

Advisory Opinion #161

Parties: Kirk & Paul Chappell; Town of Lyman

Issued: August 25, 2015

TOPIC CATEGORIES:

Entitlement to Application Approval (Vesting)

Land use approvals turn on compliance with the ordinances of the government entity. Government entities may not relinquish or surrender their authority to regulate or approve land uses and development to third parties. Where local ordinances are satisfied, the local government must approve, and cannot deny based upon the dictates of a third party.

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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ADVISORY OPINION

Advisory Opinion Requested by: Kirk Chappell

Local Government Entity: Town of Lyman

Property Owner: Kirk and Paul Chappell

Type of Property: Residence

Date of this Advisory Opinion: August 25, 2015

Opinion Authored By: Elliot R. Lawrence
Brent N. Bateman
Office of the Property Rights Ombudsman

Issues

May a Town condition land use approvals upon compliance with the requirements of a third-party water company?

Summary of Advisory Opinion

Land use approvals turn on compliance with the ordinances of the government entity. Government entities may not relinquish or surrender their authority to regulate or approve land uses and development to third parties. Where local ordinances are satisfied, the local government must approve, and cannot deny based upon the dictates of a third party.

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 § 13-43-205. An advisory 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 Kirk Chappell, on April 24, 2015. A copy of that request was sent via certified mail to the Town of Lyman, at 101 South Center Street, Lyman, Utah. According to the return receipt, the Town received the Request on April 30, 2015.

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, with attachments, submitted by Kirk Chappell, received by the Office of the Property Rights Ombudsman on April 24, 2015.
2. Email from Paul Chappell, property owner, received on June 30, 2015.
3. Response from David L. Church, Attorney for the Town of Lyman, received on July 9, 2015.
4. Reply submitted by Emily Lewis, Attorney for Kirk Chappell, with attachments, received on July 22, 2015.

Background

Kirk and Paul Chappell own a parcel in Lyman, Utah. Several years ago, the Chappells began construction on an accessory dwelling on the parcel, but different factors delayed completion of the building. In 2014, Kirk Chappell sought approval from the Town to finally complete the building. Mr. Chappell states that he has experienced numerous delays from the Town, and has not received the necessary approvals.

The Town states that it will approve the accessory dwelling, and that the delays have resulted from the Chappell's disputes with the Lyman Water System, a non-profit mutual water corporation that provides the culinary water for the Town. The Lyman Water System provides culinary water service to shareholders in the system or their lessees. In May of 2013, the Town adopted Wayne County's zoning ordinances as its own; however, the Town Council specifically stated that the new code did "not over-ride the jurisdiction of other Town entities, specifically Lyman Town Water System . . ." Lyman Town Ordinance #5-02-13 (May 2, 2013). The Town's ordinances mandate compliance with the requirements of the culinary water authority for all uses.¹

¹ The Town adopted Wayne County's Zoning Ordinances. Section 1629 of those ordinances states that "[a]ll uses and primary buildings requiring culinary water and sanitary sewer services shall comply with the requirements of

The home on the Chappell property, or the “primary building,” has water service from the Lyman Water System. However, according to the materials received for this Opinion, the water company requires that Mr. Chappell acquire an additional share of the Lyman Water System, and install a separate meter and water line to serve the accessory building.²

The bylaws of the Lyman Water System allow multiple outlets from a single connection (or “tap”), but prohibit a shareholder from supplying water to “others,” or individuals who do not have a right use the water.

A tap shall be construed to mean One connection with a one inch pipe either with the main line or with some lateral belonging thereto, it being understood that the user of such tap may have as many outlets on same as he may deem necessary for his use and convenience, subject to the approval and regulations of the [Lyman Water System]. Provided, that any stockholder, subscriber or renter who is found supplying others with water, who have no right thereto as stockholder or renter, shall be denied the right to the use of their taps and same shall be closed off Permission to tap the said water system and use water therefrom may be granted to non-stockholders of the [Lyman Water System] upon the payment to the Treasurer of a rental of _____ Dollars per month

Bylaws of the Lyman Water System, Art. 9. Connections to the system must be approved by the Water System, and the person making the connection is responsible for all costs. *Id.*

The Town’s ordinances provide that “an accessory dwelling unit for an owner or employee shall be connected to, and served by the same water, sewer, electrical, and gas meters that serve the primary building. No separate utility lines, connections, or meters shall be allowed for an accessory dwelling unit.” LYMAN TOWN ORDINANCE, § 1709(4).³

Analysis

Governmental authority cannot be surrendered to private entities. “[N]either the state nor [a] municipality can surrender by contract the governmental power to guard the safety, morals, health, and good order of society, a contract purporting to do so is void *ab initio*” *Utah Hotel Co. v. Public Utilities Commission of Utah*, 59 Utah 389, 398, 204 P. 511, 515 (1922).⁴ In simpler terms, a municipality may not give its authority away. Zoning regulation is an exercise of governmental police power, or the authority to protect the health, safety, and welfare of a

the Culinary Water Authority and Sanitary Sewer Authority, as applicable.” WAYNE COUNTY ZONING ORDINANCE, § 1629(1). The Lyman Water System is the Town’s Culinary Water Authority.

² A share in the Lyman Water System entitles the owner to receive water service. Shares may be purchased or leased, as provided by the Lyman Water System bylaws. The Chappells own at least one share, which entitles them to water service to the existing home.

³ See also LYMAN TOWN ORDINANCES, § 1706(9) (Separate utility connections and meters prohibited). An accessory dwelling unit may not be rented or sold separately from the primary structure on the lot. *Id.*, §§ 1706(10); 1709(1).

⁴ “*Void ab initio*” mean “void from the beginning”

community.⁵ Accordingly, a local government cannot give to a private third party authority to make land use decisions.

A local government may contract with an outside entity to provide essential public services, but it does not relinquish its inherent police power when it does so.⁶ The entity providing the service retains authority over how the service is provided, but it may not assume the authority to override the local government's regulations. Hence, while the Town of Lyman has contracted with the Water Company to provide water service, it has not relinquished its authority to enact and enforce zoning regulations. The Water Company's rules must be subservient to the Town's zoning regulations. If the Town would like to enforce the Water Company's rules, the Town should adopt those rules as ordinances.⁷

Accordingly, if the Chappell's application complies with the Town's Ordinances, the application is entitled to approval.⁸ Only the Town has authority to make that determination. The Town cannot make approval of the Chappell's building permit application dependent upon the approval of the water company, thus surrendering its authority to approve the application to the Water Company.

The Water Company has discretion to decide how it operates its water system, and it would be outside of the purview of this Office to opine about the Water Company's decisions and procedures. Nevertheless, it is worth noting that if the Chappell's plans meet the Town's definition of an accessory building, then the building is an accessory building under the law. The Town must make its decision to approve or disapprove on that basis, notwithstanding the water company's apparent conclusion that the building is a separate dwelling and not an accessory building.

Moreover, all parties, including the Water Company, are subject to the ordinances of the Town. According to Lyman Town ordinance, the Accessory Dwelling must receive its water service from the same source as the Primary Building, and not from a separate connection and meter. See LYMAN TOWN ORDINANCE, § 1709(4). As such, the Chappells are prohibited *by ordinance* to have separate metering and utility service to the accessory building. The Lyman Water System appears to require that the accessory building be separately served and metered. Doing so would

⁵ “[I]t is established that an owner of property holds it subject to zoning ordinances enacted pursuant to a state's police power.” *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 390 (Utah 1980)(emphasis added). As such, the underlying purpose of traditional zoning is to protect the public health, safety, and welfare and to minimize conflicts between incompatible uses.” *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 607 (Utah Ct. App. 1995) (citations omitted).

⁶ The Office of the Property Rights Ombudsman is aware of several examples where municipal services are provided by special service districts or private entities.

⁷ Even if the Town were to adopt the Lyman Water System regulations and bylaws by ordinance, compliance with those ordinances would always be a determination of the Town, never of the water company.

⁸ UTAH CODE § 10-9a-509(1)(a)(ii): “an applicant is entitled to approval of a land use application if the application conforms to the requirements of the municipality's land use maps, zoning map, a municipal specification for public improvements applicable to a subdivision or development, and an applicable land use ordinance in effect when a complete application is submitted and all application fees have been paid.”

result in the zoning violation. A property owner should not be forced into a zoning violation simply to obtain utility service from a private company.

Conclusion

The Town may contract with a private entity to provide municipal services, such as culinary water, but it may not relinquish its authority to regulate land use and development. Although the Lyman Water Company may adopt rules governing the delivery of water service in the Town, its rules are subservient to the Town's ordinances and zoning decisions.

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.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in Utah Code § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.

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:

Vanor Okerlund
Town of Lyman
101 S. Center St.
PO Box 23
Lyman, Utah 84749

On this _____ Day of August, 2015, 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