

Advisory Opinion #231

Parties: Peterson House LLC / Morgan County

Issued: October 30, 2020

TOPIC CATEGORIES:

Compliance With Land Use Ordinances

Interpretation of Ordinances

Requirements Imposed on Development

Counties may withhold occupancy for an applicant's failure to meet conditions stated in state law, local code, or subdivision approval that are essential for the public health, public safety, and general welfare of the occupants. The County requires adequate fire protection before a building permit is issued. A subdivision was approved for fire suppression either through service by the local water company, or a community well of a certain fire-flow rate.

A lot owner obtained a building permit, but by the time a certificate of occupancy was requested, the local water company was not servicing the subdivision's fire suppression system. Additionally, the culinary well on the lot was not built to fire suppression standards. Because the property has no operational fire suppression system as required by local ordinance, the County has not unreasonably withheld occupancy for lack of adequate fire protection, as essential for public safety.

DISCLAIMER

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ADVISORY OPINION

Advisory Opinion Requested By:	Peterson House LLC
Local Government Entity:	Morgan County
Applicant for Land Use Approval:	Peterson House LLC
Type of Property:	Residential
Date of this Advisory Opinion:	October 30, 2020
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUE

Where construction of a single-family home was allowed to proceed nearly to completion after issuance of a building permit, may the County now withhold a certificate of occupancy based on a failure to comply with fire suppression standards?

SUMMARY OF ADVISORY OPINION

Counties may withhold occupancy for an applicant's failure to meet conditions stated in state law, local code, or subdivision approval that are essential for the public health, public safety, and general welfare of the occupants. Morgan County requires adequate fire protection to be established by fully operational fire hydrants before a building permit is issued. A subdivision was approved for fire suppression either through service by the local water company, or a community well of a certain fire-flow rate.

A lot owner obtained a building permit—including a fire protection plan approval—and completed construction of a home, passing inspections up to final inspection. But at the time a certificate of occupancy was requested, the local water company was not servicing the subdivision's fire suppression system. Additionally, a personal well on the lot, though approved for culinary purposes, was not built to the fire suppression standards as conditioned in the subdivision approval. Because the property has no operational fire suppression system as required by local ordinance,

the County has not unreasonably withheld occupancy for lack of adequate fire protection, as essential for public safety.

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 Title 13, Chapter 43, Section 205 of the Utah Code. 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 Heather Kann, Operations Manager for Peterson House, LLC, on March 25, 2020. A copy of that request was sent via certified mail to Jann L. Farris, attorney for Morgan County, 48 Young Street, Morgan, Utah on March 25, 2020.

EVIDENCE

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

1. Request for an Advisory Opinion, submitted by Heather Kann, Operations Manager for Peterson House, LLC, received March 25, 2020.
2. Email from David Pitcher, Clear Creek Development (Developer), re: Additional information, received April 1, 2020.
3. Email response from Jann L. Farris, Morgan County Attorney, dated April 7, 2020, with copy of Morgan County "Appeal Authority, Appeal of Planning Director Determination" dated February 20, 2020.
4. Response from Heather Kann, "Overview of Complaint", received May 27, 2020.
5. Response from Morgan County – Planning and Development Services, received June 3, 2020.
6. Heather Kann rebuttal to Morgan County Response, received June 5, 2020.
7. Email response from David Pitcher, received June 5, 2020.
8. Email from David Pitcher with attached document, received June 6, 2020.
9. Email from Heather Kann, received June 8, 2020.
10. Email from Heather Kann with attached document, received July 17, 2020.

BACKGROUND¹

¹ This Office has received hundreds of pages of documents and arguments from the parties involved, each asserting to be an accurate version of the facts while taking issue with the opposing perspectives offered by the other parties. Consequently, the factual background in this matter is heavily contested. This Office is not a fact-finding body and is not equipped to resolve serious disputes of material facts. Therefore, we present a summary of the background of this matter as found in existing public record or the extrinsic documents provided, and otherwise note the disputed facts as alleged by the parties, as appropriate.

Clear Creek Development (“Developer”) is the developer of the Heather Meadows Subdivision (“HMS”) in Morgan County, a minor subdivision consisting of seven total lots on two cul-de-sac streets, with Lots 1-4 on one street, and the remaining lots on the other. Peterson House LLC, the applicant of this request, is the owner of Lot 3 (“Applicant”). Morgan County is not a provider of any public utilities; rather, when someone wishes to develop in the unincorporated areas of the County, unless provided some other way, any needed water, sewer, and other utilities must be obtained directly from utility companies that service the area.²

HMS was reviewed for preliminary/final plat approval at the May 25, 2017 Planning Commission Meeting, where it was discussed that the subdivision would need a “Will Serve” letter from the local water company, Peterson Pipeline Association (“PPA”), prior to preliminary approval; the Commission therefore motioned to postpone the application.³ Developer had inquired with PPA about providing water, but PPA responded that it was at capacity and unable to provide any further memberships at the time.

In early 2018, the County Engineer wrote to the Planning Director that the HMS subdivision plans had been modified since its initial review to provide culinary water service from individual wells instead of a water system connection, but that Developer was continuing to pursue connection with PPA, and that the plans showed both wells and culinary water pipes and service connections.⁴ The Engineer recommended HMS be supplied with water from PPA, if feasible.⁵ PPA wrote a letter to the County stating that it was actively working with HMS to be able to service water needs for the subdivision—though it made clear that the letter was not intended as a “Will Serve” letter, but asked that the County continue to allow pending applications to remain active while development agreements were put into place.⁶

The subdivision came back before the County Planning Commission on April 12, 2018. The Planning Commission Staff report described HMS’s water source to be provided through wells approved by the Weber-Morgan Health Department, and noted that for fire protection the property was inside the Wildland Urban Interface Area.⁷ The Final Plat provided to the Planning Commission showed both well zones and water line connections, and contained a signature box for PPA.⁸ The Morgan County Planning Commission approved the HMS subdivision upon

² See Building Permit Application Process, Morgan County, <http://www.morgan-county.net/DEPARTMENTS/Planning-and-Development/Building-Permits> (last visited September 14, 2020) (“We are NOT a public utility. All water and sewer connections will need to be made through the utility companies in your area.”); see also, Utility Companies Operating In Morgan County, Jul 1, 2020, <http://www.morgan-county.net/Portals/0/Utility%20Company%20Info.pdf?ver=2020-07-01-153550-247>

³ Morgan County Planning Commission Agenda, May 25, 2017, page 3.

⁴ Letter from John Bjerregaard, P.E., Wasatch Civil Consulting Engineering, to Lance Evans, Morgan County Planning and Development Services Director, February 14, 2018; *see also*, Letter from John Bjerregaard, P.E., Wasatch Civil Consulting Engineering, to Lance Evans, Morgan County Planning and Development Services Director, April 2, 2018.

⁵ Letter from John Bjerregaard, P.E., Wasatch Civil Consulting Engineering, to Lance Evans, Morgan County Planning and Development Services Director, April 2, 2018.

⁶ Letter from Trevor Kobe, President Peterson Pipeline Association, to Morgan County Planning Department, March 13, 2018.

⁷ Morgan County Planning Commission Staff Report, Heather Meadows Prelim/Final Plat, page 3, April 12, 2018.

⁸ Morgan County Planning Commission Minutes, April 12, 2018, page 14.

certain conditions, including a receipt from the County Engineer determining proof of wet water per county code, or, a ‘Will Serve’ letter from PPA.⁹

Developer submitted HMS Improvement Plans on September 2, 2018. The plans contained separate notes for both culinary and fire suppression water needs. Specifically, culinary water was noted as follows: “Preferred to have culinary water provided by Peterson Water, else wells required”. As for fire suppression needs, the plans noted: “Preferred to have Fire Suppression Water provided by Peterson Water, else NOA¹⁰ well w/1000 GPM for 2HR minimum required.”¹¹

On September 17, 2018, Developer emailed PPA to ask about servicing the HMS subdivision. PPA responded that it was hoping to begin a test well within next 30 days, and if successful, PPA should be able to provide ‘Will Serve’s.¹² Developer had installed a water system that could connect to PPA’s water lines as a “backup” to the wells in the hopes that they could come to an agreement with PPA to use the lines. However, no agreement was reached. Therefore, Developer and Applicant appear to have moved forward by relying solely on the wells for the water supply for Lot 3.

On October 12, 2018, the HMS subdivision plat was recorded with signatures of all departments, including the County Engineer, though the box for PPA’s signature, which was present at the time of approval, was omitted from the document recorded with the County Recorder.¹³

Shortly after recording, the owner of Lot 3 applied for a building permit,¹⁴ and on October 25, 2018, received a Fire Protection Plan Approval, signed by Morgan County Fire Chief.¹⁵ The County asserts that this approval was given because the Fire Chief believed that the fire suppression system that had been installed was or would be serviced by PPA.¹⁶

On November 26, 2018, HMS was inspected in response to a request from Developer for conditional acceptance. The County Engineer noted that among the remaining items for final acceptance was obtaining and submitting an acceptance letter from the “culinary water provider”.¹⁷ Developer responded asking for clarification, stating that HMS was approved for wells, and that a water system had only been installed for possible future use, and was not the intended water source.¹⁸ Nevertheless, Developer thereafter submitted a letter from PPA stating

⁹ *Id.*, at page 3.

¹⁰ Neighborhood Owner’s Association

¹¹ Heather Meadows Improvement Plans, Sheet 3.

¹² Email from David Pitcher to Trevor Kobe, September 17, 2018 12:47pm, response from Trevor Kobe to David Pitcher September 18, 2018, 03:11pm MDT.

¹³ Heather Meadows Subdivision, Entry No. 146037, recorded October 12, 2018.

¹⁴ On the application, the owner marked that the lot was “exempt” from the Wildland Urban Interface. *See* Morgan Land Use Permit Application, dated October 15, 2018.

¹⁵ Morgan Fire Protection Plan Approval, signed October 25, 2018.

¹⁶ It is unclear if any actual test was performed, and also disputed whether the system was pressurized at that time. *See* infra note 27.

¹⁷ Letter from John Bjerregaard, P.E., Wasatch Civil Consulting Engineering, to Lance Evans, Morgan County Planning and Development Services Director, November 27, 2018.

¹⁸ David Pitcher, Request for Clarification of Inspection Report dated November 27, 2018 for Heather Meadow in Peterson, November 29, 2018.

that Developer's water system was installed and inspected per PPA standards, though no 'Will Serve' has been issued for permission to use the system.¹⁹

Construction of a well on Lot 3 began in January 2019. After completion of the well, an opportunity for membership with PPA became available, but Applicant states that because of the investment made in the well system and additional costs that would be required to now connect to the water system, Applicant turned down a membership with PPA. On March 12, 2019, the Weber-Morgan Health Department approved the well for Lot 3 for culinary purposes; the approval noted that "[t]he well yields 60 GPM with a 4-foot drawdown in 1 hrs."²⁰

On April 17, 2019, a building permit was approved and issued for Lot 3. The issued permit is marked "Received" under "Water/Well Approval", as well as marked "No" under "Wildland-Urban Interface", and "No" under "Fire Sprinklers Required?".²¹ The County asserts that at the time the permits were issued, it "believed" that the fire suppression system was operational.²²

Shortly following the permit issuance, PPA sent an email to Developer and the Planning Director stating that there had been some confusion with respect to fire protection for HMS; PPA explained that it had previously been unable to provide any additional memberships to provide water to HMS, but now was in a position to offer memberships, but made clear that it was still not providing water service to any lots in HMS because no memberships had been purchased to date.²³ Following this email, PPA also sent an email to developer reiterating that it was willing to accept the HMS water system, and to provide both water *and* fire protection, but first needed commitments from the lot owners to purchase memberships.²⁴

Since the issuance of the building permit in April 2019, construction continued on Lot 3, and inspections were performed and passed, up to final inspection of the structure, without any identified violations. But due to concerns raised that Developer's fire hydrants were not pressurized because PPA was not servicing the system, the County Council held a work meeting to discuss the status of the development, how the building permits had been issued, and what would be needed going forward for final approval.²⁵

It was discussed that until the system was operational, or until the lot was determined to be compliant with fire suppression requirements, no work should be allowed to continue on the property. There was some discussion on utilizing fire hydrants on the street outside of the subdivision. On September 19, 2019, the County Fire Chief sent a letter to developer stating that the location and performance of existing fire hydrants outside of subdivision satisfied the fire department's needs for fire-fighting capabilities, but that the department would need to be

¹⁹ Email from David Pitcher to Gina Grandpre and Lance Evans, CC John Bjerregaard, December 6, 2018, with attached letter from C.J. Nix, Peterson Pipeline Assoc., to David Pitcher, dated November 30, 2018.

²⁰ Letter from Brett Bunderson, Division of Environmental Health, Weber-Morgan Health Department, Division of Environmental Health, to Angels Rest Trust, dated March 12, 2019.

²¹ Morgan County Building Permit #19-036, issued April 17, 2019.

²² See *supra* note 15 and accompanying text; see also *infra* note 27.

²³ Email from Trevor Kobe to David Pitcher, Lance Evans, and Gina Grandpre, dated April 23, 2019.

²⁴ Email from Trevor Kobe to David Pitcher, dated April 29, 2019.

²⁵ Video, Morgan County Utah, Council Work Session Meeting August 20, 2019, YOUTUBE (streamed live Aug. 20, 2019), 0:00 – 29:00, <https://www.youtube.com/watch?v=cnjgWiKhCDA>.

notified if there are any changes in the performance or accessibility of the system.²⁶ At some point after this letter, at least one of these referenced fire hydrants was removed by PPA.²⁷

On January 23, 2020, the Planning Director sent a letter to Developer notifying that no further permits or Certificates of Occupancy would be issued until HMS's fire suppression system is charged with water. The letter claimed that the system was in place and charged by PPA when the final plat was recorded but had since been terminated, and no longer met code requirements. Applicant disputes that the system was pressurized at the time the plat was recorded, or at the time the permits were issued, instead claiming that the water was not turned on until PPA did a test in October 2019.²⁸

Applicant filed an appeal with the local appeal authority challenging the County's decision to withhold final inspection or issue occupancy, and submitted a Request for an Advisory Opinion on March 25, 2020 to determine whether the well on the property and the County's prior approvals entitles Applicant to a Certificate of Occupancy, and whether the County should be estopped from enforcing its ordinances.

ANALYSIS

I. Limited Scope of this Advisory Opinion

Our Office is tasked with answering the question of compliance with applicable land use law.²⁹ We rely on the parties to provide us with the essential facts in order for us to answer those questions, however, because our office is not equipped to be a fact-finder, we cannot resolve some issues relating to the motivations, intent, and impacts of the parties' respective actions. Certain claims or defenses between the parties that rely on these more subjective factors, such as zoning estoppel,³⁰ are beyond our Office's ability to address—regardless of merit. Rather, our review is limited to answering the narrower question involving compliance with state statutes, applicable local ordinances, and associated Utah case law.³¹

²⁶ Letter from Chuck Tandy, Morgan County Fire Chief, to David Pitcher, dated September 19, 2019.

²⁷ See Letter from Trevor Kobe, President Peterson Pipeline Association, to Lance Evans, Morgan County Planning Department Director, February 20, 2020, page 3. In response to applicant's local appeal, PPA issued a letter to the Planning Director challenging the Fire Chief's September 2019 letter approving the use of existing fire hydrants outside of HMS. According to PPA, the letter was based on the fire chief being told that one fire hydrant outside of HMS was within 250 feet of Lot 3. PPA disputed that this hydrant was in fact within 250 feet from Lot 3, but additionally informed the County that the fire hydrant in question was non-working and had since been removed, and would not be replaced at that location.

²⁸ Email from Trevor Kobe to David Pitcher, dated October 14, 2019. PPA states that it pressurized the water lines for HMS and successfully completed a water test. PPA again reiterated that it was ready to accept ownership of the Developer's water lines so long as each lot owner purchased a membership in PPA to have access to culinary water and fire protection using PPA infrastructure.

²⁹ UTAH CODE ANN. §13-43-205(1) (advisory opinions may be requested to determine compliance with express sections of either the municipal or county Land Use Development and Management Acts, or the Impact Fee Act). Additionally, our Office has jurisdiction in this matter pursuant to Utah Code Section 15A-5-202(d): "For development regulated by a local jurisdiction's land use authority, the fire code official's interpretation of [State Fire Code] is subject to the advisory opinion process described in Utah Code, Section 13-43-205."

³⁰ See discussion, Part III(B), *infra*.

³¹ Most disputes tend to be accompanied by highly charged emotions. It appears the present dispute is no exception. When an objective dispute of perceived incompatible goals turns into subjective, interpersonal conflict, not only does

From a review of the factual background, it is undisputed that Peterson Pipeline Association (PPA) is not providing water services to the Heather Meadows Subdivision (HMS). It is also undisputed that the existing fire hydrant outside of the subdivision that might have otherwise been able to service Lot 3 has been removed. So, the question for us is limited to whether Applicant is entitled to a Certificate of Occupancy with the existing well on the property, as it relates to subdivision approval and fire suppression requirements, and whether the County must allow, or may withhold, occupancy.

We find that Applicant seriously misunderstood the distinct water standards required for fire suppression needs as opposed to culinary water needs. This misunderstanding was greatly compounded by the County's repeatedly making assumptions that PPA would be servicing the HMS subdivision and not accounting for Lot 3's lack of an alternative water source for fire suppression purposes. We conclude that the existing well does not comply with fire suppression requirements. Because of this, Applicant has a completed home with no possibility for occupancy without the cooperation of third-party providers, or without significant changes to the property and further personal investment. Nevertheless, residential fire protection requirements are essential for the safety and wellbeing of the structure's occupants and the public, and are a basis for the County to withhold occupancy until brought into compliance.

I. Applicable International Codes

As a threshold matter, Applicant argues that the International Residence Code (IRC) applies to the structure built on Lot 3, and that because the IRC applies, the International Fire Code (IFC) categorically does *not* apply, and that any Morgan County requirement for fire suppression is not allowed under state law. Applicant is incorrect and misunderstands the relationship between the IRC and the IFC, and the applicability of Morgan County's ordinances.

Utah has adopted the 2015 edition of the International Residential Code (IRC), subject to amendments found in the State Construction and Fire Codes Act.³² The structure on Lot 3, as a single-family dwelling, is governed by the IRC.³³ Applicant argues that because the home is governed by the IRC, and the IRC has no requirements for fire suppression, any County fire suppression ordinance is more restrictive than the State Construction Code and impermissible.³⁴

the ability and likelihood of the parties to successfully managing and resolving the dispute diminish, but issues and arguments start to detour from the ordinance compliance-based questions at hand. While many such arguments have been presented in the parties' submissions to this Office, this Opinion, as explained, will only address the questions related to legal compliance.

³² UTAH CODE ANN. § 15A-2-103(1)(b);

³³ 2015 INTERNATIONAL RESIDENTIAL CODE (IRC) § 101.2.

³⁴ See UTAH CODE ANN. § 15A-1-204(8). Applicant cites this provision for the belief that the County cannot adopt any ordinances more restrictive than the state construction code. However, even if the State Construction code applied to fire suppression standards, this very language cited contains an important exception in that Subsection (9) states that a political subdivision may enforce an ordinance that was adopted or made effective before July 1, 2015, and for which the political subdivision can demonstrate, with substantial evidence, that the ordinance is necessary to protect an individual from a condition likely to cause imminent injury or death. All of the County ordinances in question were adopted prior to this date, and as will be explained, local fire suppression standards directly relate to safety from fire danger, and would therefore not be preempted by state code, by design.

The IRC rightly does not contain any fire suppression requirements, because such requirements are governed by the State Fire Code as opposed to the State Construction Code. Utah's State Fire Code is the 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."³⁵ Utah has adopted the International Fire Code (IFC)³⁶ except as amended by the State Fire Code Act.³⁷ Though the State Fire Code's adoption of the IFC excludes appendices,³⁸ it specifically allows Counties to do so by ordinance.³⁹

In regards to the relationship between the IRC and IFC, specifically, the State Fire Code Act provides that the IFC only applies to structures built according to the IRC as follows:

1. The construction and design provisions of this code apply only to premises identification, fire apparatus access, *fire hydrants and water supplies*, and construction permits required by Section 105.7.
2. This code does not supersede the land use, subdivision, or development standards established by a local jurisdiction.
3. The administrative, operational, and maintenance provisions of this code apply.⁴⁰

Because the structure on Lot 3 is built according to the IRC, the State Fire Code dictates that the IFC applies to this structure as it relates to fire suppression standards, such as fire hydrant and water supply requirements.

Applicant cites a similar provision in the State Fire Code stating the County cannot adopt ordinances more restrictive than the State Fire Code.⁴¹ However, as will be discussed below, Morgan County's fire suppression standards simply defer to the IFC as adopted, and do not contain any specific standards that are more restrictive than the State Fire Code. Therefore, Morgan County's fire suppression ordinances are not in conflict with applicable state law.

II. County Water Standards

As Morgan County provides no public utilities, developers must provide for their own water, sewer, and other utilities, which may be provided by utility companies that service the area. While the same water source/provider is often used for both culinary and fire suppression, the water needs for culinary purposes and fire suppression are distinct, and have separate requirements.

³⁵ UTAH CODE ANN. § 15A-1-403(1)(a)(i);

³⁶ Specifically, at the time of the Applicant's application for a building permit (in late 2018), Utah had adopted the 2015 edition of the International Fire Code. The 2018 edition has since been adopted. *See* § 15A-5-103(1) (2019)

³⁷ UTAH CODE ANN. § 15A-5-103(1).

³⁸ *Id.*

³⁹ UTAH CODE ANN. § 15A-1-403(7)(c).

⁴⁰ UTAH CODE ANN. § 15A-5-202(1)(a) (emphasis added);

⁴¹ Specifically, Applicant cites to Utah Code Section 15A-1-403(7)(b), which provides: "Except as provided in Subsections (7)(c), (10), and (11), or as expressly provided in state law, a political subdivision may not, after December 1, 2016, enact or enforce a rule or ordinance that applies to a structure built in accordance with the [IRC], as adopted in the State Construction Code, that is more restrictive than the State Fire Code." UTAH CODE ANN. § 15A-1-403(7)(b) (emphasis added).

a. Culinary Water Standards

Each lot is required to have a culinary water supply available,⁴² but the Morgan County Code chapter on subdivisions provides two options for culinary water use: This can come either through a culinary water supply system,⁴³ such as a membership with a water company, or, in the case of subdivisions consisting of 8 lots or less, through individual or shared wells.⁴⁴ When wells are proposed to be shared between two or more lots, written approval from the Weber/Morgan County health department is required at the time of preliminary plat application, and a maintenance agreement between the lot owners is required prior to recordation.⁴⁵

Wells must be “capable of providing 800 gallons per day (gpd) per equivalent residential connection (ERC) for indoor culinary use and a minimum of three (3) gallons per minute (gpm) per irrigated acre for outdoor use.”⁴⁶ At the time of preliminary approval, the developer must provide proof of wet water by drilling a test well to verify these standards, though this requirement does not apply when the proposal is being served by an existing water company.⁴⁷

When an approved culinary water supply system “is available or proposed,” the county “will require to be installed, at the subdivider’s expense, water mains, valves, hydrants, service laterals, meter yokes, boxes, lids, meters . . . and appurtenances to each lot within the subdivision”⁴⁸ at the same gpd/gpm standards as those listed for wells, as referenced above. Water and connection rights are required as a condition of approval for each lot.⁴⁹ If provided by a culinary water system, the signature of the water provider is required on the subdivision plat.⁵⁰

In this case, the HMS subdivision was approved for two potential water sources for culinary use, either membership through PPA, or else personal wells. When the final plat was recorded without a signature block for PPA, it seemed clear that Developer intended to move forward with personal/shared wells as a water source. So when the County later asked for a letter of acceptance from the culinary water provider, Developer clarified that wells were the intended water source. However, the well standards required for culinary purposes are much different than what would be needed for fire suppression using wells.

b. Fire Suppression Standards

Water needs for fire suppression are separate from culinary water needs. In addition to “water storage and flow requirements for culinary and irrigation uses,” an “adequate supply of and access to water for fire suppression” shall be provided to each lot in the subdivision.⁵¹ Morgan County’s ordinances adopt the International Fire Code (IFC) as amended by Utah Code; In addition, Morgan

⁴² MORGAN COUNTY CODE § 8-12-46(B).

⁴³ MORGAN COUNTY CODE § 8-12-46(B)(2).

⁴⁴ MORGAN COUNTY CODE § 8-12-46(B)(1).

⁴⁵ MORGAN COUNTY CODE § 8-12-46(B)(1)(b).

⁴⁶ MORGAN COUNTY CODE § 8-12-46(B)(1)(a).

⁴⁷ MORGAN COUNTY CODE § 8-12-24(F)(9).

⁴⁸ MORGAN COUNTY CODE § 8-12-46(B)(2).

⁴⁹ MORGAN COUNTY CODE § 8-12-46(B)(2)(c).

⁵⁰ MORGAN COUNTY CODE § 8-12-32(N)(5).

⁵¹ MORGAN COUNTY CODE § 8-12-46(C).

County also specifically adopts the following appendixes to the IFC: Appendix B - fire flow requirements for buildings; Appendix C - fire hydrant locations and distribution; Appendix D - fire apparatus access roads; Appendix E - hazard categories; Appendix F - hazard ranking; Appendix G - cryogenic fluids - weight and volume equivalents; and Appendix I - fire protection systems/noncompliant conditions.⁵²

The County's standards provide that when water is supplied by a water company, required water storage "shall be calculated by the cumulative requirements of culinary, irrigation, and fire suppression requirements, but shall be no less than four hundred (400) gallons per equivalent residential connection for indoor use, one thousand eight hundred thirteen (1,813) gallons of storage for each irrigated acre, and one hundred twenty thousand (120,000) gallons for fire suppression."⁵³

For those properties that do not have water supplied by a water company, however, the general requirement of the code regarding fire suppression is that:

All fire flow and water storage requirements for firefighting purposes shall meet the requirements of the adopted fire code and the adopted wildland urban interface code of the county, and shall be verified in writing by the local fire code official. All requirements shall be articulated as conditions of approval during the preliminary and final plat processes, and verified in the field by the fire code official during subdivision construction and subsequent building construction.⁵⁴

The Structure on Lot 3 is a total of 6,155 square feet.⁵⁵ For a single-family home that size, the text of the IFC appears to require a fire-flow of 1,500 gpm at flow duration of 2 hours.⁵⁶ However, the IFC also allows the fire chief to reduce the fire-flow requirements for isolated structures or a group of structures in rural areas or small communities where the development of full fire-flow requirements is impractical.⁵⁷

In this matter, the HMS plat was approved with a note on fire suppression as follows: "Preferred to have Fire Suppression Water provided by Peterson Water, else NOA⁵⁸ well w/1000 GPM for 2HR minimum required."⁵⁹ We have no information on how the County arrived at the requirement for 1,000 gpm, specifically; but considering the IFC allows for flexibility by the fire chief, and that the County's requirement is more permissive, we will assume the County's standard of 1,000 gpm is not in dispute as an appropriate flow rate under applicable fire suppression standards, but that the Applicant maintains a general dispute regarding the applicability of any fire suppression standards to the property.

⁵² MORGAN COUNTY CODE § 7-8-1.

⁵³ MORGAN COUNTY CODE § 8-12-46(B)(2)(a).

⁵⁴ *Id.*

⁵⁵ See Morgan County Building Permit Application #19-036, issued April 17, 2019: Basement-Unfinished 3423 sq. ft, Main Floor 2296 sq. ft., Second Floor 436 sq. ft. (3423 + 2296 + 436 = 6,115).

⁵⁶ 2015 INTERNATIONAL FIRE CODE (IFC) § B105.

⁵⁷ 2015 IFC § B103.1.

⁵⁸ Neighborhood Owner's Association.

⁵⁹ Heather Meadows Improvement Plans, Sheet 3.

Morgan County has specified fire suppression standards in its ordinances by adoption of the IFC and its appendices, in accordance with the State Fire Code. Accordingly, the HMS subdivision was given final approval with two fire suppression options, 1) water service through PPA, or else 2) a community well with at least 1,000 gpm for duration of 2 hours. Because these requirements were articulated as conditions of approval during HMS's preliminary and final plat processes, these are the standards that apply to Lot 3.

Morgan County code provides that it is unlawful for any person to receive a building permit until, within the immediate vicinity of the requested construction, adequate fire protection is verified in writing by the local fire code official that “[a]dequate fire protection is established by fire hydrants *which are fully operational and tested* in the area of the subdivision where permits are requested, if fire hydrants were required with the building and subdivision approval,” and all other fire protection mechanisms are in place according to County code, the adopted fire code, and wildland urban interface code.⁶⁰

When applying for a building permit, Applicant received a written Fire Protection Plan Approval, signed by the County Fire Marshall indicating compliance with fire protection water supply standards. However, this approval was signed and issued months before construction on the well began. It seems clear, then, that the approval did not refer to the well as a fire protection water source, but rather the hydrant system that had been installed for possible connection to PPA's water. While it is disputed whether the hydrant system was, in fact, ever operational at the time the fire protection approval was issued, it is certainly undisputed that the system is not currently being serviced by PPA. As to the personal well on Lot 3, the applicant's submittals reflect that Weber-Morgan Health Department's inspection of the well for culinary purposes noted that “[t]he well yields 60 GPM with a 4-foot drawdown in 1 hrs,”⁶¹ far short of flow-rate required for fire suppression.

III. Withholding of Occupancy

a. Occupancy Standards

Morgan County Code provides that buildings requiring a building permit shall not be occupied nor put into use until the building is inspected and found to be in compliance with the County's land use regulations and building codes.⁶² HMS was approved with two options for fire suppression, 1) water service through PPA, or else 2) a community well with at least 1,000 gpm for duration of 2 hours. It is clear that Lot 3 does not currently meet the fire suppression standards required by ordinance and as conditioned in the final plat approval.

Utah's Land Use Development and Management Act (“LUDMA”) provides that a County may not withhold issuance of a certificate of occupancy, generally, because of an applicant's failure to comply with a requirement that is not expressed: “(i) in the building permit or subdivision plat, documents on which the building permit or subdivision plat is based, or the written record

⁶⁰ MORGAN COUNTY CODE § 8-12-8(D)(3) (emphasis added).

⁶¹ Letter from Brett Bunderson, Division of Environmental Health, Weber-Morgan Health Department, Division of Environmental Health, to Angels Rest Trust, dated March 12, 2019.

⁶² MORGAN COUNTY CODE § 8-3-6(D).

evidencing approval of the land use permit or subdivision plat; or (ii) in [LUDMA] or the county's ordinances.”⁶³ Inversely, where an applicant fails to comply with a requirement that is so expressed, the County *may* withhold occupancy, except that a County “may not unreasonably withhold issuance of a certificate of occupancy where an applicant has met all requirements essential for the public health, public safety, and general welfare of the occupants.”⁶⁴

As Morgan County’s subdivision ordinance is enacted with the purpose of “secur[ing] safety from fire, flood and other dangers,”⁶⁵ including the imposition of fire suppression standards to govern “conditions hazardous to life and property from fire,”⁶⁶ these standards are therefore “essential for the public health, public safety, and general welfare of the occupants.”⁶⁷ Consistent with state law, the withholding of occupancy contingent upon compliance with these standards is not unreasonable.

b. Zoning Estoppel

Applicant’s arguments in support of the Request for Advisory Opinion amount to a belief that, regardless of the property’s lack of adequate fire protection, the County should nevertheless be prohibited from withholding occupancy. The Applicant had, in fact, previously been approved for a building permit and had received a Fire Protection Plan Approval signed by the County Fire Marshall, stating that the property complied with IFC fire protection standards. The structure on Lot 3 also appears to have passed periodic inspections during construction and allowed to be completed up to final inspection before the County issued a stop work order.

“Zoning estoppel” prohibits a local government from changing its position concerning a land development decision when a property owner has relied upon the government’s decision to the owner’s detriment, and it would be unfair to allow the government to change its position.⁶⁸ The relief afforded to parties through zoning estoppel is given by a court sitting in its capacity as a court of equity. An equitable claim like zoning estoppel relies heavily on a factual record of the parties’ actions, and even intentions,⁶⁹ which, in this case, are heavily disputed. This office lacks the tools, and more importantly, the authority, to provide an opinion regarding the applicability of zoning estoppel. This does not, however, prevent the parties from considering the doctrine’s potential applicability in the matter, and seeking resolution in light of it.

CONCLUSION

Morgan County’s fire suppression standards are essential for the safety of occupants and the public, and the County may withhold occupancy on structures that do not comply with these standards. Whether due to the actions of a third-party water company beyond the Applicant’s control, or otherwise, the property does not have an operational fire suppression system, and does

⁶³ UTAH CODE ANN. § 17-27a-508(1)(g).

⁶⁴ UTAH CODE ANN. § 17-27a-508(1)(h).

⁶⁵ MORGAN COUNTY CODE § 8-12-2(D).

⁶⁶ MORGAN COUNTY CODE § 7-8-1(A).

⁶⁷ UTAH CODE ANN. § 17-27a-508(1)(g).

⁶⁸ See generally, *Fox v. Park City* for an overview of the zoning estoppel doctrine. 2008 UT 85, ¶ 36, 200 P.3d 182.

⁶⁹ See *Utah Cty. v. Baxter*, 635 P.2d 61, 65 (Utah 1981) (exceptional circumstances must be present for zoning estoppel, such as the intentional discriminatory application of the ordinance).

not comply with Morgan County ordinances. Consequently, the County may withhold a certificate of occupancy from the Applicant until the Applicant is able to comply with applicable code requirements.

The question of whether the Applicant is entitled to occupy the property despite the lack of fire suppression resulting from the County's actions under a theory of zoning estoppel is beyond the scope of this opinion. Regardless, it goes without saying that a fully constructed home without the possibility of final occupancy is not likely an acceptable result for any person or entity involved in this dispute. Accordingly, we encourage the parties to cooperate within the bounds of the law, and without animus, to achieve an appropriate and acceptable solution to the outstanding fire protection issues.

Jordan S. Cullimore, 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 § 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:

Jann L. Farris
Morgan County Attorney
PO Box 886
48 West Young Street
Morgan, Utah 84050

On _____, 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