

IMPACT FEE ADMINISTRATOR REPORT & RECOMMENDATION

IMPACT FEE APPEAL - IFA-004006:

APPELLANT: Alodium, LLC
Suite 320, Commerce Court
1230 O Street
Lincoln, NE 68508
402-438-4421

PROPERTY: 6710 L Street

REQUEST: The appellant is appealing from the Impact Fees Determination dated July 28, 2004 arguing that the calculation of Arterial Street Impact Fees based upon strict application of the Impact Fee Ordinance's definition of gross floor area under the described circumstances creates an unjust and undue burden on the Applicant.

RECOMMENDATION:

Denial

REASONS:

(1) Appellant is constructing a small building with a basement at 6710 L Street. The building contains a gross floor area of 5,267 square feet. The Impact Fee Administrator correctly calculated the Arterial Street Impact Fees pursuant to the Arterial Street Impact Fee Schedule for 2004 by multiplying the unit of measure (1,000 sq. ft. of gross floor area) times the fee per unit (\$2,178.00).

(2) The argument here is no different than other uses could make. A discount store could try to exclude their storage area from the impact fee or state they have more back room storage than normal. It doesn't matter, the ITE trip rate is based on the average use based on the gross floor area, storage and all. All other persons have paid arterial impact fees based on gross floor area, not net floor area as requested by the appellant.

FACTS:

(1) The City and Appellant have agreed that the building in question contains 5,267 square feet of gross floor area as defined in Lincoln Municipal Code §27.82.040 (Impact Fees).

(2) The City and Appellant have agreed that the building contains 3,750 square feet of floor area as defined by Lincoln Municipal Code §27.03.250 (Floor Area definition excluding storage in basements).

(3) The City calculated the Arterial Street Impact Fee for nonresidential use based upon the determination that the 1,000 sq. ft. unit of measure in the Arterial Street Impact Fee Schedule refers to gross floor area as opposed to floor area as those terms are defined in Sections 27.82.040 and 27.03.250 respectively.

DISCUSSION:

Lincoln Municipal Code §27.82.050(c)(1) provides in pertinent part that “the Impact Fee Administrator shall determine the amount of each required impact fee through the use of impact fee schedules adopted by the City Council.” With respect to this appeal, the only Impact Fee in dispute is the amount of the Arterial Street Impact Fee. Under the Arterial Street Impact Fee Schedule beginning January 1, 2004 the appellant’s building is classified in the general office category. The unit of measure is per 1,000 square feet and the fee per unit is \$2,178. The question raised is whether the unit of measure refers to gross floor area or “net” floor area as those terms are defined by Lincoln Municipal Code §§ 27.82.040 and 27.03.250 respectively. Pursuant to Lincoln Municipal Code §27.82.050(c)(1) and the foregoing Arterial Street Impact Fee Schedule the Impact Fee Administrator calculated the fee based upon a determination that the square footage referred to in the unit measure refers to gross floor area rather than floor area. The basic difference between the two definitions is that storage areas are included under gross floor area of a building. Although the impact fee schedule does not specifically state which definition is to be used for the unit of measure, the Impact Fee Administrator has always calculated the impact fees based upon a buildings gross floor area as opposed to its floor area for the following reasons:

1. The definition of gross floor area was specifically included in the definitions found in §27.82.040 of the Impact Fee Ordinance.

2. Other sections of the Impact Fee Ordinance specifically base the imposition of impact fees upon a determination of whether there has been an increase in **gross** floor area. For example under § 27.82.060(2) replacement of a destroyed or partially destroyed building, nonresidential building is only exempt from impact fees if the new building or structure is of the same gross floor area and under § 27.82.060(4) room additions, remodeling, rehabilitation or other improvements to an existing nonresidential structure are only exempt from impact fees if there is no increase in the amount of gross square footage of the structure.

3. General office, as well as medical office, retail and most other categories based on floor area are based on **gross** floor area due to the ITE traffic generation manual. In the manual the most common categorization is gross floor area, not net area or leasable area. In particular, ITE does not have a net area calculation for “general office” it only has gross floor area. The General Office trip rate has been calculated based on over 200 traffic count studies nationwide of general office users. When these studies are done by a traffic study firm, they typically only know the gross area of building measuring outside walls. Thus, the ITE studies include the office space, bathrooms, conference rooms, storage, mechanical, stairs, elevators, etc. all within the buildings. The arterial street impact fee impact fee is based the P.M. peak hour trip rate per gross floor area.

PH: 9-13-04
04R- —

IMPACT FEE NOTICE OF APPEAL

This appeal must be filed with the City Clerk within 10 days after the date of the determination for which the appeal is being filed. Although the fees may be reduced via this appeal process, the fees may NOT be waived using the appeal process. A City Council determination shall be final.

Appeal of Impact Fee Determination for Property Located at 6710 L Street, Lincoln, NE 68510.

Date: July 29, 2004.

Building Permit Application No. B0401846

At the next regular City Council meeting following the filing of the appeal the Council will schedule a time and place for hearing the appeal. The City Clerk shall mail notice of the hearing to the party at the address given below.

The following party alleges a grievance related to Impact Fees:

Name: Alodium, LLC
Company (if Applicable): attn: Larry V. Albers
Address: Suite 320 Commerce Court, 1230 O Street
City, State, Zip: Lincoln, NE 68508
Phone: 402.438.4421
Email Address: larryalbers@alltel.net

FILED
CITY CLERKS OFFICE
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CITY OF LINCOLN
NEBRASKA

Written Explanation of why the party feels a Determination was in Error: Attach written explanation of why the appellant feels that a determination was in error. *See Attachments, 1, 2, and 3.*

Final Determination by Council on _____ Day of _____, 2004.
Resolution No. _____

7/30 - Copy to m.H

ATTACHMENT 1

REASONS FOR APPEAL

Background. Applicant is constructing a small office building with a basement at 6710 L Street. A Special Permit limits the building's total "floor area" to 4,000 square feet. The plans submitted to the City with the application for a building permit include approximately 1,500 square feet of "storage area," which by definition of the Zoning Code is not included within the meaning of "floor area".

When Applicant's contractor submitted an application for a building permit, the Impact Fee Administrator made a calculation of the Impact Fees using a floor area calculation from the Impact Fee Ordinance. Applicant paid the Impact Fees "under protest", setting out its objections to the amount indicated to be due. See Attachment "B". The Impact Fees were paid to avoid any delays with issuance of the Building Permit while Applicant and the City attempted to resolve their differences.

Shortly after payment of the Impact Fees under protest, the Impact Fee Administrator sent a letter to Applicant acknowledging confusion between two City Ordinances and offering to meet with Applicant and representatives of Building and Safety. See Attachment "C".

Applicant met with a representative of Building and Safety and the Impact Fee Administrator on July 20. After reviewing the Drawings submitted, it was agreed that two errors contributed to a miscalculation of the Impact Fees paid, (i) inclusion of land which will not be included within the building envelope, and (ii) the inclusion exterior perimeter walls, which by definition under the Impact Fee Ordinance is expressly excluded. The Impact Fee Administrator also indicated at the meeting that she believed that while the two Ordinances require different calculations, she did not have authority to exclude the "storage area" from the calculation. At the meeting, it was agreed that Applicant would submit to her for review revised calculations for the area to be included as defined by the Impact Fee Ordinance. On July 22, the revised square footage was submitted by Applicant to the Impact Fee Administrator showing a reduction in the square feet from 5,886 to 5,267. The Impact Fee Administrator confirmed her acceptance of the new square footage and indicated that the Impact Fee initially calculated would be adjusted. By email of July 28, 2004, the Impact Fee Administrator reduced the Impact Fees from \$14,694.71 to \$12,819.71. No reduction was given for the buildings "storage area". If the storage area were included, then there is a further reduction in Impact Fees of \$3,304.03 (1,515 S.F. x \$2.178).

Applicant's Position. Most commercial office buildings have relatively little, if any, storage area when compared to the building's total gross square feet. Applicant's building, however, is unique. Of the total 5,267 square feet, approximately 1,517 square feet, i.e., 29% of the total, is devoted to storage. The strict application of the Impact Fee Ordinance's calculations under these circumstances works an unjust and undue burden on Applicant.

Applicant is limited by Special Permit 33-C to constructing a building with a total floor

area of 4,000 square feet. The definition of Floor Area under the Zoning Code is set out in Chapter 27.03.250.

Floor Area. *Floor area shall mean the total number of square feet of floor space within the outside of the exterior walls of a building, not including storage space in cellars or basements and not including space used for the parking of automobiles, not including elevator shaft or stair and escalator enclosures, and not including space used for mechanical equipment used in connection with utilities, such as heating, air conditioning and ventilation equipment, electric switching gear, water pumps, utility meters, and auxiliary electric generators. (Ord. 13364 §1; May 3, 1982; prior Ord. 12571 §27; May 8, 1979).*

The actual square foot for the Building under construction is larger than 4,000 square feet since it includes accessory "storage space", area excluded under definition.

The Impact Fee Ordinance definition, also under the Zoning Code, reads as follows:

Gross Floor Area. *The floor area within the inside perimeter of the exterior walls of the building under consideration, exclusive of vent shafts and courts, without deduction for corridors, stairways, closets, the thickness of interior walls, columns or other features.. 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. The gross floor area shall not include shafts with no openings or interior courts.*

Applicant *does not* contest the City's authority to impose impact fees. The Ordinance as written though, imposes impact fees for an area which by definition is excluded from consideration for occupancy permit purposes and parking ratios, matters which tie directly to the burden imposed by a building's occupants on the City's streets and utility infrastructure. In this instance, that burden is proportionately significant. The building's storage area does not generate traffic, does not generate additional waster water use, does not generate additional domestic water and sanitary sewer use, and does not impact other costs addressed by the Impact Fee Ordinance.

The Impact Fee Ordinance stresses the intent to impose only a *proportionate share* of the costs on the applicant. The Impact Fee Ordinance reads in part:

(e) It is only proper that those property owners who benefit by the expansion of public facilities for new development should bear their proportionate share of the cost of that expansion.

(f) The creation of an equitable impact fee system would enable the City to impose a more proportionate share of the costs of required improvements to the water and wastewater systems, arterial streets, and neighborhood parks and trails on those developments that create the need for them.

The Council has authority to make an adjustment to correct an inequitable assessment. The authority follows:

27.82.110 Miscellaneous Provisions.

(i) In an appeal of an impact fee, the Council shall not waive the fees, although the fees maybe reduced pursuant to subsection (h) above or may be reduced upon a finding that the impact fee was incorrectly calculated, or that unusual circumstances of the development demonstrate that application of the fee to the development would be unfair or unjust.

Applicant respectfully requests that the City Council make a reduction of \$3,304 to exclude the "storage area" within the calculation of the Impact Fee. Such an adjustment under these circumstances would be fair and just. If an adjustment is not made, then Applicant believes the Impact Fee Ordinance, by including storage area which does not create any burdens addressed by the Impact Fee Ordinance, is arbitrary, capricious and otherwise legally flawed.

ATTACHMENT 2

Larry V. Albers
Attorney

Suite 320 Commerce Court
1230 "O" St, Lincoln, NE 68508
tel: 402-438-4421 fax: 402-438-4680

HAND DELIVERY

June 25, 2004

Michaela Hansen
Assistant Public Works/Utilities Business Manager
Public Works and Utilities Department
555 South 10th Street, Suite 203
Lincoln, NE 68508-3994

RE: Alodium, LLC – Impact Fees – **PAYMENT UNDER PROTEST**

Dear Michaela:

Thank you for your email of today. I appreciate your prompt response to the objections.

With this letter, Alodium, LLC pays under protest the Impact Fees determined to be due. The Construction Manager is required to proceed with the work, and is required to pick up the Building Permit. As you are aware, the Impact Fees must be paid prior to the Permit's issuance.

My understanding is that you determined the Impact Fees as follows:

Breakdown of the Impact Fees for 6710 L Street

1" Water Meter

Water System	\$771.67
Water Distribution	\$478.33
Wastewater System	\$625.00

Arterial Streets

5,886 S.F. General Office @ 2.178/sf = \$12,819.71

Total Impact Fees \$14,694.71

The objections for paying the Impact Fees were included in an email sent to yesterday. As set out in my email, I have the following objections:

1) The Ordinance is explicit that the developer is to bear its *proportionate share* of the costs related to the improvements. The maximum useable space within the office building to be constructed is limited to 4,000 S.F. by the Special Use Permit. The rest of the basement space can only be used for storage. The traffic to and from the site over the arterial streets will be limited to the useable square feet. Presumably, the more useable space, the more traffic. Since the Owner will not generate traffic related to the "storage space," the Owner should not pay Impact Fees for such space.

2) The Ordinance definition of gross floor area indicates that if there are no exterior walls, then the fees are to be determined based upon the useable area. Over one-half of the lower level is basement. The Ordinance language indicates that only the useable area is to be considered, which would get us beyond the first objection.

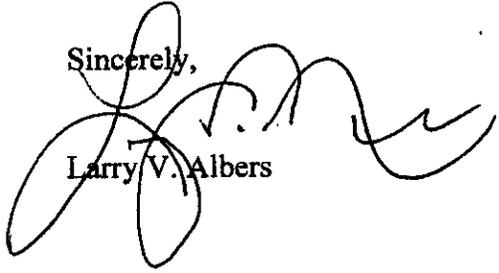
3) I can't determine how you came up with 5,886 S.F. Again, the definition for floor area excludes measurement to the exterior walls.

By paying the Impact Fee under protest, the intent is to proceed with obtaining the Building Permit and allowing Alodium to file a claim with the City.

Thank you again for your prompt response.

Sincerely,

Larry V. Albers



cc: Rick Wintermute

June 28, 2004



CITY OF LINCOLN
NEBRASKA

MAYOR COLEEN J. SENG

www.ci.lincoln.ne.us

Public Works and Utilities Department
Allan Abbott, Director
555 South 10th Street
Suite 203
Lincoln, Nebraska 68508
402-441-7548
fax: 402-441-8609

Larry V. Albers
Attorney at Law
Suite 320 Commerce Court
1230 "O" Street
Lincoln, NE 68508

Re: 6710 L Street

Dear Mr. Albers:

I have received your letter dated June 25, 2004 regarding Alodium, LLC - Impact Fees - PAYMENT UNDER PROTEST.

The source of square footage for the Impact Fee Determination comes directly from the Building and Safety Permit Application. If the square footage noted on the Building and Safety Application is incorrect, please let me, and Building and Safety, know as soon as possible of any changes or adjustments to be made.

I understand your concerns about the square footage in the lower level of the building, and it appears there is some confusion between the Lincoln Municipal Code Book 27.03.250 General Definitions for Special Use Permits and 27.82 Impact Fee Ordinance, 27.82.040 Definitions.

Chapter 27.82 Impact Fee Ordinance, 27.82.040 Definitions. Gross Floor Area. *The floor area*

within the inside perimeter of the exterior walls of the building under consideration, exclusive of vent shafts and courts, without deduction for corridors, stairways, closets, the thickness of interior walls, columns or other features. 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. The gross floor area shall not include shafts with no openings or interior courts.

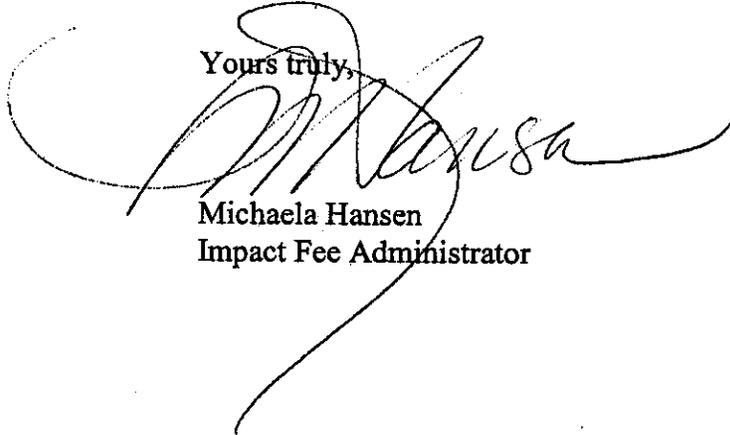
Chapter 27.03 General Definitions referencing Special Use Permits. 27.03.250 Floor Area -

Floor area shall mean the total number of square feet of floor space within the outside of the exterior walls of a building, not including storage space in cellars or basements and not including space used for the parking of automobiles, not including elevator shaft or stair and escalator enclosures, and not including space used for mechanical equipment used in connection with utilities, such as heating, air conditioning and ventilation equipment, electric switching gear, water pumps, utility meters, and auxiliary electric generators. (Ord. 13364 §1; May 3, 1982; prior Ord. 12571 §27; May 8, 1979).

Please note the difference in Floor Area Definitions. The Impact Fee Gross Floor Area Definitions (27.82.040) is much more restrictive than the General Definitions (27.03.250) set forth for other permitting purposes, such as Special Use Permits. The source of gross floor area for the Impact Fee Determination Applications has had a consistent precedence since the inception of the Impact Fee Ordinance on June 2, 2003.

Please give me a call with any questions or concerns you may have.

Yours truly,

A large, stylized handwritten signature in black ink, appearing to read 'Michaela Hansen', is written over the typed name and title.

Michaela Hansen
Impact Fee Administrator



**CITY OF LINCOLN
NEBRASKA**

MAYOR COLEEN J. SENG

www.ci.lincoln.ne.us

Office of the City Clerk
555 South 10th Street
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402-441-7436
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August 3, 2004

Mr. Larry V. Albers
Attorney at Law
Suite 320 Commerce Court
1230 O Street
Lincoln NE 68508

Re: Impact Fee Notice of Appeal - Alodium, LLC, 6710 L Street

Dear Mr. Albers:

The purpose of this letter is to advise you that the Public Hearing date for the above referenced Impact Fee Notice of Appeal has been set for **Monday, September 14, 2004, at 1:30 p.m.** at the regularly scheduled City Council meeting. 13

Sincerely,

Joan E. Ross, CMC
City Clerk

cc: Michaela Hansen
Allan Abbott
Rick Peo

WP\Joan's\Impact Fee letter.jer