

**REQUEST FOR COUNCIL ACTION**

**SUBJECT:** **Appeal of Stormwater Fees**

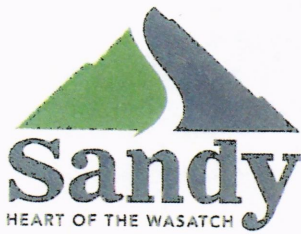
**SUMMARY:** Sandy City, as an owner of River Oaks Golf Course, desires to appeal its stormwater fees (see attached written appeal and other documentation).

**STAFF**

**RECOMMENDATION:** Staff recommends the Appeal Body conduct a hearing for Sandy City's appeal.

**Approved for Council Consideration by:**

  
\_\_\_\_\_  
Korban Lee  
Chief Administrative Officer



August 1, 2019

West Jordan City Council  
8000 South Redwood Road  
West Jordan, Utah 84088

Subject: Appeal of Commercial Storm Drain Fee

Dear West Jordan City Council,

In *Board of Education of Jordan School District v. Sandy City Corp.*, 2004 UT 37, the Supreme Court of Utah upheld the imposition of a storm drain service fee. The Jordan School District argued that it did not receive a service because it did not receive a consumable commodity such as electricity or water. The court stated, "The service provided is the acceptance and handling of storm water runoff generated by school district property. . . . the impervious surfaces on school district properties contribute to the need to have and maintain such a system." Id. at ¶26. The court went on to point out that as with sewage, "The removal of something one does not wish to retain can be as valuable as the delivery of something one wishes to receive." Id. at ¶27.

As a storm water service provider, Sandy City recognizes the storm drain benefit received by Sandy City to its approximately 59 acres of property comprising a portion of the River Oaks Golf Course located within the corporate boundaries of the City of West Jordan. However, Sandy City is appealing the amount of Sandy City's storm drain fee pursuant to West Jordan City Code §3-3-7, because Sandy City "feels that the fee or charge determined and set is in excess of the percentage of reasonable costs to be recovered." This current appeal is not an appeal of West Jordan's determination of the cost of its storm drain program or the passing on of the total cost to West Jordan's land owners; it is an appeal of the percentage of that total program cost being attributed to Sandy City's golf course property.

As will be demonstrated by multiple references listed in this appeal, user-fee based funding of a stormwater utility is a widely accepted method of financially supporting storm water programs operated through storm water utilities. User-fee based funding is one of the funding sources included in “Guidance for Municipal Stormwater Funding” (2006) prepared by the National Association of Flood and Stormwater Management Agencies under grant provided by Environmental Protection Agency. <https://www.epa.gov/sites/production/files/2015-10/documents/guidance-manual-version-2x-2.pdf>. Referencing a survey from Black & Veach, the “Guidance” document states,

Most stormwater user fee rates account for conditions on properties that affect the peak rate of runoff, total volume discharged, and pollutant loadings on receiving waters. A majority are based on the amount of impervious area (roofs, paved areas, etc.), [citing Stormwater Utility Survey 2004-2005, Black & Veach, Kansas City, MO, 2005] which determines both the proportion of rainfall that runs off and the peak rate of discharge during and following storms.

Id. at pp. 2-12 to 2-13. In a discussion of equity in calculating the fee rate structures, the “Guidance” document recognizes that “fee rate methodologies are designed to attain ‘equity’ as a fair and reasonable apportionment of cost of providing the needed services and facilities. Fees are expected to have a substantial relationship to the cost of providing the services and facilities to each customer.” Id. at p. 2-24. “A stormwater utility is *equitable* because the cost is borne by the user on the basis of demand placed on the drainage system.” Debo, T. N., and Reese, A. (2002), *Municipal Stormwater Management*. CRC Press, p. 121 (emphasis in original); see also, *El Paso Apartment Ass’n v. City of El Paso*, 415 F. Appx. 574, 578 (5th Cir. 2011) (stating, “Impervious surfaces, such as buildings, driveways, and sidewalks, prevent stormwater from being absorbed into the ground. The resulting runoff burdens the stormwater drainage system. Therefore, the amount of impervious cover on a particular piece of property is directly related to that property’s use of the stormwater drainage system”). Courts have also upheld stormwater utility fees that were calculated based on impervious surface. See id.; see also, *City of Lewiston*



v. *Gladu*, 2012 ME 42, ¶25 (holding that “the City’s impervious surface-based fee system makes a ‘fair approximation’” of the benefit received by the property owner); *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805 (upholding fees based on impervious surface); *Board of Educ. Of Jordan School Dist. v. Sandy City Corp.*, 2004 UT 37 (upholding fees that were calculated based on the impervious surface of a parcel of real property).

These same concepts of equity and fairness are reflected in the purpose of the User Fee Revenue/Cost Comparison Policy as stated in West Jordan City Code §3-3-2, which is to provide “a mechanism for ensuring that fees adopted by the city for services rendered do not exceed the reasonable cost for providing the services for which the fees are charged.” In West Jordan’s “Storm Water Fee Billing Policy” (Updated January 1, 2016), a section of the policy entitled “Fair Allocation of Storm Water Costs” states, “In order to be *fair*, all residents and businesses must help bear the cost of maintaining the storm water system since all benefit from it.” (emphasis added). In furtherance of the purpose of fair and equitable distribution of fees, the West Jordan City Council is authorized by West Jordan City Code §3-3-7 to determine whether a “fee or charge is in excess of the percentage of reasonable costs as set forth in this [User Fee Revenue/Cost Comparison Policy] chapter.” It is notable in the Stormwater Billing Policy that there is a section entitled “Properties that will NOT be billed” that identifies “A. Agricultural and undeveloped properties B. Portions of properties in excess of 20 acres C. Public streets.”

Sandy City’s River Oaks Golf Course property is similar to agricultural and undeveloped properties in its impact to the stormwater system, in that the River Oaks Golf Course has very little impervious area (approximately 4.5% of the portion within the City of West Jordan is impervious) and significantly more pervious area. Though not exempt from the fee as agricultural and undeveloped property is, in order to be assessed a fee that is fair and equitable and not in excess of Sandy City’s reasonable percentage, the fee rate methodology applied to Sandy City’s property needs to be based on impervious area. “Stormwater looks and is managed a lot [] like water and sewer. . . So, it only makes sense to pay for stormwater on the same basis – the more you pave, the more you pay.” Debo at 121.



“[M]ost people can understand that replacing natural earth with impervious pavement or structures will diminish infiltration of water and increase runoff. Thus, rate structures based in some manner on impervious area and gross area are common.” Guidance for Municipal Stormwater Funding at p. 2-24. The Environmental Protection Agency (EPA) recognizes three fee rate methodologies in its fact sheets entitled “Funding Stormwater Programs” for EPA Region 3 (EPA 833-F-07-012, January 2008) and EPA Region 1 (EPA 901-F-09-004, April 2009) “Impervious area is the *most important factor* influencing stormwater runoff and is therefore a major element in each method.” EPA 833-F-07-012 at p. 2; EPA 901-F-09-004 at p. 3 (emphasis added). The publication, “An Analysis of Trends in the U.S. Stormwater Utility & Fee Systems” (2015) [https://vtechworks.lib.vt.edu/bitstream/handle/10919/53704/Kea\\_K\\_T\\_2015.pdf?Sequence=1](https://vtechworks.lib.vt.edu/bitstream/handle/10919/53704/Kea_K_T_2015.pdf?Sequence=1), explains the relationship of impervious surface and stormwater utility usage.

“Usage” varies and is determined by the magnitude of stormwater runoff the consumer produces. . . . Usage is often dictated by impervious area or surfaces that do not allow water to infiltrate into the ground (e.g. rooftops, sidewalks, and driveways). Impervious area is considered the most influential factor in determining peak stormwater runoff rates, total discharge volume, and pollutant contributions. As impervious area increases, the volume of stormwater produced rises.”

Id. at 5 (internal citations omitted). The “Analysis” document further states,

The methods for measuring impervious area and establishing a service utility can vary widely, but the NAFSMA publication describes methods based on four major factors: 1) impervious area, 2) a combination of impervious area and gross area, 3) impervious area and the percentage of imperviousness, and 4) gross property area and the intensity of development. . . .

Id. at 5-6.

Though the Environmental Protection Agency (EPA) recognizes three fee rate methodologies in its fact sheets referenced above, the Equivalent Residential Unit (ERU) method appears to be the method employed by West Jordan based on the similar nomenclature and the approach of treating each billing customer either as one ERU or a calculated number of ERUs. In

describing the ERU method, and after recognizing that “More than 80 percent of all stormwater utilities use the ERU method,” the EPA states,

Parcels are billed on the basis of how much *impervious area* is on the parcel, regardless of the total area of the parcel. This method is based on the *impact* of a typical single family residential (SFR) home’s impervious area footprint. A representative sample of SFR parcels is reviewed to determine the *impervious area* of a typical SFR parcel. This amount is called one ERU. . . . The *impervious areas of non-SFR parcels are usually individually measured*. Each non-SFR impervious area is divided by the impervious area of the typical SFR parcel to determine the number of ERUs to be billed to the parcel.

EPA 833-F-07-012 at 2 (emphasis added); see also, EPA 901-F-09-004 at 3.

Sandy City receives storm drain bills for \$1,199.70 per month. According to the “City of West Jordan Uniform Schedule of Fees and Service Charges” (Effective January 22, 2019), each ERU is charged \$5.58, which means Sandy City was billed for approximately 215 ERUs. Under the above-described ERU methodology, Sandy City is paying as though the River Oaks Golf Course property has the same impact on West Jordan’s stormwater system as 215 single-family homes. However, measurement of the impervious area on the attached aerial photograph indicates that Sandy City’s property only has about 4.5% or 2.69 acres of impervious surface. (Attachment A). For comparison, three nearby single-family parcels were also measured and found to have impervious surface areas of approximately 0.12 acres, 0.166 acres and 0.126 acres. Sandy City’s impervious surface area ranges from about 16 - 22 times the impervious surface area of these single-family parcels, which is one-tenth (or even less) of the impact for which Sandy City is being charged.

This disparity results from the Storm Water Fee Billing Policy under which the Sandy City property is charged 1 ERU per 4,000 square feet of lot size (gross area) up to 20 acres, regardless of impervious area. The single-family parcels, on the other hand, are each charged one ERU regardless of parcel size and regardless of impervious area. Comparison of the 4,000 square feet of lot size (gross area) ERU with other measurements helps demonstrate the inequity of this



approach to Sandy City's property. As can be seen on Attachment A, the lot sizes of the three measured homes are approximately 12,022 square feet, 11,979 square feet, and 14,810 square feet, triple the 4,000 square feet of lot size ERU being applied to Sandy City's property.

The adjacent 7.26-acre apartment complex was also measured on the aerial photograph attached as Attachment B. The apartment complex was approximated to have 4.68 acres of impervious area, which is more than 1½ times the impervious surface of the Sandy City property. The apartment complex's impervious surface is about 64% of its total area, meaning the apartment complex offers significantly less pervious area to assist with infiltration of stormwater runoff and offset its impact to West Jordan's storm drain system compared to Sandy City's 4.5% of impervious area. Yet, based on the lot size (gross area) calculation methodology of the West Jordan Storm Water Fee Billing Policy, the apartment complex would pay a rate based on 79 ERUs (7.26-acre lot size converted to ERUs) while Sandy City would pay a rate based on 215 ERUs; this means Sandy City pays 2.7 times the fee for less than 60% of the impact.

Possibly 4,000 square feet is a closer approximation of the *impervious areas* of the single-family parcels, which impervious surface areas are approximated at 5,227 square feet, 7,231 square feet and 5,489 square feet. However, all three of these particular single-family homes exceed 4,000 square feet of impervious surface, one by as much as 80% [(7231-4000)/4000]. It is arguable that the single-family homes would be undercharged, and Sandy City would be overcharged, even if the ERU were 4,000 square feet of *impervious area* instead of 4,000 square feet of lot size.<sup>1</sup> But it is clear that applying the ERU definition of 4,000 square feet of *lot size* results in a fee or charge to Sandy City in excess of the percentage of reasonable costs.

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<sup>1</sup> Under this definition, Sandy City would be charged for 29 ERUs (2.69 acres of impervious area converted to ERUs at a rate of 1 ERU per 4,000 square feet of impervious area) even though the Sandy City property has only 16 - 22 times more impact based on impervious surface area.



August 1, 2019  
West Jordan City Council

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Sandy City respectfully requests the following:

1. That, pursuant to West Jordan City Code §3-3-7, and for the reasons set forth herein, the West Jordan City Council determine that the fee or charge to Sandy City for Commercial Storm Drain of \$1,199.70 is in excess of the percentage of reasonable costs as set forth in West Jordan City Code.
2. That the West Jordan City Council determine that the fair and equitable fee or charge to Sandy City for Commercial Storm Drain shall be based on the *impervious surface area* for Sandy City's property located within the corporate boundaries of the City of West Jordan and not lot size or gross area.
3. That the excess amount of the April, May and June bills be refunded within thirty calendar days pursuant to West Jordan City Code §3-3-7, the excess amount being calculated as follows:

Amount paid by Sandy City to West Jordan	\$1,199.70
ERUs based on impervious surface $117,176/4,000 = 29$ ERUs	
Fee per ERU	\$5.58
Total due based on impervious area $29 \times \$5.58 =$	<u>\$161.82</u>
Refund Amount (April)	\$1,037.88
Refund Amount (May)	\$1,037.88
Refund Amount (June)	<u>\$1,037.88</u>
<b>Total Refund Amount to be paid by West Jordan to Sandy City</b>	<b>\$3,113.64</b>

Thank you for your consideration of this appeal. Please contact me to request additional information. We appreciate the opportunity to answer any questions you may have.

Sincerely,



Darien Alcorn

Sandy City Senior Civil Attorney

## ATTACHMENT A



Total area of River Oaks Golf Course within West Jordan: 59.38 acres

Impervious area within the section of River Oaks Golf Course that lies within West Jordan: 2.69 acres

4.5% of the area is impervious

Nearby random Single-Family homes west of the River Oaks Golf Course

Home 1:  
Total area: 0.276 acres  
Impervious area: 0.12 acres

Home 2:  
Total area: 0.275 acres  
Impervious area: 0.166 acres

Home 3:  
Total area: 0.34 acres  
Impervious area: 0.126 acres

Impervious  
Pervious

Produced by Sandy City GIS  
July 16, 2019

0 125 250 500 Feet



Section of River Oaks Golf Course that lies within West Jordan City

3 sample single-family homes

West Jordan

S  
L  
C  
O

Sandy

South Jordan

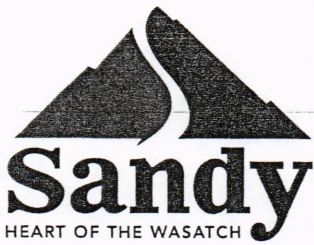


## **ATTACHMENT B**









February 16, 2018

Joel Linares  
Office of the City Attorney  
West Jordan City  
8000 South Redwood Road  
West Jordan, Utah 84088

Dear Joel,

It is our understanding that West Jordan is in the process of amending storm water service fees in a manner that will reduce the fees for owners of property that has more permeable surface, less impermeable surface and therefore less impact on the storm water system. Members of Sandy City staff have met with members of West Jordan City staff and encouraged them to revise the fee structure, and its calculation of ERUs based on lot size and impervious surface area, to be more in line with other cities in the Salt Lake Valley. We hope that this revision is on-going, and in a recent conversation with David Brickey he indicated that you would be the best attorney for me to contact in this matter.

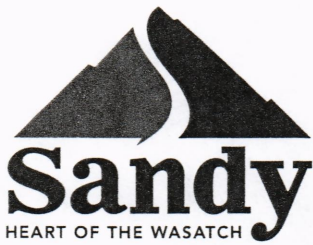
As you may be aware, Sandy City owns the River Oaks golf course, a portion of which is located within the West Jordan City limits. Sandy City believes that the golf course has less impact on the storm water system and provides a benefit that other properties do not as it is primarily landscaped with permeable grasses, shrubs and other plant material and therefore removes storm water from surface flow. Our pending request is for Sandy City to pay a reduced fee in the future and also receive a refund of historical fees in accordance with a revised fee calculation formula that, as stated previously, is similar to other cities.

We appreciate your assistance in continuing our discussion on this matter. Please feel free to contact me directly by telephone at (801)568-7194, or email at [dalcorn@sandy.utah.gov](mailto:dalcorn@sandy.utah.gov), if you would like to discuss it further.

Sincerely,

Darien Alcorn  
Senior Civil Attorney  
Sandy City





March 12, 2019

Rob Wall  
Office of the City Attorney  
West Jordan City  
8000 South Redwood Road  
West Jordan, Utah 84088

Dear Rob,

Sandy City owns the River Oaks golf course, a portion of which is located within the West Jordan City limits. The golf course is primarily landscaped with permeable grasses, shrubs, and other plant material and therefore removes storm water from surface flow, resulting in a benefit that other properties do not provide, which is less impact to West Jordan's stormwater system.

As a result of Sandy City's complaint that the River Oaks stormwater fee is high and should be lowered to more accurately reflect the property's impact on the stormwater system, members of Sandy City staff met with members of West Jordan City staff. It was represented to Sandy City that West Jordan would address the disputed amount in a comprehensive revision of its stormwater fee structure and calculation of ERUs based on lot size and impervious surface area, which would be more in line with other cities in the Salt Lake Valley. It is and has been our understanding that West Jordan is in the process of completing this revision and reducing the fees for owners of property that has more permeable surface, less impermeable surface and therefore less impact on the storm water system, including the River Oaks golf course.

However, West Jordan's process of revision has been lengthy, and Sandy City has continued to pay a fee amount with which Sandy City does not agree. From my conversation with Joel last May, I believe: (1) this revision is still on-going; (2) it is anticipated that Sandy City's fees will be reduced when the revision is complete; and (3) Sandy City's request made in my letter to Joel of February 16, 2018, is still under consideration. Specifically, our pending request is for Sandy City to pay a reduced fee in the future and also receive a refund of historical fees in accordance with a revised fee calculation formula that, as stated previously, is similar to other cities.

Consequently, Sandy City has determined not to pay any further stormwater fee invoices for the River Oaks golf course pending West Jordan's revision of the fee structure, recalculation of Sandy City's fee and delivery of invoices that are based on the revised fee structure. While it is understood that a reasonable fee may be calculated and applied at some point, and while Sandy City is still willing to pay the recalculated and reduced fee, it was not Sandy City's

Page 2  
Rob Wall  
March 12, 2019

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understanding from our prior discussions that the period to complete the revised calculation may be indefinite.

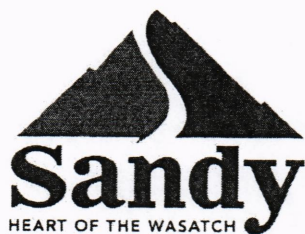
We appreciate your assistance in continuing our discussion on this matter. Please feel free to contact me directly by telephone at (801)568-7194, or email at [dalcorn@sandy.utah.gov](mailto:dalcorn@sandy.utah.gov), if you would like to discuss it further.

Sincerely,



Darien Alcorn  
Senior Civil Attorney  
Sandy City

Cc: Scott Earl, Sandy City Parks Director  
Matt Huish, Sandy City Chief Administrative Officer  
Kim Bell, Sandy City Deputy Chief Administrative Officer  
Bob Thompson, Sandy City Attorney  
David Brickey, West Jordan City Manager



July 22, 2019

Finance Department  
City of West Jordan

*Via Hand Delivery*

Re: Commercial Storm Drain Fee Payment – River Oaks Golf%Sandy City AP  
April and May 2019

Dear Finance Department:

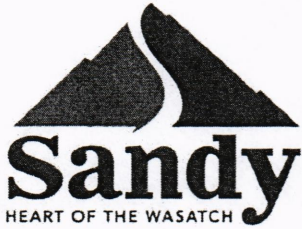
Please find enclosed payment in the amount of \$2,417.40 as billed to customer River Oaks Golf%Sandy City AP for Commercial Storm Drain for the months of March and April. Sandy City is paying this amount under protest. Pursuant to West Jordan City Code §3-3-7, Sandy City will file an appeal with the West Jordan City Council within "fifteen (15) calendar days of the . . . payment of the fee."

Sincerely,

Darien Alcorn  
Senior Civil Attorney  
Sandy City

Cc: Jared C. Tingey, Assistant City Attorney (by email)  
Kim Bell, Deputy City Administrative Officer (by email)





July 22, 2019

Finance Department  
City of West Jordan

*Via Hand Delivery*

Re: Commercial Storm Drain Fee Payment – River Oaks Golf% Sandy City AP  
June 2019

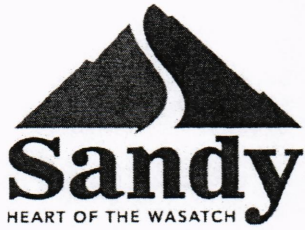
Dear Finance Department:

Please find enclosed payment in the amount of \$1,199.70 as billed to customer River Oaks Golf% Sandy City AP for Commercial Storm Drain for the month of June. Sandy City is paying this amount under protest. Pursuant to West Jordan City Code §3-3-7, Sandy City will file an appeal with the West Jordan City Council within "fifteen (15) calendar days of the . . . payment of the fee."

Sincerely,

Darien Alcorn  
Senior Civil Attorney  
Sandy City

Cc: Jared C. Tingey, Assistant City Attorney (by email)  
Kim Bell, Deputy City Administrative Officer (by email)



August 19, 2019

Finance Department  
City of West Jordan  
8000 South Redwood Road  
West Jordan, Utah 84088

Re: Commercial Storm Drain Fee Payment – River Oaks Golf%Sandy City AP  
July 2019

Dear Finance Department:

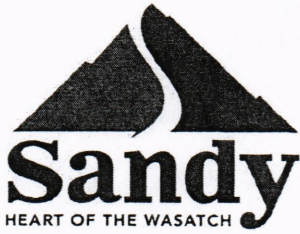
Please find enclosed payment in the amount of \$1,291.22 as billed to customer River Oaks Golf%Sandy City AP for Commercial Storm Drain for the month of July. Sandy City is paying \$1,199.70 of this amount under protest. Pursuant to West Jordan City Code §3-3-7, Sandy City will file an appeal with the West Jordan City Council within “fifteen (15) calendar days of the . . . payment of the fee.”

Sincerely,

Darien Alcorn  
Senior Civil Attorney  
Sandy City

Cc: Jared C. Tingey, Assistant City Attorney (by email)  
Kim Bell, Deputy City Administrative Officer (by email)





November 7, 2019

Finance Department  
City of West Jordan  
8000 South Redwood Road  
West Jordan, Utah 84088

Re: Commercial Storm Drain Fee Payment – River Oaks Golf% Sandy City AP  
October 2019

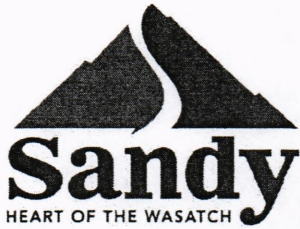
Dear Finance Department:

Please find enclosed payment in the amount of \$1,295.38 as billed to customer River Oaks Golf% Sandy City AP for Commercial Storm Drain for the month of August. Sandy City is paying \$1,215.32 of this amount under protest.

Sincerely,

Darien Alcorn  
Senior Civil Attorney  
Sandy City

Cc: Jared C. Tingey, Assistant City Attorney (by email)  
Kim Bell, Deputy City Administrative Officer (by email)



January 8, 2020

Finance Department  
City of West Jordan  
8000 South Redwood Road  
West Jordan, Utah 84088

Re: Commercial Storm Drain Fee Payment – River Oaks Golf% Sandy City AP  
December 2019

Dear Finance Department:

Please find enclosed payment in the amount of \$1,272.46 as billed to customer River Oaks Golf% Sandy City AP for Water, Street Lights and Commercial Storm Drain for the month of December. Sandy City is paying \$1,215.32 of this amount under protest.

Sincerely,

Darien Alcorn  
Senior Civil Attorney  
Sandy City

Cc: Jared C. Tingey, Assistant City Attorney (by email)  
Kim Bell, Deputy City Administrative Officer (by email)