Advisory Opinion #165

Parties: Provo City, Jackson Frandsen

Issued: December 30, 2015

TOPIC CATEGORIES:

Compliance with Mandatory Land Use Ordinances
Interpretation of Ordinances

Utah Code § 10-9a-505.5 and Provo City Ordinance 14.34.440 do not conflict. The statute addresses the number of unrelated persons allowed per unit, and the City ordinance addresses the number of units permitted in a residential dwelling.

Provo City's method of determining whether a dwelling contains one unit or two complies with Utah law and is within the City's broad zoning discretion.

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ADVISORY OPINION

Advisory Opinion Requested by:	Jackson Frandsen
Local Government Entity:	Provo City
Scope of Advisory Opinion:	Single Family Dwelling
Date of this Advisory Opinion:	December 30, 2015
Opinion Authored By:	Brent N. Bateman Lead Attorney, Office of the Property Rights Ombudsman

Issues

Did Provo City violate UTAH CODE § 10-9a-505.5, *Limit on single family designation*, when it declared Mr. Frandsen's home nonconforming under Provo City Code 14.34.440, *Second Kitchen in One-family Dwellings*?

Summary of Advisory Opinion

UTAH CODE § 10-9a-505.5 and Provo City Code 14.34.440 do not conflict. This matter turns on the definition of *unit* rather than the definition of *family*. UTAH CODE § 10-9a-505.5 addresses the number of unrelated individuals that may occupy one residential unit, but expressly leaves the definition of *residential unit* to the local government. Provo City Code 14.34.440 does not address the number of individuals in a residential unit, but limits the number of residential units in a single family dwelling.

Provo City's method of determining whether a dwelling contains one unit or two complies with Utah law and is within the City's broad zoning discretion. Even assuming all relevant facts in Mr. Frandsen's favor, Mr. Frandsen's living arrangement does not comply with applicable Provo City ordinances. Absent a determination of reasonable accommodation under the Americans with Disabilities Act, Mr. Frandsen must come into compliance with Provo City's ordinances.

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 Jackson Frandsen on June 19, 2015. A copy of that request was sent via certified mail to Janene Weiss, Provo City Recorder, on June 24, 2015. According to the return receipt, the City received the Request on June 29, 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 Advisory Opinion,* with attachments, submitted by Jackson Frandsen, received by the Office of the Property Rights Ombudsman on June 19, 2015.
2. *Response from Camille Williams, Assistant Provo City Attorney,* with attachments, dated July 15, 2015.
3. *Response from Jackson Frandsen,* with attachments, received by the Office of the Property Rights Ombudsman on August 20, 2015.
4. *Reply from Camille Williams, Assistant Provo City Attorney,* with attachments, dated August 25, 2015.
5. *Replies from Jackson Frandsen,* received by the Office of the Property Rights Ombudsman on September 8, 2015, and on September 9, 2015.
6. *Additional Reply from Jackson Frandsen,* received by the Office of the Property Rights Ombudsman on September 17, 2015.
7. *Additional Reply from Camille Williams, Assistant Provo City Attorney,* dated September 22, 2015.
8. Various Provo City Ordinances, found at http://www.codepublishing.com/ut/provo/.

Background

Jackson and Whitney Frandsen own, and with their family reside in, the home at 558 W 1450 S in Provo, Utah. By lease agreement with the Frandsens, Barrett and Emily Johnson, a married

couple unrelated to the Frandsens, also reside in the home.[1] A second kitchen has been constructed in the basement of the Frandsen home, but according to Mr. Frandsen, no locked door exists between the basement and main floor, and all residents of the home may freely move from the upstairs and the downstairs with no limitation.[2] It is undisputed that the home is within a single family residential zone, and the Frandsens have not received a permit for a multi-family residential use in the home.

Provo City has determined that Mr. Frandsen's home does not conform to Provo City zoning ordinances. Specifically, the City believes that the home violates Provo City Code 14.34.440, *Second Kitchen in One-family Dwellings*. That code section states:

> (1) One (1) or more additional kitchen(s) in a one-family dwelling unit shall be allowed . . . if all of the following requirements are met:
>
> (a) The dwelling unit shall have only one (1) front entrance.
>
> (b) The dwelling unit shall have only one (1) address.
>
> (c) An interior access shall be maintained to all parts of the dwelling unit to assure that an accessory apartment is not created. There shall be no keyed or dead bolt locks, or other manner of limiting or restricting access from the additional kitchen(s) to the remainder of the dwelling unit.
>
> (d) The dwelling unit shall have no more than one (1) electrical meter.
>
> (e) Additional kitchen(s) may exist as part of the primary dwelling structure or be installed in an accessory or "out" building provided the use and occupancy limitations of this Section are met and no second dwelling unit or accessory apartment is established in the primary or accessory buildings.
>
> (f) Upon request made by Provo City staff, residents of the dwelling unit shall allow, within reasonable hours, an inspection of the dwelling unit and any building accessory to the dwelling unit which has an additional kitchen in order to determine compliance with this Section.
>
> (g) The dwelling unit owner shall sign a notarized agreement, as prescribed by Provo City, which provides that the dwelling unit, including any accessory building, may not be converted into two (2) or more dwelling units unless allowed by and in accordance with applicable provisions of this Title. The document shall be recorded with the Utah County Recorder's Office prior to issuance of a building permit.
>
> (h) When an additional kitchen is approved under the provisions of this Section, both present and future owners of the dwelling unit shall limit the dwelling unit to family occupancy only; provided, however, that no additional unrelated persons, personal care providers, or personal service providers shall be permitted to occupy a one-family residence which contains an additional kitchen except as provided in Section 14.34.450, Provo City Code.

[1] According to Mr. Frandsen, the unrelated couple resides in the home in order to assist Mr. Frandsen and his son with certain disabilities. Unrelated to this Advisory Opinion, the Frandsens have applied for an ADA reasonable accommodation to permit the Johnsons to live in the home.

[2] These facts regarding the configuration of the Frandsen home may be in some dispute. However, for purposes of this Advisory Opinion, Mr. Frandsen's characterization of these facts will be assumed to be true.

(i) Construction of any such kitchen shall meet the standards of the adopted building code and may require issuance of a Provo City building permit prior to commencing any construction or remodeling to accommodate the additional kitchen.

(2) An additional kitchen shall not be established in a one-family dwelling unit which contains an accessory apartment, whether or not such apartment was established pursuant to Chapter 14.30.

Provo City argues that the Frandsens violate this ordinance because the home does not comply with subsection (h), which states that homes with a second kitchen are limited to "family occupancy only" and "no additional unrelated persons . . . shall be permitted to occupy a one-family residence that contains an additional kitchen." Provo City states that the Frandsens must remove the second kitchen. If they do so, the tenants may remain. Alternately, the Frandsens may remove the unrelated tenants, and are then free to keep the second kitchen.

Mr. Frandsen argues that Provo's ordinance, or Provo's application of this ordinance, conflicts with UTAH CODE § 10-9a-505.5, *Limit on single family designation*. That section of the State Code reads:

(1) As used in this section, "single-family limit" means the number of unrelated individuals allowed to occupy each residential unit that is recognized by a land use authority in a zone permitting occupancy by a single family.

(2) A municipality may not adopt a single-family limit that is less than:

(a) three, if the municipality has within its boundary:

(i) a state university; or

(ii) a private university with a student population of at least 20,000; or

(b) four, for each other municipality.

Mr. Frandsen feels that his living arrangement complies with this restriction because the Johnsons amount to fewer than three unrelated persons within his home. He feels that Provo City Code 14.34.440 conflicts with and must be subordinate to the state statute because in his opinion, the Provo ordinance unlawfully prohibits unrelated persons from living in a single family dwelling. Furthermore, Mr. Frandsen argues that the definition of *Family* in the Provo City ordinance fits or should fit his situation, and permits his living arrangement. Finally, he argues that Provo City's ordinance is arbitrary in its application because his living arrangement would be permitted in other zones in the City.

Analysis

I. UTAH CODE § 10-9a-505.5 and Provo City Code 14.34.440 Do Not Conflict

Both parties have provided arguments regarding the meaning of UTAH CODE § 10-9a-505.5, its limit on unrelated persons in a single family home, and the definition of *family* in the Provo City Ordinance. But this issue does not turn on definitions of *family* or *unrelated persons*. Rather, it turns on Provo City's definition of *residential unit*. The two laws under examination, UTAH CODE

§ 10-9a-505.5 and Provo City Code 14.34.440 do not conflict because they address different subjects. It is entirely possible to give full legal effect to both.

A. UTAH CODE § 10-9a-505.5

Enacted in 2012, UTAH CODE § 10-9a-505.5 prevents local governments from adopting excessive limits on the numbers of unrelated persons that can occupy a single residential unit in a single family zone. The minimum number is 4 unrelated persons in most areas, and 3 in cities that contain a university. Provo contains a university under the statute.

A critical and plainly stated component of that statute is that the limit applies per residential unit:

> "[S]ingle-family limit" means the number of unrelated individuals allowed to occupy *each residential unit that is recognized by a land use authority*.

Id. (emphasis added). Accordingly, Provo City may not prohibit fewer than three unrelated persons from residing in a single residential unit. Moreover, the statute expressly states that the residential unit will be the "unit that is recognized by a land use authority." The statute does not provide any other definition or limitation on a *residential unit*. Rather, the statute defers *residential unit* to the purview of the land use authority. *Id*. In other words, this statute limits the minimum number of unrelated persons per residential unit, but the local land use authority determines whether a residential unit exists.

B. Provo City Code 14.34.440

Provo City has set forth a process for determining whether a second residential unit exists. The key to Provo's determination is a second kitchen:

> (c) In applying this definition the existence of more than one (1) kitchen in a dwelling unit shall create a presumption that two (2) housekeeping units exist in the dwelling.

Provo City Code 14.06.020, *Family (c).* Thus, if a second kitchen exists within a dwelling, Provo City presumes that a second residential unit exists.

That presumption may be overcome through the application Provo City Code 14.34.440, the ordinance in controversy. That section states that in the listed zones, a second kitchen will be permitted in a home as long as each listed requirement is met. Each requirement—one front entrance, one street address, one electric meter, etc.—relates to and provides assurance to Provo City that, despite the extra kitchen, only one residential unit exists in the home. If each requirement is satisfied, then the second kitchen is allowed because the home does not contain a second residential unit.

C. Conflicts

The potential conflict arises between UTAH CODE § 10-9a-505.5 and subsection (h) of Provo City Code 14.34.440. Subsection (h) states that:

> When an additional kitchen is approved under the provisions of this Section, both present and future owners of the dwelling unit shall limit the dwelling unit to family occupancy only; provided, however, that no additional unrelated persons, personal care providers, or personal service providers shall be permitted to occupy a one-family residence which contains an additional kitchen except as provided in Section 14.34.450, Provo City Code.

Provo City Code 14.34.440(h). Accordingly, in order to have an additional kitchen approved in a single family dwelling, the owners must limit the residents to family occupancy only.[3] No additional unrelated persons, including personal service providers, may live within the dwelling with a second kitchen.

UTAH CODE § 10-9a-505.5 states that a municipality may not limit the number of unrelated persons in a single family unit to fewer than three. Provo City goes farther. Provo City's definition of family permits not only a head of household and the related family members, but also up to two additional unrelated individuals, to live in a single family unit. Provo City Code 14.06.020, *Family*. Accordingly, several more than three unrelated individuals are normally permitted to live in a single family residence in Provo. This local rule complies with the state statute because it allows more people in the home than the statute's minimum. According to Provo City, this rule, and not the state statute, applies to the Frandsens. Thus the Frandsens and the Johnsons are free to live together in one residential unit.[4]

Provo City Code 14.34.440(h) does not prohibit unrelated persons from living in a single dwelling. Rather, its plain language prohibits second kitchens in homes where unrelated persons reside. In function, it prohibits a second residential unit. If a second kitchen exists, and unrelated persons live in the home, then the presumption of a second dwelling unit survives. Unrelated persons are still allowed to live in the home. But the home is not permitted to have a second kitchen. Thus UTAH CODE § 10-9a-505.5 and subsection (h) of Provo City Code 14.34.440 do not conflict. The first addresses the minimum number of unrelated persons in a residential unit, and the second concerns the number of residential units permitted.

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[3] Mr. Frandsen has executed an agreement to limit the occupancy of the dwelling to family occupancy only, as subsection (h) requires. However, Mr. Frandsen argues for various reasons that this agreement should not be enforceable against him. This Office lacks authority in an Advisory Opinion to interpret or enforce contracts. Nonetheless, because this Opinion presumes that Mr. Frandsen's version of the facts is true, the agreement will not factor into this Advisory Opinion. We note, however, that should this matter be litigated, the agreement is likely to be a major factor, and the enforceability thereof is likely to be, as with all signed agreements, difficult to overcome.

[4] Although both parties have argued the point, it is not necessary to decide whether UTAH CODE § 10-9a-505.5 *by itself* would permit Mr. Frandsen's living situation. That is because Mr. Frandsen's living situation complies with Provo City's definition of *Family* in Provo City Code 14.06.020, which allows two unrelated persons to live in a home (without a second kitchen) along with a head of household and his/her family. For purposes of this Advisory Opinion, the local ordinance will be read together with the state statute.

Key to finding that no conflict exists is the statement in UTAH CODE § 10-9a-505.5 that the minimum number applies *per residential unit* "that is recognized by a land use authority." *Id*. By this statutory language, it remains up to the land use authority to decide what a residential unit is. Once the local government recognizes a residential unit, then the statute applies to that unit. Because Provo has determined that a second kitchen is the key indicator of a second residential unit, dwellings with second kitchens are not on equal footing with dwellings without second kitchens under the state statue. Unrelated persons are not being prohibited. Second residential units are. Prohibiting second residential units does not violate UTAH CODE § 10-9a-505.5.

Subsection (h) of Provo City Code 14.34.440 must be read in context with the remaining provisions of Provo City Code, and indeed all of state law. Provo City residents have a right to the benefits of UTAH CODE § 10-9a-505.5. However, Provo City residents *do not* have the right to have two residential units in a single family dwelling if doing so is prohibited by Provo City ordinance. Provo City has determined, within their discretion, that a second kitchen creates a presumption of a second unit. If a second kitchen exists, and unrelated persons live in the home, then the presumption is not overcome. The second unit thus violates the ordinance. But UTAH CODE § 10-9a-505.5 still applies to the residential unit that is recognized by the land use authority.

The Frandsens have a second kitchen in their dwelling. They indicate that there is no locked door between dwelling areas in the home, and all residents, the Frandsen family and the Johnson family, are free to occupy all areas of the home. Those facts, assumed to be true, do contribute to a conclusion that the dwelling contains only one residential unit. However, Provo City Code 14.34.440 expressly states that *all* of the listed requirements must be satisfied. *Id*. Requirement (h) is not satisfied because the Johnsons live in the home. The second kitchen plus the Johnson's occupancy means that there is a second unit. As the City suggests, if the Frandsens remove the second kitchen, and thus the second residential unit, then the Johnsons can remain in the home in compliance with UTAH CODE § 10-9a-505.5.

Accordingly, Provo City Code 14.34.440 does not conflict with UTAH CODE § 10-9a-505.5. UTAH CODE § 10-9a-505.5 defers the determination of a residential unit to the land use authority. Provo City has stated that the Frandsens may either remove the second kitchen (and thus eliminate the second unit), in which case they may keep the tenants, or may maintain the kitchen and remove their tenants. Both of these options comply with these laws.

II. The City Has Discretion to Enact the Ordinance

Mr. Frandsen further argues that the restriction on a second kitchen is arbitrary and has no reasonable basis. He argues that in other nearby neighborhoods, the restrictions on second kitchens do not exist. Also, the restriction would not exist under the Provo City Code if he were 65 years old or older. These arguments merit comment.

Mr. Frandsen raises some important points about the limits of zoning authority and the City's police power. His question, regarding whether a city can dictate elements of a person's land use

or design that have nothing to do with the health, safety, and welfare of a community, is legitimate. If a second kitchen inside the home does not impact the health safety and welfare of the community outside of the home, can the City prohibit a second kitchen?

However, here the City has not prohibited second kitchens. Provo has elected to use second kitchens as the prime indicator that a second residential unit exists. An indoor kitchen may not directly impact the health, safety, and welfare of a community. However, an additional residential unit in a single dwelling can increase pedestrian and automobile traffic, increase personal safety and privacy concerns, increase demand on City services, etc. This can impact the health, safety, and welfare of the community. Likewise for policies regarding the dwelling circumstances of older citizens, who for health, safety, and welfare reasons may require additional assistance in their everyday tasks. Thus the restriction on second kitchens, in the context of restricting second residential units, is reasonably related to legitimate public interests.

In Utah, local governments have great discretion in creating and amending their zoning ordinances. Under Utah law, a court will presume that a legislative land use decision is valid unless it is found to be arbitrary, capricious, or illegal. A legislative land use decision, such as adoption of a zoning ordinance, will not be found to be arbitrary or capricious if it is "reasonably debatable" that the decision promotes the purposes of LUDMA. UTAH CODE § 10-9a-801(3)(b).

"In zoning, as in any legislative action, the functioning authority has wide discretion. Its action is endowed with a presumption of validity . . . ." *Harmon City, Inc. v. Draper City*, 2000 UT App 31, ¶ 12, 997 P.2d 321, 325 (quoting *Gayland v. Salt Lake County*, 11 Utah 2d 307, 358 P.2d 633, 636 (1961)). Furthermore, "[i]f an ordinance could promote the general welfare, of even if it reasonably debatable that it is in the interest of the general welfare [it will be upheld]" *Smith Investment Co. v. Sandy City*, 958 P.2d 245, 252 (Utah Ct. App. 1998).

Very good arguments may exist against adoption of a particular ordinance, including Provo City Code 14.34.440. But as long as reasonable debate is possible that the ordinance could promote the public welfare, the ordinance is not arbitrary under the law and will be upheld. Provo City has decided to prohibit second residential units in some single-family residential zones. Provo has decided to allow second residential units in other zones. Provo has also determined that the existence of a second kitchen creates an overcomeable presumption that a second dwelling unit exists. Reasonable debate is possible that each of these ordinances promote the public's health, safety, or welfare. Thus, the ordinances are not arbitrary, even when they are allowed in one zone and prohibited in another. It does not need to be beyond question that the ordinances promote the public's health, safety, and welfare. It need only be reasonably debatable that they do.

It is also worth noting as well that second dwelling units in Provo have been examined by Utah courts before. In *Anderson v. Provo City Corp.*, 2005 UT 5, the Utah Supreme Court examined whether Provo City's limitation that allowed only those homeowners who resided in their homes to rent out "accessory" apartments. The Court found that the restriction was within Provo City's zoning authority:

> Because the restriction [on accessory apartments] serves to control only this supplemental use while not interfering with any owner's use of his primary residence, we believe the restriction is reasonably related to the underlying purposes of Provo's land use regulation.

Id., at ¶15. Although not directly on point, this case does counter many of Mr. Frandsen's arguments that such restrictions in Provo City are arbitrary and not within Provo's legislative discretion.

Conclusion

UTAH CODE § 10-9a-505.5 and Provo City Code 14.34.440 do not conflict because they address different subjects. Mr. Frandsen may retain his tenants or keep his second kitchen. Retaining both, however, means that under Provo City ordinances, Mr. Frandsen has a prohibited second residential unit in the dwelling.

Ordinances may be amended if the legislative body, the Provo City Council, find that an ordinance change would best reflect Provo City policy. Mr. Frandsen or any other citizen may request that an ordinance be amended at any time, and the Council is free to amend if persuaded. Nevertheless, as the ordinances stand now, Mr. Frandsen's use of his property violates local ordinances. Provo City has discretion to establish these ordinances, and the ordinances are not arbitrary, capricious, or illegal under the law. Thus, absent a determination of reasonable accommodation under the ADA, Mr. Frandsen must come into compliance with them.

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:

Janene Weiss, City Recorder
Provo City
351 West Center Street
Provo, Utah 84601

On this 30th day of December, 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.

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Office of the Property Rights Ombudsman