Advisory Opinion #87

Parties: Deepwater Distribution Co. and Wasatch County

Issued: June 17, 2010, clarified on August 25, 2010

TOPIC CATEGORIES:
R(v): Other Topics (Interpretation of Ordinances)

The Utah Division of Drinking Water regulates culinary water systems and supplies, and does not have authority over fire suppression systems. Compliance with the Fire Code serves important public interests, but any regulation can "go too far" and constitute a regulatory taking of private property. Dedication requires a showing of intent to dedicate property to a public entity.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Deepwater Distribution Company, Inc. Sean Brown, President
Local Government Entity:	Wasatch County
Applicant for the Land Use Approval:	Deepwater Distribution Company, Inc.
Project:	Culinary Water System
Date of this Advisory Opinion:	June 17, 2010
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

May a local government require installation of a fire suppression system as a condition for approval of a culinary water system?

Summary of Advisory Opinion

The Division of Drinking Water does not have authority to require a culinary water system to include a fire suppression system. The Division ensures that drinking water is safe, that delivery systems are adequate, and that watersheds are protected, but they do not have authority to require an applicant to install a fire suppression system.

The County has authority to require compliance with the International Fire Code. This is a valid condition imposed by ordinance, and serves a legitimate public purpose. However, regulations that promote the public interest may still constitute a "virtual taking," if the regulation frustrates investment-backed expectations and shifts a public burden onto a private property owner. Instead of the "*Nollan/Dolan*" exaction analysis, non-dedicatory conditions may be evaluated using the framework established by the U.S. Supreme Court in *Penn Central Transportation* and other cases. Under that framework, the Fire Suppression Requirement is probably not a taking.

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 Deepwater Distribution Company, Inc. on March 1, 2010. A copy of that request was sent via certified mail to Thomas L. Low, Wasatch County Attorney. The County received the request on March 2, 2010. The County submitted a response to the Office of the Property Rights Ombudsman, which was received on April 15, 2010. Deepwater submitted a reply, which was received on May 3, 2010. The County submitted a response on May 4, 2010.

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 March 2, 2010 with the Office of the Property Rights Ombudsman by Paxton Guymon, attorney for Deepwater Distribution Company, Inc., with attachments.
2. Response from Wasatch County, submitted by Kevin S. Thurman, Deputy County Attorney, received on April 15, 2010, with attachments.
3. Reply submitted by Paxton Guymon, received by fax on May 3, 2010.
4. Response submitted by the County, received by fax on May 4, 2010.

Background

Deepwater Distribution Company, Inc. is a mutual water company, and is made up of property owners from the Brighton Estates area in Wasatch County. Brighton Estates is a subdivision located near Guardsman Pass, above the Brighton Ski Resort, across the mountain from Deer Creek and Park City, and above Midway and the Wasatch Mountain State Park. It is an unincorporated area of Wasatch County, and was approved as a subdivision in the 1960s. According to Deepwater, there are 108 residences, although most of them are considered secondary or recreational homes. However, at least 17 homes are occupied year-round. Because

it is located in a rather remote, mountainous location, Brighton Estates has no public water or sewer system, and very limited public service in general.[1]

Deepwater was formed for the purpose of installing a culinary water system for up to 60 properties in Brighton Estates. The proposed system would provide service to the homes by accessing a nearby well and piping the water to underground tanks located on each residential lot. The system was designed provide at least 400 gallons of drinking water for each home, which apparently would meet the minimum standards for culinary water service.

Beginning in 2005, the County began to strictly enforce a requirement that new development comply with fire codes. Both Wasatch County and the State of Utah have adopted the International Fire Code as the standard for fire safety.[2] Prior to 2005, the County approved or allowed construction of new homes in the Brighton Estates area, even though there was no fire suppression system in place.

The International Fire Code is not merely a guideline, but is a statutory requirement for all buildings. 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.[3] The County further explains that the *International Wildland Urban Interface Code* proposes a 1,500 gpm minimum flow rate for a two-hour duration.[4]

In February of 2009, Deepwater petitioned the Utah Division of Drinking Water for approval of the proposed drinking water system in Brighton Estates. Deepwater proposed using 8-inch delivery lines, rather than 4-inch lines, so that their system could be integrated into a fire-suppression system in the future.[5] The Division of Drinking Water responded with a letter outlining several "review comments" on the system, covering such things as water quality, the amount of water rights, and the carrying capacity of the pipes in the system. One comment addressed water storage, and stated that each residential connection required a minimum of 400 gallons. However, the Division noted that fire suppression required a minimum of 120,000 gallons, and that "[t]his additional capacity will be required for Deepwater's system unless we

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[1] Several properties with structures apparently have septic systems, and wells for drinking water. The area has electrical service, but not a natural gas system. The roads receive little maintenance from the County, and there is no snow removal in the winter.

[2] *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). The County explains that the Wasatch County Fire Protection Special Service District was formed to govern fire protection, and that this special service district is a separate entity from Wasatch County. However, the County Council also serves as the board for the special service district. For the purposes of this Opinion, the County and the special service district will be treated as if they were the same entity.

[3] "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.

[4] *See* INTERNATIONAL FIRE CODE, § B103.3. Brighton Estates is located within a Wildland Urban Interface zone.

[5] The larger lines would accommodate the additional capacity needed for fire suppression. Evidently, Deepwater envisions a hydrant system for Brighton Estates.

receive written notification from Wasatch County that it will not require fire suppression capability."

Deepwater responded to the Division's concerns, including the requirement of additional capacity for fire suppression. Deepwater stated that it had asked the County to allow construction of the culinary water system without requiring a fire suppression system, but the County declined to do so. In a letter dated September 29, 2009, the County Fire District stated that it will not issue new building permits unless the requirements of the International Fire Code could be met. Deepwater argued that it is only interested in designing a drinking water system, and that fire suppression is a separate matter that ought to be addressed by the County. Deepwater felt that the Division could approve a drinking water system without requiring that it also provide fire suppression.[6] The County has not required Deepwater to include a public fire suppression system as part of the proposed culinary water pipeline.

Deepwater met with the County, attempting to resolve the dispute. By January of 2010, the County Council (which also makes up the Wasatch County Fire Board) declined to modify its position that no new development could be approved without compliance with the International Fire Code.

In January of 2010, the State Drinking Water Board considered Deepwater's request to approve its culinary water system, and disregard the County's fire suppression requirement. Although Deepwater had addressed the other concerns raised by the Division, the Drinking Water Board determined that it could not ignore the County's requirement. As of the date of Deepwater's Request for Advisory Opinion, the Board had not taken a final action on the application.

The County notes that it is not obligated to construct a fire suppression system for Brighton Estates, or for any other area of Wasatch County. The County explains that it provides fire protection services for unincorporated areas, through its Fire Protection Special Service District, but that service does not mean that the County must install fire suppression systems. A group of property owners may create a special service district for the purpose of constructing a public fire suppression system. The County states that it would support such an effort by the property owners in Brighton Estates, but that to its knowledge, there have been no efforts to form a special service district.[7]

The County also objects to this Opinion, claiming that since Deepwater has no active land use application before the County, the Office of the Property Rights Ombudsman lacks authority to prepare an Advisory Opinion on this matter.

[6] The Division cited to its administrative rules which state that a culinary system shall comply with the International Fire Code if a local fire authority requires that the system provide water for fire suppression. *See* UTAH ADMIN. CODE Rule R309-550-5(5).

[7] Special Service Districts may be created for several public purposes, including fire protection. A district would have power to assess properties to raise funds for public projects. Provisions related to the creation and management of special service districts are found in Titles 17B, 17C, and 17D of the Utah Code.

Analysis

I. Because There is a Question Related to Conditions on Land Development, the Office of the Property Rights Ombudsman May Issue an Advisory Opinion on this Matter.

In spite of the County's objections, the Office of the Property Rights Ombudsman may issue an Advisory Opinion on this matter, because it involves the application and interpretation of an ordinance directly related to land development. The County correctly notes that § 13-43-205 generally delineates the topics for Advisory Opinions. That section also states that Advisory Opinions may be requested "[a]t any time before a final decision on a land use application by a local appeal authority." UTAH CODE ANN. § 13-43-205. However, that provision does not necessarily block the ability to issue Advisory Opinions on issues which concern interpretation and implementation of ordinances affecting land use and development. There is no requirement in § 13-43-205 that a land use application actually be pending before an Advisory Opinion can be requested. Indeed, some of the topics listed as appropriate for Advisory Opinions do not necessarily arise due to land use applications, such as impact fees and non-conforming uses/non-complying structures. Moreover, conditions, exactions, and application of ordinances are topics for which Advisory Opinions are available. It follows that interpretation of an ordinance or a condition expressed during the land use approval process must be a valid topic for an Advisory Opinion. By offering such opinions, the Ombudsman's Office is able to provide guidance to local government and property owners, help avoid litigation, and encourage resolution of disputes.[8]

Local governments may impose conditions on land uses through ordinances. *See id.*, §§ 10-9a-509 and 17-27a-508.[9] The Ombudsman's Office may issue Advisory Opinions on questions arising not only from imposition of conditions, but also concerning application and interpretation of conditions imposed pursuant to §§ 10-9a-509 and 17-27a-508. *See id.*, § 13-43-205. In order to fulfill the purposes of Advisory Opinions and the mission of the Ombudsman's Office, it is necessary that Advisory Opinions be prepared that focus on the interpretation and application of ordinances affecting land use.[10]

Deepwater requested this Opinion because a County requirement affected Deepwater's application for approval of a drinking water system. The culinary water system was proposed to improve development of the Brighton Estates area. The State Division of Drinking Water deferred to the County's requirement that the proposed system must also provide fire suppression for residences in the area. Drawing from its interpretation of the International Fire Code, the

[8] The dispute resolution function of the Advisory Opinion, combined with the fact that Advisory Opinions are advisory and not binding upon either party, supports the conclusion that Advisory Opinions should be made available to more, rather than fewer, parties. Where an Advisory Opinion can help resolve a matter without the need for litigation, it ought to be available. Accordingly, it is the policy of the OPRO to interpret the limitations on availability of Advisory Opinions expansively where possible. Advisory Opinions remain unavailable when exclusion is explicit.

[9] Local governments may impose conditions, provided they are expressed in statute, ordinance, or clearly stated in writing as part of the final approval.

[10] Moreover, a decision by the land use authority regarding interpretation or application of a condition, and a dispute thereon, may arise long after the condition is imposed.

County indicated that the fire suppression requirement would be imposed as a condition upon permits for the culinary water system.[11]

The County argues that Deepwater has not formally submitted an application for approval to construct the culinary water system, so questions about the validity of the fire suppression requirement are not yet ripe, and cannot be a valid topic for an Advisory Opinion. However, the County has already imposed the condition on Deepwater's project, because it declined a request to waive the requirement, thus making it a condition of approval by the Division of Drinking Water. In other words, the County's position is clear, and a formal land use application by Deepwater would yield the same result. Therefore, the County's position interpreting and applying an ordinance imposing a requirement upon land development is a suitable subject for an Advisory Opinion.

II. The Division of Drinking Water May Not Require Deepwater to Install a Fire Suppression System as a Condition of Approval.

The Division of Drinking Water may not require compliance with the County's fire suppression requirements as a condition on approval of Deepwater's drinking water system. The Division has no authority to include fire suppression as part of the culinary water system, because the proposed system is not intended or required to provide water for fire suppression. The Division's authority is limited to regulating public water systems, and ensuring that those systems deliver adequate supplies of safe drinking water. *See* UTAH CODE ANN. § 19-4-104. Fire suppression, while important, is not within the Division's statutory mandate.

The Division seems to be misinterpreting Rule R309-550-5, which was adopted by the Division to govern design of water mains. Part of that rule governs design of water mains *if* a system is also required to provide water for fire protection:

> If a public water system ***is required to provide water for fire suppression*** by the local fire authority, or if the system has installed fire hydrants on existing distribution mains for that purpose:
>
> (a) The design of the distribution system shall be consistent with Appendix B of the 2003 International Fire Code. . . .
>
> (c) An exception to the fire protection requirements of (a) . . . may be granted if a suitable statement is received from the local fire protection authority.

UTAH ADMIN. CODE R. R309-550-5(5) (emphasis added). This rule grants limited authority for the Division to regulate the design of a water main used to deliver water for fire suppression, but

[11] The County observed that Deepwater would need excavation and building permits to begin construction of the culinary water system.

only when the system is ***required*** to provide water for fire suppression.[12] That provision of R309-550-5 does not apply to systems not required to deliver water for fire protection.

Deepwater does not intend that the proposed system would provide water for fire suppression, and the County has not required that the system be designed for fire protection.[13] Deepwater designed its system with larger water lines which could be incorporated into a suppression system in the future, if one is installed. However, this additional capacity appears to be voluntary on the part of Deepwater, and is not a requirement imposed by the County. Since the Deepwater system is not required to provide water for fire suppression, Rule R309-550-5(5) does not apply, and there is no basis for the Division to require that the system be designed to provide additional water as well as a delivery system for fire protection.[14]

III. The Fire Code Suppression Requirement Should be Evaluated as a Condition on Development, Including Analysis as a Regulatory Taking

Because compliance serves an important public interest, the County may require compliance with the International Fire Code before granting approval for new development. However, compliance with the Fire Code may constitute a "virtual taking" if it unreasonably interferes with the owner's expected use and development of property. Compliance with building and fire codes ought to be evaluated as a condition imposed upon development.

A. The Fire Code Promotes the Legitimate Public Interest of Preventing Fires and Minimizing Loss due to Fires.

Local governments may impose conditions on new development, provided those conditions are expressed in statute, ordinance, or are included as part of the approval process. *See* UTAH CODE

[12] Under R309-550-5(5), the Division only regulates the capacity and design of water mains, to ensure that they can provide the necessary water for fire suppression. *See also* UTAH ADMIN. CODE R. R309-510-8(1)(b) (requiring adequate fire suppression storage capacity, if the water system has fire hydrants, and is intended to provide water for fire suppression.). It should also be noted that the Division's response required additional storage capacity to provide water for fire suppression, but there was no indication that the proposed system was intended to provide fire suppression, or would have hydrants.

[13] The County's letter of September 29, 2009 states that it will not issue building permits, unless the builder complies with the fire-suppression requirement. The County did not require that Deepwater's culinary water system also provide water for fire suppression.

[14] Moreover, there is no rational basis for the Division to be involved in whether a drinking water system must also provide fire suppression. The Division's purpose is to ensure that drinking water is safe, that delivery systems are adequate, and that watersheds are protected. *See* UTAH CODE ANN. § 19-4-104. If a drinking water system is required to provide fire suppression, then the Division may incorporate that consideration into the design of water mains and storage capacity. However, the Division's authority is limited even in that scenario. The amount of water needed, and even the placement of hydrants is regulated by the International Fire Code, not the Division. In order to justify such regulatory authority, the Division must show that its regulation bears some rational relationship to legitimate governmental purposes. *See Purdie v. University of Utah*, 584 P.2d 831, 832 (Utah 1978); *see also Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819) (Due Process is "intended to secure the individual from the arbitrary exercise of the powers of government"). The County is sufficiently empowered to implement the Fire Code and require compliance, so there is no rational basis for the Division's assumption that it is responsible to impose fire suppression as a condition on Deepwater's application for a culinary water system.

ANN. § 17-27a-508(1)(h).[15] Since the International Fire Code has been adopted by both the State of Utah and Wasatch County, it may be validly imposed upon new development.[16] Requiring compliance with the Fire Code also promotes an important public interest. "When a fundamental right is not at issue, a statute will not violate substantive due process if it is rationally related to a legitimate state interest." *Gardner v. Board of County Commissioners of Wasatch County*, 2008 UT 6, ¶ 33, 178 P.3d 893, 903. In general, imposing the Fire Code on new development does not involve a fundamental right, so the requirement is valid if it is rationally related to a legitimate public purpose. Preventing fires, and minimizing loss caused by fires is obviously an important public interest.[17] The requirements of the Fire Code are designed to promote fire prevention and minimize damage, and so are rationally related to a legitimate public interest.

B. The Fire Suppression Requirement is Invalid if it Significantly Interferes with Development of Property to the Point that a "Virtual Taking" has Occurred..

Although the Fire Code promotes an important public purpose, imposing it as a condition on an individual development may constitute a regulatory taking, if the high burden of compliance unreasonably restricts the owner's investment-backed expectations, and if the regulation shifts a public burden onto a private property owner. The Fire Code is rationally related to a legitimate governmental interest, but, "even 'a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a taking.'" *Arnell v. Salt Lake County Board of Adjustment*, 2005 UT App. 165, ¶34, 112 P.3d 1214, 1224 (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 127 (1978)). Furthermore, "an analysis of several factors indicates [whether] the interference is so great that a virtual taking has nonetheless occurred." *Diamond B-Y Ranches v. Tooele County*, 2004 UT App 135, ¶ 14, 91 P.3d 841, 845. The question then becomes whether this particular application of the fire suppression requirement is such a significant interference that it constitutes a "virtual taking" of Deepwater's property.

1. <u>The Fire Suppression Requirement is not an Exaction Unless a Property Owner Dedicates Property for a Public Use</u>.

As a preliminary matter, it must be explained that the Fire Suppression Requirement is not an exaction, as long as the suppression system is not dedicated to the public. This is a departure from earlier opinions issued by the Office of the Property Rights Ombudsman, and so a brief explanation is in order. Earlier opinions, including one analyzing a similar fire suppression

[15] *See also* UTAH CODE ANN. § 10-9a-509(1)(h) (applicable to cities). According to that subsection, a local government "may not impose on a holder of an issued land use permit or approved subdivision plat a requirement that is not expressed . . . in the land use permit or subdivision plat, documents on which the [approval] is based, or the written record evidencing approval . . ., or in [the Utah Code] or [local] ordinances." It follows, then, that a requirement that is expressed may be imposed.

[16] *See* UTAH CODE ANN. § 53-7-204 (Utah Fire Prevention Board authorized to adopt fire code. *See also* Utah Admin. Code R710-9-1 (adoption of International Fire Code). WASATCH COUNTY CODE § 16.21.13 (County adoption of International Fire Code).

[17] *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.

requirement in Brighton Estates, analyzed the requirement under an "exaction" theory. This theory used the "*Nollan/Dolan*" rough proportionality test, as codified at § 17-27a-507 of the Utah Code.[18] For the reasons stated herein, the Office of the Property Rights Ombudsman modifies that approach, insofar as it affects requirements or conditions imposed upon development without a dedication of a public improvement.

The term "exaction" is not defined in the Utah Code, but decisions from Utah's appellate courts provide some guidance. The Utah Supreme Court has stated that "[e]xactions are conditions imposed by government 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*").[19] That sentence seems to support a conclusion that *any* condition imposed upon development should be analyzed as an exaction. However, the court provided a few examples of exactions:

> They . . . may take the form of (1) mandatory dedication of land for roads, schools, or parks, . . . (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees, and (4) impact fees. In these respects, exactions take on the likeness of regulatory takings. . . . [E]xactions resemble physical takings in the sense that they typically require the permanent surrender of private property for public use.

Id. (internal quotations omitted). While this does not provide a concrete definition, the *B.A.M I* decision indicates that the term "exaction" is limited to dedication of private property (including monetary dedications) for a public purpose in exchange for development approval.[20] This interpretation is consistent with the U.S. Supreme Court, which has held that "rough proportionality" analysis only applies when property is dedicated for public use.[21]

In addition, "rough proportionality" analysis is not well-suited to determine whether a non-dedicatory condition is valid. Development of land is highly-regulated, and a property owner must comply with numerous conditions involving the use of land, placement and design of structures, required improvements (such as water and sewer service), etc. These regulations are conditions that must be satisfied in order for development to occur, but they do not always involve dedication of property for a public use. Rough proportionality analysis requires a comparison of the expense imposed on the developer against the cost to the public entity to

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[18] *See e.g.*, Shea/Wasatch County, Advisory Opinion No. 55, Office of the Property Rights Ombudsman, November 2008.

[19] *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.")

[20] The *B.A.M I* decision also discussed both *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) to clarify its analysis of exactions. Both cases concerned dedication of property rights for public uses. "Water and sewage connection fees" are a type of exaction, because a developer is contributing (or "dedicating") money to help pay for a public utility.

[21] "[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions — land-use decisions conditioning approval of development on the dedication of property to public use." *Monterey v. Del Monte Dunes at Monterey, LTD*, 526 U.S. 687, 702 (1999).

address the impact caused by the new development. *See B.A.M Development, LLC v. Salt Lake County*, 2008 UT 74, ¶ 11, 196 P.3d 601, 604 ("*B.A.M. II*"). It may be difficult to ascertain the public cost to address impacts when the purpose of the regulation is to promote health and safety and it more directly benefits the property owner.

For example, building codes regulate the design of structures. These regulations are conditions imposed on property owners for the issuance of a building permit. Complying with these conditions increases the cost of the building. However, it is difficult to determine the public impact which is addressed by the building codes. While the regulations serve important public purposes, by ensuring that structures are safe, the property owner benefits more than the public at large. Rough proportionality analysis requires that the expense to the owner be roughly equivalent to the cost of addressing the impact. How would the public address the impact if the owner did not comply? What would be the cost to the public to address the impact?

Even if a value for the public impact could be assigned, it may be well below the expense incurred by a property owner. If that is the case, rough proportionality analysis requires that the public entity compensate the owner. Such a requirement would be unsupportable financially, and would serve as an incentive to relax building codes defeating the purpose of ensuring safe building construction. It is well-established that property may be regulated without requiring compensation to the property owner.[22] All of the factors listed here lead to the conclusion that the "*Nollan/Dolan*" rough proportionality test is not suited to analyze non-dedicatory conditions.[23]

The Office of the Property Rights Ombudsman therefore concludes that the rough proportionality test, as explained in *Nollan, Dolan*, and the *B.A.M* decisions should not be applied to non-dedicatory conditions or regulation of property development. Instead, such regulations should be subject to the traditional regulatory takings analysis explained in *Penn Central Transportation*. This approach will be more fully explained below.

2. The Fire Code Must Satisfy the *Penn Central Transportation* Analysis

Having concluded that the appropriate test is the analysis expounded by the U.S. Supreme Court in *Penn Central Transportation*, the focus now turns to an explanation of that analysis. The *Penn Central* analysis addresses when regulation of property "goes too far."[24] There is no "set formula," but rather an *ad hoc* analysis balancing private and public interests. The basic principles of this analysis have actually been part of the Supreme Court's Takings jurisprudence for some time:

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[22] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."

[23] *See also Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1579 (10th Cir. 1995) (In a case arising from Wyoming, the Tenth Circuit concluded that "[g]iven the important distinctions between general police power regulations and development exactions, and the resemblance of development exactions to physical takings cases, we believe that the 'essential nexus' and 'rough proportionality' tests are properly limited to the context of development exactions.")

[24] "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal*, 260 U.S. at 415.

> All rights tend to declare themselves absolute to their logical extreme. Yet all are in fact limited by neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908). In *Penn Central Transportation* and subsequent decisions, the Court developed a framework to analyze claims of regulatory takings.

To begin with "the nature of the [governmental] action is critical in takings analysis . . .." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 (1987). In addition,

> the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.

Penn Central Transportation, 438 U.S. at 125.[25] The purpose of the regulation is also an important factor, and "aids in accomplishing the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Diamond B-Y Ranches*, 2004 UT App 135, ¶ 14, 91 P.3d at 846 (*quoting Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001); other internal quotes omitted).[26] This means that both public and private concerns must be considered:

> The determination that governmental action constitutes a taking is, in essence, a determination that public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. . . . [T]he question necessarily requires a weighing of private and public interests.

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[25] *See also Diamond B-Y Ranches v. Tooele County*, 2004 UT App 135, ¶ 14, 91 P. 3d 841, 845-46 (Utah Court of Appeals adopting *Penn Central* analysis).

[26] The Supreme Court observed that "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted . . . this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." *Penn Central Transportation*, 438 U.S. at 125.

Agins v. Tiburon, 447 U.S. 255, 260-61 (1980) (*abrogated in part by Lingle v. Chevron*, 544 U.S. 528 (2005)). Finally, "[a]lthough a comparison of values before and after a regulatory action is relevant, it is by no means conclusive." *Keystone Bituminous*, 480 U.S. at 491 (quotations and alterations omitted).

As the Court explained in a later decision, the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis in original). Two other principles are important guides when balancing public and private interests. First, the Court has long recognized that "all property . . . is held under the implied obligation that the owner's use of it shall not be injurious to the community, . . . and the Takings Clause [does] not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Keystone Bituminous*, 480 U.S. at 491-92 (citations and emphasis omitted). Secondly,

> one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. . . . These restrictions are properly treated as part of the burden of common citizenship.

Id., 480 U.S. at 491. To conclude, regulations that promote important public interests may significantly interfere with property to the extent that the regulation constitutes a "virtual taking," if the regulation shifts a public burden onto a private property owner.

3. <u>The Fire Suppression Requirement is Probably not a Regulatory Taking, Because the Private Benefit Outweighs the Public Burden</u>.

Because of the complexity of the economic factors involved this Opinion cannot fully determine whether the Fire Suppression Requirement constitutes a "virtual taking." There is a possibility that the requirement constitutes such a substantial interference with Deepwater's property rights, because of the extraordinarily high cost to construct the required fire suppression system. However, the analytical framework developed to evaluate regulatory takings seems to support a conclusion that the requirement does not constitute a "virtual taking," despite the substantial economic impact.

As a preliminary matter, the nature of the government regulation is not unusual, and is intended to promote a legitimate governmental objective. The County is imposing the requirement through regulation. The Fire Code has been adopted by both the County and the State of Utah, and is required of all new construction. This requirement affects how new construction is designed and used, and generally means additional costs for new buildings. As has already been

discussed, the Fire Code promotes important public purposes, and local governments are within their authority to require compliance.[27]

However, the analysis does not end there. The culinary water system has a different impact than residential uses, although it has an impact nevertheless. Deepwater proposes installing a pump and presumably constructing a building for its equipment, along with piping and storage tanks. Deepwater claims that "[w]ater systems do not create fire hazards." *See* Letter from Paxton Guymon, May 3, 2010, at 3. While underground pipes and storage tanks probably do not constitute a great fire danger, the pump equipment and building do raise concerns about fire hazards. It is not known what fire suppression would be required for the pumping equipment and building.[28] The County so far has cited only the suppression requirements for residential buildings, but has not provided information on what the Fire Code would require for culinary water systems. A reasonable suppression requirement must be based on what the Fire Code requires for that particular development. A culinary water system is much different than a residential use, and the County cannot assume that both have identical fire suppression requirements. The County must determine requirements for a water system rather than simply impose residential requirements.

There has been no information submitted about whether the Fire Code allows for alternative fire suppression systems. If there is a less-expensive alternative that satisfies the Fire Code's requirements for pumping facilities, the County should defer to that standard. Regardless of which applicable standard is used, the burden on the property owner still must be compared to the public need for the regulation.

It is recognized that compliance imposes an extremely large economic impact on the developer. Deepwater states that the cost of a suppression system that satisfies the Fire Code requirements would be at least $7 Million, substantially more than the investment they planned to put into the proposed water system. This cost limits the ability of owners to use their property, and also impacts the value of the property in Brighton Estates. In fact, it could be argued that such a high cost effectively prohibits development of the Brighton Estates property. The analysis, however, does not exclusively turn on the magnitude of the burden on the property owner. As was discussed earlier, property use and development is subject to many kinds of regulation. Even though such regulations usually increase the costs to property owners, they are not necessarily

[27] It is worth noting that the Fire Code does not prohibit land uses, as long as buildings comply with the Code. Cases applying the *Penn Central* analysis often consider restrictions on land use. (For example, *Penn Central* dealt with a local ordinance which prohibited construction of a skyscraper on the property, and *Arnell v. Board of Adjustment* concerned a local ordinance prohibiting construction on steep slopes.) However, the analysis is the same whether a land use is prohibited or merely regulated. *See e.g., Hodel v. Virgina Surface Mining & Reclamation Ass'n Inc.*, 452 U.S. 264 (1981) (Permit conditioned on reclamation of mining sites); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (State regulation requiring that mine owners leave coal in place to support surface lands); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) (Restrictions on lease agreements and cap on rents).

[28] The County would also be justified in following other applicable building and electrical codes, to the extent that those codes would apply to similar facilities.

"virtual takings."[29] The analysis instead considers the interference to the property owners' interest in light of the public burden that is involved, and whether the property owner is being asked to bear a cost that ought to be borne by the public.

The Fire Suppression Requirement benefits Deepwater, by protecting its investment in the equipment, and minimizing losses due to fire. There is also a benefit to the public, by preventing fires in a remote area. The question is whether the public benefit is so substantial that it "outweighs" the private benefit, requiring compensation because Deepwater is being forced to bear a cost that should be borne by the public. This comparison necessarily involves Deepwater's cost of compliance and the value of the public benefit.

Other than Deepwater's estimate of $7 Million, there has been no other information submitted pertaining to the public and private values of the Fire Suppression Requirement. The County argues that the cost of fighting a fire in the Brighton Estates area would easily exceed $7 Million, because of the difficulties in accessing such a remote area. However, even though the County's estimate may be accurate, it is not a suitable measure of the public benefit. The County must not use "worst case scenarios" to gauge the public value of the Fire Suppression Requirement, or any other regulation, for that matter.[30] An estimation of the public impacts, similar to the calculation of an impact fee, is the most appropriate measure.[31]

Even without a calculation of public impact, it appears that the Fire Suppression Requirement does not pass a public burden onto Deepwater. It stands to reason that fire suppression benefits the property owner more than the public, even if there is a general community benefit of preventing or mitigating fire damage. Regulatory takings analysis following the *Penn Central Transportation* factors does not envision partial compensation because a regulation benefits the public in some way, along with a greater benefit to a property owner. Unless it can be shown that the general public derives more benefit from the Fire Suppression Requirement than Deepwater, it must be concluded that the Requirement does not constitute a "virtual taking" that requires compensation.

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[29] "[A]ll property . . . is held under the implied condition that the owner's use of it shall not be injurious to the community, . . . and the Takings Clause [does] not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Keystone Bituminous*, 480 U.S. at 491-92.

[30] The County's estimate actually argues in *favor* of the regulation being a regulatory taking. By saying that because the cost of fighting a fire is so high new development must install costly fire suppression equipment, the County is essentially imposing a public burden on new development. "[T]he purpose of the Takings Clause . . . is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Diamond B-Y*, 2004 UT App 135, ¶ 14, 91 P.3d at 846 (citation omitted). A more appropriate measure of the public burden is similar to impact fee analysis.

[31] Impact fee analysis seeks a way to allocate the public and private costs of new development. *See generally Banberry Development Corp v. City of South Jordan*, 631 P.2d 899 (Utah 1981); *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979); UTAH CODE ANN. §§ 11-36-101 to -501 (Cases and statute related to impact fees). A similar analysis is appropriate for building and fire code regulations, because there may be both private and public benefits involved. This Opinion does not suggest that a "formal" impact fee analysis be applied to building and fire code regulation, only that impact fee principles may be adapted to determine the appropriate public and private benefits of such regulations.

Conclusion

The Division of Drinking Water does not have authority to require installation of a fire suppression system as a condition of approval of Deepwater's culinary water system. The Division of Drinking Water regulates water delivery systems, to ensure that water supplies are safe, that delivery systems are adequate, and that watersheds are protected. The Division has no statutory authority over fire protection. If a water delivery system includes capacity for fire protection, the Division may include that consideration; however, it has no authority to impose fire suppression on a system that is not intended for fire protection. The County has sufficient authority to require compliance with fire and building codes. However, the County should determine the fire suppression requirements applicable to Deepwater's proposed culinary water system, rather than simply applying the standard applicable to residential buildings.

The Fire Suppression Requirement may be validly imposed by the County on new development, because it has been adopted by statute, and it serves a legitimate governmental interest. However, even a regulation that serves a substantial government interest may amount to a "virtual taking" if it frustrates a property owner's investment-backed expectations of development. The Fire Suppression Requirement does not constitute an exaction because it does not require dedication of property for public use. Therefore, the requirement may be evaluated using the factors identified by the U.S. Supreme Court in *Penn Central Transportation* and other regulatory takings decisions.

A number of factors have been identified as relevant to such an analysis. The nature of the government's action and the purpose of the regulation are important. In addition, economic impact of the regulation is relevant, particularly the extent of the interference on investment-backed expectations. Ultimately, the question focuses on whether a private property owner is being forced to bear a burden which should be borne by the public as a whole. This requires weighing private and public interests.

Given the analytical framework established by the U.S. Supreme Court, it appears that the Fire Suppression Requirement does not constitute an impermissible taking of Deepwater's property rights. Although the cost of compliance is high, the benefits to Deepwater seemingly outweigh any public burden being imposed. There is a public benefit derived from the requirement, in the form of preventing and mitigating fire damage. However, unless it can be shown that the public benefit outweighs the private advantage of compliance, the property owner has not suffered a taking, and the County may enforce the Fire Suppression Requirement.

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

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 June, 2010, 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.

_____
Office of the Property Rights Ombudsman

GARY R. HERBERT
Governor

GREG BELL
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

AMENDMENT AND CLARIFICATION OF ADVISORY OPINION

Date:	August 25, 2010
Requested by:	Deepwater Distribution Company, Inc.
Local Government Entity:	Wasatch County

Issues

I. What constitutes a public dedication?

II. Does Wasatch County have any basis or authority to require construction of a fire suppression system where the International Fire Code does not impose a fire suppression requirement on a culinary water system?

Summary

This informal opinion addresses questions raised by Deepwater Distribution Company following the Advisory Opinion issued on June 17, 2010, and amends and clarifies that Advisory Opinion.

Public dedication requires a showing of some intent to dedicate by the property owner. Only the private property owner can imply dedication. The public cannot take implied dedication of property without a manifestation of intent to dedicate by the property owner. If the public takes possession or control without dedication by the property owner, a taking has occurred. Accordingly, if the fire suppression facility is calculated only to serve the activities of Deepwater, and Deepwater does not manifest an intent to dedicate, then the system is the property of Deepwater, and the public cannot use the property without just compensation. Nevertheless, where the County requires dedication, or requires Deepwater to oversize its facilities beyond its own needs, it is an exaction, and the "rough proportionality" exactions analysis applies.

The International Fire Code contains provisions that appear to apply to the water system being installed. In addition, there may be other authority outside of the Code that gives the County the authority to impose fire suppression requirements upon the water system. However, those requirements must be appropriate and reasonable in light of the activity and use of the property.

Revisions to Advisory Opinion

This Amendment and Clarification of Advisory Opinion, together with the Advisory Opinion issued dated June 17, 2010 by this Office in this matter constitute the full Advisory Opinion on this matter under Utah Code § 13-43-205. This Amendment and Clarification is not intended to supersede the previous Advisory Opinion, which, together with this document, remains in full force and effect.

Deepwater requested that the Office of the Property Rights Ombudsman amend or reconsider the June 17, 2010 Advisory Opinion in a letter it submitted on July 6, 2010 from its attorney Paxton Guymon. Wasatch County, through Assistant County Attorney Kevin S. Thurman, submitted a response on July 22, 2010. In addition, on July 15, 2010, The Utah Department of Environmental Quality submitted a letter from Kenneth H. Bousfield, P.E.

Background

In brief, Deepwater has proposed to construct a culinary water system to serve several properties in the Brighton Estates area of Wasatch County. The County has required that Deepwater also install a fire suppression system, which will cost much more than the culinary water system itself. The County derives this requirement from the International Fire Code, which has been adopted not only by the County, but by the State of Utah. The County argues that a fire suppression system is necessary to help prevent fires and mitigate fire damage, but that no public fire suppression system exists in Brighton Estates.

The County requires Deepwater to install a system capable of delivering at least 1,500 gallons per minute for a minimum of two hours. This is based upon the Fire Code's requirements for residential buildings. However, Deepwater is not planning to construct a residential building, but a culinary water system, which would consist of underground and aboveground facilities.

This Office issued a formal Advisory Opinion on June 17th, 2010. In its request to amend and reconsider the Advisory Opinion, Deepwater requests clarification of the meaning of "dedication" of property for purposes of the exactions analysis. Deepwater argues that if it is required to install a system that would be used by Wasatch County, doing so would in fact be an implied dedication. Deepwater further argues that the International Fire Code has no provision requiring fire suppression for culinary water systems, and so therefore the County cannot require any type of fire suppression system.

Analysis

I. Clarification of "Dedication."

Deepwater points out that dedication of private property to public use may be implied or inferred. Deepwater then appears to argue that, because the County will use the fire suppression facilities to benefit other properties, an implied dedication has occurred, thus triggering an exaction. Deepwater is correct that implied dedication is possible. However, the County's intent to use the facilities later to benefit other properties does not result in an implied dedication. An implied dedication is only possible where the intent to dedicate is manifested by the property owner. Where no intent to dedicate is shown, the property is private property. Where that property is later used for a public purpose, a taking has occurred.

a. Dedication to Public Use Cannot Occur Unless the Owner Intends to Dedicate.

In support of its theory of implied dedication, Deepwater cites two Utah cases involving dedication of private property for roadways.[1] Both of those cases find that implied dedication to the public is possible, but state that "dedication rests primarily in the intent of the owner. There must be a concession intentionally made by him, which may be proved by declarations or acts, or may be inferred from circumstances." *Morris v. Blunt*, 49 Utah 243, 249, 161 P. 1127, 1130 (Utah 1916). In other words, what may be implied or inferred is the owner's *intent* to dedicate property to the public. If the owner does not want the property dedicated to the public, and does not manifest an intention to dedicate, then no dedication occurs. Dedication cannot be implied simply because public use is possible or even likely.[2]

It is the *intent* to dedicate, not possible public use, which determines whether private property has been dedicated to public use. For example, private drives are not uncommon in Utah. Often, these roadways are indistinguishable from public roads, and may be used extensively by the public. Those roads remain privately owned, however, as long as the owner takes steps to demonstrate that the roads are private.[3] As long as the owner's intent is clear, even extensive public use will not imply public dedication, and the road will remain private property. While it remains private property, the property owner retains the right to restrict public access to the road. Similarly, as long as the fire suppression system remains under the control of the property owner, and no intent to dedicate is manifest, dedication cannot be presumed.

This aligns with constitutional takings law. The purpose of the Takings Clause is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Diamond B-Y Ranches*, 2004 UT App 135, ¶ 14, 91 P.3d at 846 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960). If property is

[1] *William J. Lemp Brewing Co. v. P.J. Moran, Inc.*, 51 Utah 178, 169 P. 459 (1916); *Morris v. Blunt*, 49 Utah 243, 161 P. 1127 (Utah 1916).

[2] If the owner permits (or does not stop) public use for a period of time, an intent to dedicate may be implied. Section 72-5-104 of the Utah Code provides that a roadway on private property becomes dedicated to the public if it is used continuously by the public for at least ten years. The owner's intent to dedicate is implied because the public use is allowed for an extended period of time.

[3] *See e.g.*, *Town of Leeds v. Prisbrey*, 2008 UT 11, ¶ 7, 179 P.3d 757, 760 (a "ceremonial" road closure was sufficient to interrupt the 10-year period provided in § 72-5-104, demonstrating that the property owner did not intend to dedicate the roadway to the public.)

privately owned, the owner of that property should be able to control whether the property is dedicated to public use. The government should not simply be able to assume that the property has been dedicated. If property is taken for public use by the government, without authorization from the Owner, then it is done in violation of the constitutional Takings Clause of the Utah and U.S. Constitutions. Just compensation is then due.

b. County Requirements Will Trigger Dedication.

If the County *requires* that the suppression system be made available to other properties, or if the County requires that the property owner oversize the system beyond what is needed, then the system (or the oversized portion) would be expressly dedicated to the public. In that case, it would be considered an exaction, and the "rough proportionality" exaction analysis would apply.

The County indicates that its fire suppression requirement would not be required to be used by other properties, and is sized only to respond to the activities and needs of Deepwater. Assuming that is true, then those facilities will be the private property of Deepwater and will not be available for use by the County without just compensation.

The County points out that at this stage, it is unclear whether Deepwater's system would be used to service more properties than Deepwater's. If that is the case, it is assumed that the County is not requiring Deepwater to oversize or dedicate any fire suppression facilities to the public. Deepwater will therefore own a private fire suppression facility, unavailable for public use unless Deepwater manifests an intent to permit public use. In the future, if it becomes necessary that the system serve the public, then the County and Deepwater can then make the proper arrangements to facilitate that.

II. The Development is Subject to the Fire Code, as Administered by the County.

Deepwater argues that the International Fire Code does not impose any fire suppression requirements on a culinary water system. Accordingly, Deepwater posits, there is no basis or authority for requiring construction of a fire suppression system as a condition for approval of the proposed culinary water system. The County responds to that argument by stating that the County is not only governed by the International Fire Code, but the Police Power also gives the County authority to establish fire suppression standards where the International Fire Code is silent on the issue.

Upon review of the International Fire Code, there appears to be many provisions that may apply to the activities of Deepwater. For example, there appears to be provisions in the International Fire Code that apply above-ground buildings containing electrical and mechanical systems. *See* International Fire Code, Chapter 6. Assuming Deepwater would have above-ground buildings and improvements containing electrical or mechanical systems (*i.e.* for a pump), those provisions may apply. There are also restrictions that apply to construction activities, "including those in underground locations." *See* International Fire Code, Section 1401.1. Other sections and provisions may apply. In addition, the International Fire Code, grants the local fire official fairly

wide latitude to interpret and apply its provisions. Accordingly, the International Fire Code applies.[4]

Furthermore, there may indeed be other authority under which the County can impose fire suppression requirements upon Deepwater, including the police power to insure the health, safety, and welfare of citizens. Thus, the County can impose fire suppression restrictions upon Deepwater. However, as stated in the original Advisory Opinion, and reaffirmed above, the County may not impose restrictions beyond those adequate to respond to the activities and needs of Deepwater's culinary water system. It appears that Deepwater's only activity at the property is construction and operation of a culinary water system. Much of it will be buried underground, presumably greatly reducing the risk of fire. It will be a water delivery system, rather than a system to deliver some combustible material. It will be smaller than a typical home, and not permanently occupied. The appropriate approach by the County would be to review the plans and intentions of Deepwater, and upon review thereof, determine Deepwater's fire suppression needs. Simply applying the residential fire suppression requirement on an unoccupied, nonresidential use that is primarily underground is patently inappropriate. In order to avoid a taking, the County must review Deepwater's plans, and impose only those fire suppression requirements necessary to respond to Deepwater's activities.

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

[4] This is not to say that the particular conditions imposed upon Deepwater by the County are valid, or are justified in the International Fire Code. However, it cannot be said that there are no restrictions therein that apply to Deepwater.

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

On this _____ Day of August, 2010, 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.

_____
Office of the Property Rights Ombudsman