

# Advisory Opinion #55

Parties: Jim Shea and Wasatch County

Issued: November 12, 2008

## TOPIC CATEGORIES:

D: Exactions on Development

J: Requirements Imposed Upon Development

Compliance with the fire code was a requirement expressed in statute at the time the Property Owner applied for the building permit. Requiring installation of a fire suppression system is an exaction, which must satisfy rough proportionality analysis. The Property Owner's expense must be roughly equivalent to the public costs to assuage the impact of the development. The Property Owner should not be forced to bear the total cost of a system that will also benefit other homes, but only a proportionate share of the total cost.

## DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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# State of Utah Department of Commerce

**OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN**

## **ADVISORY OPINION**

### Fire-Suppression System Requirements in Rural Area

Advisory Opinion Requested by: Jim Shea

Local Government Entity: Wasatch County

Applicant for the Land Use Approval: Jim Shea

Project: New Home Construction

Date of this Advisory Opinion: November 12, 2008

Opinion Authored By: Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

### **Issues**

May a local government require a property owner to install a new fire suppression system as a condition for building permit approval?

### **Summary of Advisory Opinion**

The condition that the property owner install and maintain a fire suppression system capable of delivering at least 1,000 gpm with a duration of 2 hours was validly imposed, because it is part of the County's ordinances as well as State law. The requirement is also an exaction, and is subject to rough proportionality analysis. The County may not require the property owner to bear the full burden of construction and maintenance, if the system will serve other properties. To the extent that the system will benefit other property owners, the County (or those owners) should bear the financial burden of installation.

## **Review**

A request for an advisory opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE ANN. § 13-43-205. The opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A request for an Advisory Opinion was received from Jim Shea on September 8, 2008. A copy of that request was sent via certified mail to Thomas L. Low, Wasatch County Attorney. The County received the request on September 12, 2008. The County submitted a response to the Office of the Property Rights Ombudsman, which was received on October 13, 2008. The County submitted additional material, in response to a request from the Office of the Property Rights Ombudsman, on November 5, 2008. Copies of the County's responses were mailed to the Mr. Shea.

## **Evidence**

The following documents and information with relevance to the issue involved in this advisory opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion, filed September 8, 2008 with the Office of the Property Rights Ombudsman by Jim Shea, with Attachments.
2. Response from Wasatch County, submitted by Kevin S. Thurman, Deputy County Attorney, received on October 13, 2008.
3. Additional information from Wasatch County, provided at the request of the Office of the Property Rights Ombudsman, received November 5, 2008.
4. Site visit by the Office of the Property Rights Ombudsman.

## **Background**

Jim Shea, Jr. owns a lot in the "Brighton Estates" subdivision in the Guardsman Pass area above Midway, where he plans to construct a home or cabin. Although the subdivision is close to both Midway and Park City, it is still quite remote, and has limited services. There are about seven homes or cabins already constructed in that area. Mr. Shea was informed that the Wasatch County Fire Marshall would not approve the building permit application unless Mr. Shea could install and maintain a water system capable of delivering at least 1,000 gallons per minute with a duration of at least 2 hours. The Brighton Estates subdivision does not have a hydrant or public water system, so Mr. Shea would need to install some sort of system to meet this requirement. Evidently, some (if not all) of the existing homes in the subdivision were allowed to use water

storage tanks to supply a fire-suppression system. Mr. Shea states that the County would no longer approve such tanks.

The County cites to the International Fire Code, which has been adopted by State statute as well as County ordinance.<sup>1</sup> Appendix “B” governs “Fire-Flow Requirements for Buildings,” and Subsection B105.1 requires that residential dwellings meet the 1,000 gallon per minute flow with a 2-hour duration requirement.<sup>2</sup> The County further explains that the *International Wildland Urban Interface Code* proposes a 1,500 gpm minimum flow rate for a two-hour duration. Since Mr. Shea’s dwelling is located in a “Wildland Urban Area,” the higher flow rate may apply.<sup>3</sup>

The County states that Mr. Shea may fulfill this requirement through a tank or other water service. Since there is no public water service in that area, the only alternative would be a water tank attached to a hydrant.<sup>4</sup> It also appears that the hydrant would be available to fight fires on other properties, and would not be exclusive to Mr. Shea’s dwelling. Mr. Shea indicated that there have been no discussions about installing a tank capable of serving all properties in the area, or pooling the resources of all property owners to construct such a tank.

## Analysis

### **I. The Fire-Flow Requirements of the Fire Code were Properly Imposed by State Law and County Ordinance.**

The Fire Code has been adopted as part of state law and the County’s ordinances, and so the requirements were properly imposed on Mr. Shea’s building permit application. Local governments may impose requirements and conditions on building permits, if those requirements are enacted by statute or are clearly expressed as part of the approval process:

A county may not impose on a holder of an issued land use permit or approved subdivision plat a requirement that is not expressed:

(i) in the land use permit or subdivision plat, documents on which the land use permit or subdivision plat is based, or the written record evidencing approval of the land use permit or subdivision plat; or

(ii) in [Chapter 17-27a of the Utah Code] or the county’s ordinances.

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<sup>1</sup> See UTAH CODE ANN. § 53-7-106(1): “A fire code promulgated by a nationally recognized code authority . . . is the state fire code, to which cities, counties, fire protection districts, and the state shall adhere in safeguarding life and property from the hazards of fire and explosion.” See also WASATCH COUNTY CODE, § 16.21.13 (Adoption of the International Fire Code).

<sup>2</sup> “The minimum fire-flow requirements for one- and two-family dwellings having a fire-flow calculation area which does not exceed 3,600 square feet . . . shall be 1,000 gallons per minute.” The fire-flow rate is measured at 20 pounds per square inch. The “two-hour duration” requirement is also found in Appendix B of the International Fire Code.

<sup>3</sup> See INTERNATIONAL FIRE CODE, § B103.3.

<sup>4</sup> The County stated that a hydrant would be required. The Fire Code allows for water tanks or reservoirs, or “other fixed systems capable of providing the required fire flow.” INTERNATIONAL FIRE CODE, § 508.2

UTAH CODE ANN. § 17-27a-508(h). A “land use permit” is any permit required by a local government as part of its land use regulations. *See id.* § 17-27a-103(25).<sup>5</sup> Since a building permit is required, the County may impose reasonable conditions and requirements that are found in its ordinances or in State law.

The State and the County have both adopted uniform building codes by reference, including the International Fire Code, to protect life and property. All buildings must comply with those standard codes. Since the International Fire Code is required by County ordinance and state law, compliance with it is a valid requirement for building permits.

## **II. Installation of a Fire-Flow Water System is an Exaction, Which Must Comply with Section 17-27a-507 of the Utah Code.**

### *A. The Requirement is an Exaction, which is subject to “Rough Proportionality” Analysis.*

The County’s requirement that Mr. Shea install a water system to provide a 1,000 gpm fire flow constitutes an “exaction” under Utah law.<sup>6</sup> “Exactions are conditions imposed by governmental entities on developers for the issuance of a building permit or subdivision plat approval.” *B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 34, 128 P.3d 1161, 1169 (“*B.A.M. I*”).<sup>7</sup> The term “exaction” includes any condition on development, including not only dedication of property, but also payment of money, installation of specific improvements, or other requirements imposed by a public entity. Furthermore, the term “exaction” includes conditions imposed by a general legislative enactment as well as those imposed by decisions or negotiations on specific proposals. *Id.*, 2006 UT 2, ¶ 46, 128 P.3d at 1170.

Since the County requires installation of the fire-suppression system as a condition of approval for a building permit, the County is requiring an exaction, which must satisfy § 17-27a-507(1) of the Utah Code. This statute authorizes counties to impose exactions on new development, within established limits:

- (1) A county may impose an exaction or exactions on development proposed in a land use application provided that:
  - (a) an essential link exists between a legitimate governmental interest and each exaction; and
  - (b) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

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<sup>5</sup> “‘Land use permit’ means a permit issued by a land use authority.” UTAH CODE ANN. § 17-27a-103(25); “‘Land use application’ means an application required by a county’s land use ordinance.” *Id.* § 17-27a-103(22). A building permit is required to construct a new dwelling. A building permit must be approved by the County Fire Department.

<sup>6</sup> It is not clear whether the flow requirement would 1,000 or 1,500 gpm.

<sup>7</sup> *See also Salt Lake County v. Board of Education, Granite School District*, 808 P.2d 1056, 1058 (Utah 1991) (holding that “development exactions” are “contributions to a governmental entity imposed as a condition precedent to approving the developer’s project.”)

UTAH CODE ANN. § 17-27a-507(1).<sup>8</sup> The Utah Supreme Court observed that the language of this statute was borrowed directly from the U.S. Supreme Court analyses in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994). (See *B.A.M. I*, 2006 UT 2, ¶ 41, 128 P.3d at 1170) In those two landmark cases, the U.S. Supreme Court promulgated rules for determining when an exaction may be validly imposed under the federal constitution's Takings Clause.<sup>9</sup> This has come to be known as the *Nollan/Dolan* "rough proportionality" test, and that two-part analysis has been codified in § 17-27a-507.

The Utah Supreme Court further honed the "rough proportionality" analysis in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 45 ("*B.A.M. II*"), which was a second appeal stemming from the same development project at issue in the earlier decision. This opinion explained that rough proportionality analysis "has two aspects: first, the exaction and impact must be related in nature; second, they must be related in extent." *B.A.M. II*, 2008 UT 45, ¶ 9. The "nature" aspect focuses on the relationship between the purported impact and proposed exaction. The court agreed that the approach should be expressed "in terms of a solution and a problem . . . . [T]he impact is the problem, or the burden which the community will bear because of the development. The exaction should address the problem. If it does, then the nature component has been satisfied." *Id.*, 2008 UT 45, ¶ 10.

The "extent" aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost:

The most appropriate measure is cost—specifically, the cost of the exaction and the impact to the developer and the municipality, respectively. The impact of the development can be measured as the cost to the municipality of assuaging the impact. Likewise, the exaction can be measured as the value of the land to be dedicated by the developer at the time of the exaction.

*Id.*, 2008 UT 45, ¶ 11. The court continued by holding that "roughly proportional" means "roughly equivalent." Thus, in order to be valid, the cost of an exaction must be roughly equivalent to the cost that a local government would incur to address (or "assuage") the impact attributable to a land use.<sup>10</sup>

### *B. The Requirement Satisfies the First Prong of the Rough Proportionality Test*

In order to be a valid exaction, the County's requirement must satisfy all aspects expressed in § 17-27a-507(1). First, there must be an essential link between a legitimate interest and the

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<sup>8</sup> There is a corresponding statute applicable to cities found at § 10-9a-508 of the Utah Code.

<sup>9</sup> See U.S. CONST., amend. V. ("nor shall private property be taken for public use, without just compensation"). The Supreme Court has interpreted the Takings Clause as limiting a government's ability to impose conditions on development. Furthermore, "[t]he Utah Constitution reinforces the protection of private property against uncompensated governmental takings . . . ." *B.A.M. I*, 2006 UT 2, ¶ 31, 128 P.3d at 1168. See also UTAH CONST. art. I, § 22 ("Private property shall not be taken or damaged for public use without just compensation").

<sup>10</sup> As of the date of this Opinion (fall 2008), Salt Lake County has requested that the Utah Supreme Court reconsider the *B.A.M. II* decision. Readers are advised that the decision may be changed or superseded.

requirement. The County has a legitimate governmental interest in preventing fires and safeguarding life and property.<sup>11</sup> Requiring installation of a water system for fire suppression is a reasonable means of accomplishing the County's objectives.<sup>12</sup> Since the County's legitimate interests are promoted by the requirement, the first prong of § 17-27a-507 is satisfied.

*C. The Requirement Satisfies the Nature Aspect of the Analysis*

The requirement also meets the "nature" aspect of the analysis. The nature aspect of the rough proportionality analysis requires only a relationship between a need or "problem," and how the exaction "solves" the problem. Requiring installation of a fire-suppression system addresses the "problem" of fire safety, by providing a readily available water supply to fight fires. Thus, the requirement satisfies the nature aspect of the rough proportionality analysis found in § 17-27a-508(1).

*D. In Order to be Valid, the Requirement Must Satisfy the Extent Aspect of the Analysis*

The County may validly require installation of the fire-suppression system. However, the County can require that a property owner pay for that installation only to the extent that the requirement meets the "extent" aspect of the rough proportionality analysis. As explained by the Utah Supreme Court, the cost incurred by the property owner to comply with the condition must be roughly equivalent to the expense needed to address the impact caused by the development activity. It would not be appropriate, for example, to impose the full cost of constructing a public road on one property owner if the road will also serve other properties. However, that property owner may be asked to bear a proportionate share of the cost of constructing the road, based on the impact attributable to that owner's new home.

No information has been provided indicating the cost of installing the fire-suppression system, or the impact on public services caused by Mr. Shea's proposed dwelling. Therefore, it is not possible to compare Mr. Shea's cost to comply against the expense that would be incurred by the County to address the impact caused by his home. However, Mr. Shea should not be expected to bear the full cost of installing a fire-suppression system that may benefit other properties, whether those properties currently exist or are expected to be constructed in the future. The County may validly require Mr. Shea to bear the cost of the system, but only to the extent that the system addresses impacts directly caused by his proposed dwelling. If the system will also serve other properties, then the County should bear the excess cost of the public benefit, or impose it on the other property owners who will benefit from the system.<sup>13</sup>

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<sup>11</sup> See UTAH CODE ANN. § 53-7-106; see also § 17-50-302: (Counties may provide services reasonably related to the health, safety, and welfare of residents). Furthermore, building and fire codes promote safety and fire prevention.

<sup>12</sup> Note that the first step of the evaluation under § 10-9a-508(1)(a) requires an essential link between the requirement and a legitimate governmental interest. This first prong of the test does not require a connection between the exaction and a need attributable to new development. As has been discussed, the "nature aspect" expressed in § 10-9a-508(1)(b) concerns the relationship between the exaction and the need created by new development. *B.A.M. II*, 2008 UT 45, ¶ 10.

<sup>13</sup> Because the cost to fully comply with the fire code's requirement is quite high, imposing the full cost on a single property owner may prevent any development. Such a severe restriction may raise issues concerning a regulatory

## Conclusion

Wasatch County's requirement that new development comply with the International Fire Code is a valid requirement, because both the County and the State have adopted the code as part of its ordinances. Local governments may impose conditions on new developments, if those conditions are adopted by statute, or are clearly expressed during the approval process. Since the Fire Code was adopted by the County, compliance is a valid condition imposed upon a building permit.

The requirement is also an exaction, because it is a condition imposed in order to get approval of a new development. In order to be a valid exaction, the requirement must satisfy the rough proportionality analysis found in § 17-27a-507 of the Utah Code. The requirement satisfies the first half of the analysis, because fire prevention is a legitimate government interest, and requiring an adequate water supply to fight fires is a reasonable means to promote that interest. The requirement also satisfies the "nature" aspect of the analysis, because the fire-suppression system addresses a need directly related to the impact of the proposed dwelling.

The exaction must also satisfy the "extent" aspect, meaning that the cost of complying with the requirement must be roughly equal to the expense that would be incurred by the County to address the impact caused by the proposed dwelling. No information was submitted regarding the expense of installing the system or the cost to the County of addressing the impact, so this Opinion cannot make a full analysis. However, if the system also benefits other properties, the County cannot force Mr. Shea to bear the full expense of construction and maintenance. To the extent that the system benefits other properties, the County (or the other property owners) must assume the financial burden.

Brent N. Bateman, Lead Attorney  
Office of the Property Rights Ombudsman

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taking. ("[I]f [a] regulation goes too far, it will be considered a taking" *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see also Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005) (economic burden of regulation may constitute a taking)). Sharing the costs amongst the affected property owners may be an equitable way to provide this vital system, and avoid any takings implications. A special service district, involving all properties in the area, is a possible means of fulfilling the need for an adequate fire system.



**NOTE:**

**This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.**

**While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.**

**An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.**

**Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.**

## MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Thomas L. Low  
Wasatch County Attorney's Office  
805 W 100 S  
Heber, Utah 84032

On this \_\_\_\_\_ Day of November, 2008, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

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Office of the Property Rights Ombudsman