

# **American Fork City Council Appeals**

## **Background**

Analysis on utilities was conducted on Fields at Timpanogos located at 302 S 740 E, American Fork, Utah 84003 and Timpanogos Industrial located at 752 E State St., American Fork, UT 84003. The analysis revealed corrections that need to be made in the application of utility rates. Specifically the Storm Sewer on both properties, and the sewer and water at the Fields at Timpanogos. All these utilities are provided by American Fork City.

The American Fork City Utility department has been in discussion with us about the issues and have agreed to recalculate the impervious square footage for the storm sewer on both properties. The storm sewer charges for Timpanogos Industrial have already been recalculated and the changes have been reflected on the bills. The Storm Sewer for Fields at Timpanogos has not yet been recalculated. The requests for refunds of past overcharges on storm sewer following the Utah State Statute of Limitations have been denied. The requests to adjust the water and sewer charges to a more equitable fee for the Fields at Timpanogos have been denied or not addressed.

## **Summary of Requested Adjustments**

The Storm sewer charge calculations at Fields at Timpanogos and Timpanogos Industrial are required by city code to use the "measured impervious area" to apply the number of ESU's that are applicable for storm runoff. Fields at Timpanogos uses a per unit ESU system, which is much higher than the measured impervious area and does not follow city code. Timpanogos industrial was being charged for two times the measured parcel due to what appears to be a mistake when taking the parcel square footage from parcel maps.

The water usage at Fields at Timpanogos uses a per unit billing model, which results in a much higher ESU equivalent charge than the actual water that is used on the property. Charges would be more accurately reflected through a usage (commercial) billing model.

The sewer usage at Fields at Timpanogos also used a per unit billing model, resulting in a much higher ESU equivalent than the actual sewer discharged from the property.

## **Requests**

1. The storm sewer impervious square footage be re-calculated on the Fields at Timpanogos property and the corrections to the billing made.
2. The Water charges for Fields at Timpanogos use a usage-based model in-stead of a per unit charge.
3. The sewer charges for Fields at Timpanogos use a usage-based model in-stead of a per unit charge.
4. The 6 year State Statute of Limitations be applied for overcharges in the past.

## Fields at Timpanogos Storm Drain Correction Request

We are requesting that the City re-evaluate and correct the Storm Drain charges to Fields at Timpanogos, located at 302 S 740 E, American Fork, Utah 84003 as provided in American Fork City code 13.70.050. The Storm Drain provider is American Fork City located at 51 E Main, American Fork, UT 84003.

### Background

The Storm Drain at the Fields at Timpanogos property was evaluated to determine whether the service provider was charging appropriately based upon city code and the utility provider's fee schedule. Upon review of the storm drain charges from American Fork City, it was observed that the charges were not consistent with the impermeable square footage at the property and the rates posted by the provider. In addition, ignoring the corrections for this property is inconsistent with the correction already provided for Timpanogos Industrial. The City indicated that they would adjust the billings to reflect the 266,000 square feet of impervious surface but we have yet to see that correction.

### Discrepancy

According to American Fork City Code section 13.70.050 part C, the following is stated: "Calculation. The city council finds that each single family residential parcel contributes approximately the same amount of storm water runoff; therefore, each developed single family residential parcel shall pay a base rate of one ESU. All non-single family residential parcels shall pay a multiple of this base rate, expressed in ESUs, according to the measured impervious area on the parcel. The city council may adopt separate rates for residential planned unit developments (PUDs), condominiums and other uses that are not easily handled under the standard rate schedule."

According to American Fork City Code Part 13.70.050, one equivalent service unit (ESU) is defined as "three thousand four hundred square feet of impervious surface area". According to the Utah County parcel map, the property is 7.968 acres, or 347,104 square feet (including all buildings). The landscaping makes up 34,081 square feet (permeable spaces). This means that there is 313,024 square feet of impervious surface on the property. This equals about 92.07 ESU's for the property. The property is currently being charged for 193 ESU's. The current billed impervious square footage is 210% of the measured impervious square footage on the property. See below for a comparison of current charges contrasted against the calculated square footage:

Current Monthly Charges vs. Corrected Charges		
	Current	Corrected
Square Footage	656,200	313,024
ESU's	193	92.07

**Request**

We request that the storm drain for the property be appropriately calculated based on the impervious surface per the city code as described above. Please let us know when the adjusted storm drain fee has been calculated and properly applied to the accounts.

## Fields at Timpanogos Water Appeal

This is an appeal to change the water charges for Fields at Timpanogos LLC, located at 302 S 740 E St, American Fork, UT 84003. The following American Fork City Sewer account numbers are included in this appeal: 18160.01, 18182.01, 18410.01, 18585.01, 18586.01, 18587.01, 18588.01, 18653.01, 18665.01. We are requesting that the water rates for the referenced accounts are updated to more accurately represent the water used on the property.

The property is a single owned for-profit business consisting of 192 apartments with water served by 8 water meters. This property uses water at a rate that can be more accurately measured and charged based on a commercial rate. The usage of the property is currently being charged at a per unit rate which is based on the number of units on site, this does not consider the water consumption of each unit. The charge is the same as if it were 192 single family homes. The apartment complex is nowhere near the usage, management, or infrastructure needed for the equivalent number of single-family homes. The commercial rate is more appropriate because it uses a water consumption method instead of simply the number of units on site. The current monthly charges represent 282% of the actual water used by the property. We recommend that the water rate for the property be changed to a commercial rate to reflect the more accurate billing of the water that is used on site.

<b>Current Monthly Implied Usage (Billed) vs. Actual Recorded Usage</b>		
	<b>Current Charges</b>	<b>Actual Average Monthly Recorded Usage</b>
Monthly Gallons (av. 2019-2020)	N/A (1,196,000 equivalent)	424,162
Equivalent Users (ERU)	193	68
Gal/Month/Unit	6200	2198

	Current Charges	Recorded Usage
Monthly Gallons (av. 2019-2020)	N/A (1,196,000 equivalent)	413,896
Equivalent Users (ERU)	193	67
Gal/Month/Unit	6200	2145

As shown above, the actual discharge into the sewer system is only about a third of the ERU's usage being applied to the account based on the established 6200 Gallon per month ERU. Additionally, there are only 8 meters/accounts that are recorded once each February to determine the monthly sewer charge for the year, which is much less than the management for 193 meters. In section 13.40.030 it states that "The city shall determine the average monthly sewer use for each connection". In Addition, 13.40.010 states, "The costs of operation and maintenance of the city's sewer system shall be distributed to all users of the wastewater system in proportion to each user's contribution to the total loading of the treatment works." There are 8 meters on the site, which represent 8 connections that require much less infrastructure, billing, and administrative costs than 193 equivalent single family homes. Clearly the costs distributed to this project are disproportionate compared to an equivalent number of single family homes.

We request that the sewer fees for the property be adjusted according to the actual usage, not based on a per unit fee.

## Fields at Timpanogos Sewer Appeal

This is an appeal to change the sewer charges for Fields at Timpanogos LLC, located at 302 S 740 E St, American Fork, UT 84003. The following American Fork City Sewer account numbers are included in this appeal: 18160.01, 18182.01, 18410.01, 18585.01, 18586.01, 18587.01, 18588.01, 18653.01, 18665.01. We request that the sewer rates for the referenced accounts are updated to more accurately represent the actual sewer discharged into the sewer system.

We request that the property be charged as a commercial property based on its actual sewer discharge as it is owned by one for-profit entity. This is a more appropriate and accurate method of applying the ERU's to the property rather than considering the property to be 193 single family homes as it is currently being charged.

Currently the sewer charges are based on a multi-family dwelling which charges the base charge per unit plus a per 1000-gallon charge based on the winter water usage. The per unit charge is based on an ERU, which is 6200 Gallons per month (or 205 gallons per day) according to the American Fork City Sewer Master Plan. The property was analyzed to determine the actual water usage from Feb 2019-Feb 2021 based on the water meter reads provided by American Fork City. A table below shows the actual charges vs the actual usage (all accounts combined):

Current Monthly Implied Usage (Billed) vs. Actual Recorded Usage		
	Current Charges	Average Winter Monthly Recorded Usage

## Refund Per Statute of Limitations

American Fork City has acknowledged the overcharges for Stormwater fees at Fields of Timpanogos and Timpanogos Industrial. The overcharges are based on an error in the calculation of the Equivalent Service Units (ESUs) that have been applied to both properties. The city has agreed to an adjustment to the proper ESUs for future billings but we have yet to see any correction for Fields at Timpanogos. In addition the City is making various arguments as to how far back to refund the accounts for past overcharges. To date the City has credited Timpanogos industrial for 12 months but has done nothing for Fields at Timpanogos. This is inconsistent with the treatment of Timpanogos Industrial and inconsistent with City and State code.

There has been a great deal of inconsistent responses from the City and inconsistent treatment of the two properties and the overcharges.

First, the City said that their own code only allowed for a 12 month refund. We did discover however that the City code also states that they are to comply with State code per section 13.04.010B: . "Such agreement and application shall comply with the form as established by American Fork City, and be in compliance with Utah State Code, to be reviewed and updated periodically to adhere to any municipal, county, or State of Utah requirements."

We then asked the City to refund the remainder per the applicable State statute of limitations. This request was first denied over the phone citing the following Utah State Code section: 63G-7-401,402, commonly referred to as the Governmental Immunity Act.

In response to American Fork City's reference of Utah State Code 63G-7-401, 402; This code does not apply to the statute of limitations placed on contracts (like the one entered into between a utility provider and the customer). That code section applies to claims against a government entity for injury. "Injury" in the code is defined as:

"Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to the person or estate, that would be actionable if inflicted by a private person or the private person's agent.'

Clearly this definition of "injury" does not apply to overcharges by a utility / municipality.

The most recent argument made by the American Fork City Utilities department is that the City is not obligated to refund more than 6 months based on Utah Code 78B-2-301. This section states that "An action may be brought within six months against a tax collector or the tax collector's designee: ....(4) for money paid or seized under protest and which, it is claimed, ought to be refunded."

Utah Code § 59-1-301 provides a cause of action for the recovery of wrongfully assessed "taxes, licenses, or other demands for public revenue." The statute provides as follows:

In all cases of levy of taxes, licenses, or other demands for public revenue which is deemed unlawful by the party whose property is taxed, or from whom the tax

or license is demanded or enforced, that party may pay under protest the tax or license, or any part deemed unlawful, to the officers designated and authorized by law to collect the tax or license; and then the party so paying or a legal representative may bring an action in the tax division of the appropriate district court against the officer to whom the tax or license was paid, or against the state, county, municipality, or other taxing entity on whose behalf it was collected, to recover the tax or license or any portion of the tax or license paid under protest.

The Utah Supreme Court has construed the term "demand for public revenue" narrowly, to refer to taxes and assessments levied for the purpose of generating public revenue. It does not encompass utility charges that represent fees for "services furnished." See *Ponderosa One Ltd. Partnership v. Salt Lake City Suburban Sanitary Dist.*, 738 P.2d 635, 637 (Utah 1987). In *Ponderosa*, a sewer usage charge assessed against a vacant building was held to be a "use charge," while a flat per-household fee assessed in a prior case for the purpose of funding a new city sewer system was held to be a "demand for public revenue." *Id.* (distinguishing *Rupp v. Grantsville City*, 610 P.2d 1145 (Utah 1983)).

Even if the storm water utility fee could be defined as a "demand for public revenue," then the overcharge claims would be governed by Utah Code § 59-1-301 and but subject to two strict requirements:

1. The payments must have been made "under protest." This means that the customer must have alerted the utility at the time of payment that the customer believed the charge was improper. See *Hammons v. Weber County*, 2018 UT 16, ¶ 12.
2. The statute of limitations is six months. See Utah Code § 78b-2-301; *Peterson v. Bountiful City*, 25 Utah 2d 126, 130, 477 P.2d 153, 156 (1970).

We argue that the stormwater charges are a "use charge" for services furnished and therefore not subject to 59-1-301 or 78b-2-301. Even if the charge was to be defined as a "demand for public revenue" the payments would have needed to have been paid under protest and they were not. In any case 78b-2-301 would not apply.

American Fork City has a written agreement with the properties owners that places the statute of limitations clearly within the definition of 78b-2-309, which states:

**78B-2-309. Within six years -- Mesne profits of real property -- Instrument in writing -- Fire suppression.**

- (1) An action may be brought within six years:
  - (a) for the mesne profits of real property;
  - (b) subject to Subsection (2), upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78B-2-311; or
  - (c) to recover fire suppression costs or other damages caused by wildland fire.
- (2) For a credit agreement, as defined in Section 25-5-4, the six-year period described in Subsection (1) begins the later of the day on which:
  - (a) the debt arose;
  - (b) the debtor makes a written acknowledgment of the debt or a promise to pay the debt; or



(c) the debtor or a third party makes a payment on the debt.

This code is directly applicable to the agreement in place between the utility provider (American Fork City) and the customer (Timpanogos Industrial and Fields at Timpanogos). The code is within the statute of limitations chapter in the Utah State Code, whereas the code referenced by American Fork City (63G-7-401,402) is in the Governmental Immunity Act of Utah section, put into place for injury, not financial obligation. "Injury" in the code is defined as, "death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to the person or estate, that would be actionable if inflicted by a private person or the private person's agent." We respectfully request that you review the code again to understand the code that applies to this specific issue.

Based on this we request that all overcharges within the last 6 years as of the date of notice for Timpanogos Industrial and Fields of Timpanogos be refunded. It is worth noting that the property's occupancy began only three years ago. The applicable statute of limitations is for 6 years but the refund request is only since the occupancy began.