

October 10th, 2023

An Open Letter to the Whitefish Mayor, Council Members, and General Public,

Due to the Class Action against the City of Whitefish relating to impact fees, we had the opportunity to view the latest 2023 Impact Fee update developed by City employees and written by City's hired consultant, TischlerBise (TB). This consultant is a Maryland based company with an office in Boise, Idaho. This update was provided to the Plaintiff's attorneys and we assume that it is the most recent version. We performed a review of parts of this update as private citizens and residents of Whitefish, although our review was also provided to the plaintiff's attorneys. Neither of us are plaintiffs in the current Class Action suit nor will we be enriched by this lawsuit in any manner.

As such, we have found numerous errors in the TB report that materially affect the impact fees that will be charged to future Whitefish homeowners, builders and current residents.

A notable point is that if the recommendations in the TB report are implemented, the City will continue to assess illegal and excessive fees into the future. Claims for refunds of these fees may be raised in the current class action suit or be the subject of future lawsuits against the City. The recently enacted SB 142 (which becomes law effective Jan 1, 2024) provides that in lawsuits claiming refunds of illegally assessed impact fees, the prevailing party will be entitled to recover from the other party not only impact fees illegally assessed, but also its attorneys' fees and expert witness fees. Thus, if a successful claim were made against the City, Whitefish would have to refund the fees illegally assessed AND pay the claimant's attorney and expert witness fees. The City has already incurred considerable expenses defending the current lawsuit. The Federal Court in Missoula recently ruled this lawsuit can proceed as a Class Action (over the strenuous and expensive objections of the City). If impact fee illegalities persist into the future (as now recommended in the current TB report), the amounts expended to date in the City's defense will likely pale in comparison.

To eliminate the continuing and totally unnecessary expenditure of City funds in defense of illegally assessed impact fees, we recommend that prior to approving the TB report, the City Council order a comprehensive review of that report by a neutral third party to assure that the City will not be exposed to more refund claims in the future. We offer our services free of charge to consult and cooperate with such an independent study. Our primary motivation is to safeguard the rights of future and current Whitefish residents and protect Whitefish taxpayers (including ourselves) from completely avoidable future litigation costs.

With that said, here are a few examples of some of the TB report's errors to which we refer:

- 1. Water and Sewer Fees.** Both water and sewer fees are significantly overstated due to inconsistent data provided by the City and calculations performed by TB. We spent considerable time reviewing these numbers and found the city was charging sewer fees roughly 4 times greater than the maximum allowed by law. This is in

direct violation of MCA 7-6-1602 which requires a nexus and proportionality of fees to the costs of projects used to compute impact fees. As one example, using the TB recommendations and based on previous annual permit numbers, we estimate the City would likely collect over \$4,000,000 in just five years for one small project that the City can only legally collect \$178,000! Water fees are also calculated by TB using the same errors. Brent Campbell, a professional engineer, expert witness and owner of an engineering consulting company, is employed by the Plaintiff's attorneys and reviewed the TB report. In his analysis submitted to the City, he identified these specific problems with the sewer and water impact fees in the TB report. His report was provided to the City through its attorneys. We, ourselves, have created a full report on just this one issue relating to the sewer impact fees. Using the TB methodology and the Campbell analysis we also recalculated the correct sewer fees. We offer to make this available to the City upon request.

2. Failure To Follow MCA 7-6-1601 - 1604. The TB report is substantively incomplete because it fails to include some of the most basic requirements established in MT state law. Here are just a few examples, particularly from MCA 7-6-1602:

- a. Projects used in calculating impact fees are not defined in a CIP (Capital Improvement Plan) as mandated by state law and the City's own Ordinance.
- b. Projects lack proper documentation that supports why Development is responsible for funding each project.
- c. Project funding sources were not properly identified.
- d. Projects identified in a CIP and excluded from impact fee calculations are not identified.
- e. Credits for external financing or outside funding are not calculated and applied.
- f. Credits for project impact fees previously collected by the City are not identified or applied.
- g. Project costs lack sufficient documentation needed to assess their viability. This was identified by Mr. Campbell in his report to the Court.
- h. In some cases, project costs used to calculate impact fees are listed in aggregate (not individually) such as the wastewater treatment plant that simply lists a total cost. We found that most of the costs identified by the City above and beyond the \$20M initial construction cost were not eligible for impact fees, (i.e. principal payments on existing loans).

3. Water Meter Sizing. Although this is not directly a part of the TB report, it is relevant because the City has now adopted a dwelling's water meter size as the method for assessing water and sewer impact fees and abandoned the use of fixture units. However, if the City continues to size water meters using its current methods, it will force some homeowners to install larger meters than necessary and will be overcharging impact fees which are based on meter size.

We applaud the City for using the meter size method of assessing impact fees, which is used by nearly all other cities in Montana. However, virtually all cities in Montana accept the meter size recommended by the homeowner's or builder's licensed plumber, whereas Whitefish requires homebuilders and owners install a meter size **dictated** by an unlicensed city employee. ALL cities in Montana use the Uniform Plumbing Code (UPC) (as mandated by state law) as its standard for sizing

meters. Whitefish uses a method that does not adhere to ANY standard, even though its own rules and regulations require it to follow the AWWA, which was not adopted by the state. This is inconsistent with the original 2007 Impact Fee Report and conflicts with state law. Whitefish meter sizing is both arbitrary and inconsistent with any published standard. It's method changes at the whim of City employees, as demonstrated in the 2018 Impact Fee update where a city employee arbitrarily lowered the threshold for each meter size to increase impact fees. Meter sizing should not be based on the political or financial agendas of Whitefish, but instead should be based on well-established scientific standards. We strongly recommend that the City re-join all other Montana cities, adopt the UPC standard method of sizing water meters, and allow an independent licensed plumber to perform this task.

These are just a few examples of the many problems found with the TB update and the City's new impact fees. As a result, new homeowners, businesses, existing residents will all be charged higher fees than allowed by statute and all City taxpayers will be footing the bill for further litigation.

We recommend a comprehensive review of the TB report by a competent, independent organization before the City Council votes to approve this report and starts overcharging its residents again.

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(co-authors of SB 142, Oversight of Impact Fees, signed by Governor in 2023)