agency to finance capital improvements or public facilities for which the development impact fee may be imposed.

(3) No development impact fee shall be assessed for or expended upon the operation or maintenance of any public facility or for the construction or improvement of public facilities that does not create additional capacity.

(d)(1) A municipality or a municipal service agency may assess and collect impact fees only from new development and only against a particular new development in reasonable proportion to the demand for additional capacity in public facilities that is reasonably attributable to the use and occupancy of that new development.

(2) The owner, resident, or tenant of a property that was assessed an impact fee and paid it in full shall have the right to make reasonable use of all public facilities that were financed by the impact fee.

(e)(1) A municipality or municipal service agency may assess, collect, and expend impact fees only under a development impact fee ordinance adopted and amended under this section.

(2) A development impact fee ordinance shall be adopted or amended by the governing body of a municipality or municipal service agency only after the municipality or municipal service agency has adopted a capital plan and level of service standards for all of the public facilities that are to be so financed.

(3) The development impact fee ordinance shall contain:

(A) A statement of the new public facilities and capital improvements to existing public facilities that are to be financed by impact fees and the level of service standards included in the capital plan for the public facilities that are to be financed with impact fees;

(B) The actual formula or formulas for assessing the impact fee, which shall be consistent with the level of service standards;

(C) The procedure by which impact fees are to be assessed and collected; and

(D) The procedure for refund of excess impact fees in accordance with subsection (h) of this section.

(f)(1) The municipality or municipal service agency shall collect the development impact fee at the time and manner and from the party as prescribed in the ordinance and shall collect the fee separate and apart from any other charges to the development.

(2)(A) A development impact fee shall be collected at either the closing on the property by the owner or the issuance of a certificate of occupancy by the municipality.

(B) However, a municipal water or wastewater department, waterworks, joint waterworks, or consolidated waterworks system operating under the Consolidated Waterworks Authorization Act, § 25-20-301 et seq., may collect a development impact fee in connection with and as a condition to the installation of the water meter serving the property.

(3) At closing, the development impact fee that has been paid or will be paid for the property shall be separately enumerated on the closing statement.

(4) The ordinance may include that the development impact fee may be paid in installments at a reasonable interest rate for a fixed number of years or that the municipality or municipal service agency may negotiate agreements with the owner of the property as to the time and method of paying the impact fee.

(g)(1) The funds collected under a development impact fee ordinance shall be deposited into a special interest-bearing account.

(2) The interest earned on the moneys in the separate account shall be credited to the special fund and the funds deposited into the special account and the interest earned shall be expended only in accordance with this section.

(3) No other revenues or funds shall be deposited into the special account.

(h)(1) The municipality or municipal service agency shall refund the portion of collected development impact fees, including the accrued interest, that has not been expended seven (7) years from the date the fees were paid.

(2)(A) A refund shall be paid to the present owner of the property that was the subject of new development and against which the fee was assessed and collected.

(B) Notice of the right to a refund, including the amount of the refund and the procedure for applying for and receiving the refund, shall be sent or served in writing to the present owners of the property no later than thirty (30) days after the date on which the refund becomes due.

(C) The sending by regular mail of the notices to all present owners of record shall be sufficient to satisfy the requirement of notice.

(3)(A) The refund shall be made on a pro rata basis and shall be paid in full not later than ninety (90) days after the date certain upon which the refund becomes due.

(B) If the municipality or municipal service agency does not pay a refund in full within the period set in subdivision (h)(3)(A) of this section to any person entitled to a refund, that person shall have a cause of action against the municipality for the refund or the unpaid portion in the circuit court of the county in which the property is located.

(i)(1)(A) On and after July 16, 2003, a municipality or municipal service agency shall levy and collect a development impact fee only if levied and collected under ordinances enacted in compliance with this section.

(B) Beginning January 1, 2004, a municipality or municipal service agency shall collect development impact fees under ordinances enacted before July 16, 2003, or under ordinances amended after July 16, 2003, only if collected in compliance with subsections (f)-(h) of this section.

(2) However, except for the compliance with the collection requirements under subsections (f)-(h) of this section, this section does not invalidate any development impact fee or a similar fee adopted by a municipality or municipal service agency before July 16, 2003, nor does this section apply to funds collected under any development impact fee or similar fee adopted July 16, 2003.

(3) In addition, a municipality with a park land or green space ordinance that has been in existence for ten (10) years on July 16, 2003, and any amendments to the ordinance, which allows the option to pay a fee or to dedicate green space or park land in lieu of a fee, may continue to be administered under the existing ordinance.

History. Acts 2003, No. 1719, § 1; 2007, No. 310, § 1.

RESEARCH REFERENCES

Ark. L. Notes. Carl J. Circo, Land Use Impact Fees: Does Koontz v. St. Johns River Water Management District Echo an Arkansas Philosophy of Property Rights?, 2014 Ark. L. Notes 1626.

Subchapter 2 — Building Regulations

SECTION.
14-56-202. Additional powers of cities of the first class, cities of the second class, and incorporated towns.
14-56-203. Removal or razing of buildings.
14-56-204. Municipal regulation of residential building design elements prohibited — Findings — Exceptions — Definitions.

14-56-201. Authority generally.

CASE NOTES

Analysis

Construction.
Billboards.
Erection, Construction, Etc.

Construction.

Section 14-56-202 conferred upon cities of the first class the exclusive power to issue or refuse to issue building permits and to regulate the building of houses and thereby denied such power to cities of the second class, despite the general powers listed in § 14-56-201. First State Bank v. City of Elkins, 2018 Ark. 191, 546 S.W.3d 477 (2018) (answering question of law certified by the federal district court).

Billboards.

Motion to dismiss for failure to state a claim was improperly granted because a complaint filed by a lessor and a lessee sufficiently alleged that their rights or other legal relations were affected by Avoca, Ark., Ordinance No. 69 where a town was making demands regarding the removal of billboards; therefore, the lessor and the lessee were entitled to declaratory relief under § 16-111-104. They were arguing that the town lacked power to regulate the billboards at issue. Statewide Outdoor Adver., LLC v. Town of Avoca, 104 Ark. App. 10, 289 S.W.3d 111 (2008).

Erection, Construction, Etc.

In light of the devastation caused by a tornado, the city had the authority to adopt an ordinance which added new requirements for the construction and anchoring of manufactured homes. Smith v. City of Arkadelphia, 336 Ark. 42, 984 S.W.2d 392 (1999).

filed with the City Engineer prior to the acceptance of the improvements by the city. A walk-through shall be performed at the end of the two (2) year period and all deficiencies corrected prior to the release of the bond.

(B) Erosion and Sediment Control. For developments in excess of 5 acres, an acceptable guarantee shall be provided at the time of the issuance of the drainage permit in the amount of 100% of the total cost to install the approved Erosion & Sediment Control Plan to insure the continuation of the proper maintenance of the plan. The guarantee shall remain in place until permanent stabilization has been achieved for the development site.

(Code 1965, App. C., Art. III, §C: Ord. No. 1750, 7-6-70; Code 1991, §§159.35, 163.13; Ord. No. 3895, §1, 6-20-95; Ord. No. 4100, (Ex. A), 6-16-98; Ord. No. 5140, 5-06-08; Ord. No. 5184, 10-7-08)

158.04 Grading; Bonds/Sureties

The Building Official may require bonds or other sureties in such form and amounts as may be deemed necessary to assure the work, if not completed in accordance with the approved plans and specifications, will be corrected to eliminate hazardous conditions.

(Code 1991, §161.23; Ord. No. 3551, 6-4-91; Ord. No. 4100 (Ex. A), 6-16-98)

158.05 Off-Site Improvements/Delays

Current Code

(A) *Proportionate Share.* If the Planning Commission determines that a needed off-site improvement cannot be built until future development occurs, the developer shall pay to the city an amount determined by the Planning Commission, in accordance with the standards prescribed in §166.04, to be the developer's proportionate share of the cost of said off-site improvements as of the date of final plat or large scale development approval.

(1) The city shall deposit said money into an interest bearing escrow account until such time as the off-site improvement is constructed and shall provide for payment of interest on said amount at the rate of 10% per annum, or the maximum rate allowable under Arkansas law, whichever is lower.

(2) If the off-site improvement is not constructed within five (5) years from the date of the first payment into the escrow account by a developer, the Planning Commission shall hold a public hearing, after notification to all affected property owners, to determine the disposition of all money in the escrow account. Following the public hearing, the Planning Commission may:

(a) Determine that the off-site improvement is still necessary and feasible, and can be built within a reasonable time, in which case the escrow account shall be continued for a period specified by the Planning Commission; or

(b) Determine that the off-site improvement is not necessary, or will not be feasible, or that insufficient development has occurred to render the improvement likely in the foreseeable future, in which case the Planning Commission shall refund the monies to the then current owner of the land for which such fee was paid with interest since the date of payment. Interest shall be based on a 5% percent annual rate.