

Advisory Opinion #215

Parties: Aaron Langston on behalf of Utah School and Institutional Trust Lands Administration
(SITLA); Washington City
Issued: September 11, 2019

TOPIC CATEGORIES:

Interpretation of Ordinances

A city may require short-term rental communities to maintain a single property management overseer which lives on-site for projects with more than forty units.

However, the city may not extend enforcement of the ordinance beyond the plain meaning of the text. The city may require a single overseer, but not a single property management company. The city may not require that a single property management company perform all cleaning, advertising, and management duties. Similarly, the city may require that the overseer reside on-site where projects have forty or more units, but may not require that the overseer be present twenty-four hours a day, seven days a week.

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:	Aaron Langston on behalf of Utah School and Institutional Trust Lands Administration (SITLA)
Local Government Entity:	Washington City
Type of Property:	Residential
Date of this Advisory Opinion:	September 11, 2019
Opinion Authored By:	Marcie M. Jones, Attorney Office of the Property Rights Ombudsman

ISSUES

- I. May Washington City require short-term rental communities to maintain a single property management overseer which lives on-site for projects with more than forty units?
- II. Based on the above-mentioned regulation, may Washington City require short-term rental communities to use a single property management company which must do all of the advertising, cleaning, management, etc. for all units, and that said company must be on-site twenty-four hours a day, seven days a week.

SUMMARY OF ADVISORY OPINION

Washington City may require short-term rental communities to maintain a single property management overseer which lives on-site for projects with more than forty units.

However, the City may not extend enforcement of the Ordinance beyond the plain meaning of the text. The City may require a single overseer, but not a single property management company. The City may not require that a single property management company perform all cleaning, advertising, and management duties. Similarly, the City may require that the overseer reside on-site where projects have forty or more units, but may not require that the overseer be present twenty-four hours a day, seven days a week.

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 Aaron Langston on behalf of School Trust Lands on February 19, 2019. A copy of that request was sent via certified mail to Danice B. Bullock, City Recorder for Washington City, 111 North 100 East, Washington City, Utah 84780 on February 22, 2019.

EVIDENCE

The Ombudsman's Office reviewed the following relevant document(s) and information prior to completing this Advisory Opinion:

1. Request for Advisory Opinion submitted by Aaron Langston on behalf of School Trust Lands on February 19, 2019.

BACKGROUND

In 2018, Washington City passed WASHINGTON CITY ORDINANCE 9-8F-8 Planned Unit Development (PUD) Zone. A portion of that ordinance regulates the management of short-term rentals. The short-term rental portion of the ordinance includes a number of provisions, concerning parking, building setbacks, and density limits. In addition, subsection 9-8F-8(f) of the ordinance states that

A single property management company overseer will be required for a residential-short term rental development. Projects with more than forty (40) units will require that the property management overseer will have a representative living on the site.¹

Utah School and Institutional Trust Lands Administration (SITLA) owns property within that zone. SITLA alleges that Washington City indicates that “they must all use one single management company and that management company must do all of the advertising, cleaning, management, etc., for all units within the community, and that said company must be on site 24/7.”

¹ WASHINGTON CITY ORDINANCE 9-8F-8(f).

SITLA has submitted this request for Advisory Opinion to determine whether (1) the City is within their rights to pass the ordinance in question, and whether (2) the way in which the City is enforcing the Ordinance exceeds their authority. Washington City did not respond.

ANALYSIS

I. Washington City may require short-term rental communities to maintain a single property management overseer which lives on-site

The State of Utah has granted local governments the authority to create and enforce land use regulations within their jurisdictions. The Land Use Development and Management Act (“LUDMA”) states the following:

. . . a municipality may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that the municipality considers necessary or appropriate for the use and development of land within the municipality, including ordinances, rules, restrictive covenants, easements, and development agreements governing: (a) uses.²

This authority was established to protect the interest of the public health, safety, welfare, and prosperity and includes the right to improve the comfort, convenience, and aesthetics of each community, to protect the tax base, and to protect property values.³ This authority is broad and subject to very deferential discretion.

The exercise of local governmental powers is not unlimited, however. Municipalities may not impose a requirement or regulation that exceeds the granted authority or otherwise conflicts with any provision of state or federal law.⁴

As mentioned above, WASHINGTON CITY ORDINANCE 9-8F-8(f) (the “Ordinance”) includes a provision which reads:

F. Property Management Overseer: A single property management overseer will be required for a residential - short term rental development. Projects with more than forty (40) units will require that the property management overseer will have a representative living on the site.⁵

The information provided in SITLA’s Advisory Opinion request does not present legal arguments indicating why the ordinance might exceed the scope of City’s authority, nor identify a protected property interest which purportedly has been violated. As a result, we have reviewed the ordinance for obvious discord with established legal standards. By statute, Utah courts presume

² UTAH CODE § 10-9a-102(2).

³ See UTAH CODE § 10-9a-102.

⁴ UTAH CODE § 10-9a-104(2).

⁵ WASHINGTON CITY CODE § 9-8F-8(f).

that land use regulations are valid and determine only (1) if it is “reasonably debatable” that the land use regulation is arbitrary and capricious, and (2) was not enacted contrary to state or federal law and thus illegal. The provision will first be analyzed to determine whether it is arbitrary and capricious.

A. *Arbitrary and Capricious*

Municipal governments are granted great deference. Utah Courts have long recognized that “municipal land use decisions should be upheld unless those decisions are arbitrary and capricious or otherwise illegal.”⁶ The enactment of a land use ordinance, such as the one in question here, is deemed not arbitrary and capricious as long as the grounds for the decision “could promote the general welfare; or even if it is reasonably debatable that it is in the interest of the general welfare.”⁷

The City’s rationale for enacting the Ordinance was not included in the record, however, their likely motivation can be assumed. Short-term rentals have the reputation of being a nuisance to neighbors because they have transient tenants with little stake in the neighborhood. Short-term tenants may have less motivation to keep the noise down, trash picked up, and maintain good relationships with the neighbors since they soon will be gone and never return. One can argue that even the best-behaved short-term renters could possibly reduce neighborhood stability. Likewise, it is possible that short-term rentals could dramatically increase rents for traditional renters, reduce the housing supply, and dramatically change the character of residential neighborhoods.⁸

Note that zoning law is founded on the premise of reducing nuisances and protecting residential neighborhoods. In the landmark Supreme Court opinion, *Village of Euclid v. Ambler Realty Co.*, the Court upheld a city ordinance which excluded apartment houses, retail stores, and shops from residential districts to preemptively prevent nuisances.⁹ Closer to home, Utah Courts have upheld the rights of municipalities to protect the character of residential neighborhoods.¹⁰ In *Anderson v. Provo City*, the Court upheld a local ordinance which permitted only owner-occupied homes to take advantage of the ability to rent out basement apartments. The Court held that “the presence of the property owner, who would maintain closer control over both the primary and the accessory dwelling units, would more likely mitigate this effect and tend to preserve the neighborhood’s single-family residential character.”¹¹

The Washington City Ordinance could similarly protect neighboring property owners from possible nuisances caused by short-term rentals. For instance, a single overseer would provide a single point of contact with the City to quickly address complaints and code violations. It is arguable that the Ordinance would reduce trash, noise, parking, parties, etc. and the single-family

⁶ *Bradley v. Payson City*, 2003 UT 16, ¶ 10.

⁷ *Bradley v. Payson City*, ¶ 14, quoting *Smith Inv. Co. v. Sandy City*, 958 P.2d at 252 (Utah Ct. App. 1998).

⁸ See Comment: Making A Business Of “Residential Use”: The Short-Term-Rental Dilemma In Common-Interest Communities, 68 Emory L.J. 801 (2019).

⁹ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

¹⁰ *Anderson v. Provo City Corp.*, 2005 UT 5.

¹¹ *Id.*

neighborhood aesthetic could be better preserved, particularly where the overseer lives on-site. Therefore, the presumed motivation for the Ordinance arguably promotes the health, safety, and welfare of the community and is not arbitrary and capricious.

B. Illegal

The next step is determining whether the Ordinance is illegal. An ordinance is illegal if it violates a law, statute, or ordinance in effect at the time the ordinance was adopted, or if the ordinance is expressly preempted by state or federal law.

The record does not specify any laws have been violated by the Ordinance, nor allegations that the Ordinance has been preempted. In light of that silence, we have reviewed the Ordinance for conformance with standard zoning laws, the U.S. and Utah Constitutions, and state and federal laws. Accordingly, herein, we have analyzed whether (1) the City has exceeded their statutory authority in passing the Ordinance, (2) the Ordinance is preempted by State or Federal Law.

1. Washington City has not exceeded statutory authority

Courts have long recognized that the municipal zoning power “is of necessity confined by the limitations fixed in the grant by the state, and to accomplishment of the purposes for which the state authorized the city to zone.”¹² The City has the power to “enact a zoning ordinance establishing regulations for land use and development that furthers the intent of LUDMA.”¹³ One could argue that by regulating the method by which short-term rentals are managed, the City is no longer regulating land “use” and therefore exceeding the power conferred by the state.

We reject this proposition. “As a practical matter, many zoning laws extend beyond the mere regulation of property.”¹⁴ *Anderson v. Provo City* includes an analogous situation, whereby Provo enacted a zoning overlay ordinance which required a home to be owner-occupied to take advantage of the right to rent out an accessory apartment. The Court reasoned that a resident property owner would be more likely to mitigate the negative effects of tenants and tend to preserve the neighborhood’s single-family residential character.¹⁵ This Ordinance similarly requires short-term rentals to provide a single, accountable, property management company, we have assumed, to mitigate potential nuisances and lessen the negative effect on the residential character of the neighborhoods.

One may argue that the same or similar result could be had without restricting owners from using a *single* property management overseer. Allowing multiple overseers could arguably produce the same results. However, nothing in LUDMA requires cities to use the least restrictive means necessary to achieve their goals. Furthermore, we found no evidence that similar ordinances have been challenged in the courts. Accordingly, Washington City has not exceeded their

¹² *Anderson v. Provo City Corp.*, quoting *Marshall v. Salt Lake City*, 105 Utah 111, 141 P.2d 704, 708 (Utah 1943).

¹³ See also *Anderson v. Provo City Corp.*

¹⁴ *Anderson v. Provo City Corp.*, 2005 UT 5.

¹⁵ *Id.*

authority in enacting the Ordinance, as it falls within their authority to regulate land use and mitigate nuisances.

2. *The Ordinance has not been preempted by federal or state law*

An ordinance is illegal if it is expressly preempted by, or was enacted contrary to, state or federal law.¹⁶ We are unaware of any state or federal laws which preempt or contradict the Ordinance.

In summary, our analysis indicates that the Ordinance is not illegal. Therefore, based on the information currently available, Washington City is within their authority to require short-term rental communities to maintain a single property management overseer which lives on-site for projects with more than forty units.

II. Washington City exceeding scope of Ordinance

We next address whether Washington City is exceeding the scope of the Ordinance when they require short-term rental communities to use a single management company which must do all of the advertising, cleaning, management, etc. for all units, and that said company must be on-site twenty-four hours a day, seven days a week.

Ordinance interpretation requires employment of the canons of statutory construction.¹⁷ An analysis of the plain language of the ordinance always comes first.¹⁸ The primary goal of interpretation is “to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve.”¹⁹ If the plain language of an ordinance is sufficiently clear, the analysis ends there.²⁰

It is also important to recognize that zoning ordinances should be strictly construed in favor of the property owner, since such ordinances are in derogation of an owner’s use of land.²¹

The language of the Ordinance requires that “[a] single property management overseer will be required for a residential - short term rental development. Projects with more than forty (40) units will require that the property management overseer will have a representative living on the site.”²²

SITLA has questioned whether the City may interpret this to require (1) a single property management company that must do all of the advertising, cleaning, management, etc., and (2) which must be present 24 hours a day, 7 days a week.

¹⁶ UTAH CODE § 10-9a-801(3)(ii)(A).

¹⁷ *Foutz v. City of South Jordan*, 2004 UT 75, ¶8.

¹⁸ *Carrier v. Salt Lake County*, 2004 UT 98 ¶30.

¹⁹ *Foutz*, 2004 UT 75, ¶11.

²⁰ *General Construction & Development, Inc. v. Peterson Plumbing Supply*, 2011 UT 1, ¶ 8.

²¹ *Carrier*, 2004 UT 98 ¶31.

²² WASHINGTON CITY CODE § 9-8F-8(f).

A. Single property management company not required to perform all management functions

The text of the Ordinance requires a “single property management overseer.” The adjective “single” clarifies the noun “overseer”. An overseer is “a person who oversees others; a person with supervisory responsibilities.”²³ The plain meaning of the text provides that short-term rental developments must provide a *single overseer* that supervises the property management duties. The text does not limit the number of property management companies used, only the number of overseers. Therefore, requiring short-term rental developments to hire a single property management company that performs all management-related functions exceeds the scope of the ordinance. Because the plain language of the Ordinance is sufficiently clear, our analysis ends there.

B. Overseer does not need to be on-site 24/7

The Ordinance next stipulates that the “Projects with more than forty (40) units, will require that the property management overseer will have a representative living on the site.”²⁴ The definition of “living”, as used in this instance, is “to occupy a home; dwell.” As commonly used, it does not imply presence twenty-four hours a day, seven days a week. Even homebodies leave home to go to work, the store, dinner, movies, etc. Therefore, based on the plain meaning of the text of the Ordinance, the City may not require the property management overseer to be on-site twenty-four hours a day, seven days a week.

In summary, the City must follow its own code, and may only enforce the Ordinance as it is written. The code requires that a single overseer be hired, which can supervise a multitude of different property management companies, each performing a variety of duties. The overseer must live on-site on projects with more than 40 units, but the City may not require the overseer to be present twenty-four hours a day, seven days a week.

CONCLUSION

Based on the information currently available, Washington City may require short-term rental communities to maintain a single property management overseer which lives on-site for projects with more than forty units. However, the City may not extend enforcement of the Ordinance beyond the plain meaning of the text. The City may not require that a single property management company perform all cleaning, advertising, and management duties, nor that the overseer be present twenty-four hours a day, seven days a week.

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

²³ Merriam-Webster online dictionary.

²⁴ WASHINGTON CITY CODE § 9-8F-8(f).

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 § 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:

Danice B. Bulloch, City Recorder
Washington City
111 North 100 East
Washington, Utah 84780

On this 11th Day of September, 2019, I caused the attached Advisory Opinion to be delivered via the United States Postal Service, postage prepaid, and certified mail, return receipt requested and addressed to the person shown below.

Office of the Property Rights Ombudsman