

Advisory Opinion #120

Parties: Ciel Investment Co., Salt Lake County, and Salt Lake City

Issued: February 5, 2013

TOPIC CATEGORIES:

E: Entitlement to Application Approval (*i.e.*, Vesting)
K Compliance With Mandatory Land Use Ordinances
Other Topics (v): Interpretation of Ordinances

The Utah Code grants extraterritorial jurisdiction to cities to protect watersheds and water sources. Salt Lake City, as a city of the first class, has authority over the watershed areas of the Wasatch Mountains which supply water for the City. The City is therefore authorized to regulate construction on parcels to minimize pollution of water sources.

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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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by: Ciel Investment Company
by its attorney, Matthew M. Nelson

Local Government Entity: Salt Lake City
Salt Lake County

Applicant for the Land Use Approval: Ciel Investment Company

Type of Property: Residential Building Lot

Date of this Advisory Opinion: February 5, 2013

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

Issues

May a City assert extraterritorial jurisdiction to regulate construction on wetland area within an area claimed by the City as a source of culinary water?

Summary of Advisory Opinion

As provided in the Utah Code, cities have extraterritorial jurisdiction to protect contamination of water sources. In particular, Salt Lake City has jurisdiction over the watershed areas of the Wasatch Mountains that provide culinary water for the City. That statutory authority enables the City to impose regulations and conditions on buildings and other uses intended to eliminate or minimize pollution of water sources. The City may therefore require a setback from a wetland area, and conditions on the design of a driveway, if the requirements would reasonably be expected to limit or prevent contamination of water resources. The City's authority, however, does not extend to requirements intended to protect wetland habitat, particularly in light of federal and state authority over those areas.

Review

A Request for an Advisory Opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE ANN. § 13-43-

205. 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 Matthew M. Nelson on August 6, 2012. A copy of that request was sent via certified mail to Christine Meeker, City Recorder for Salt Lake City, at 451 S. State Street, Salt Lake City, Utah. 84111. The City received that copy on August 21, 2012.

Evidence

The following documents and information with relevance to the issue involved in this Advisory Opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion, with attachments, submitted by Matthew M. Nelson, attorney for Ciel Investment Company, received by the Office of the Property Rights Ombudsman on August 6, 2012.
2. Response from the Salt Lake City, submitted by Lynn Pace, Deputy City Attorney, received October 2, 2012.

Background

Ciel Investment Company owns an option to purchase property located in the Silver Lake area near Brighton in Big Cottonwood Canyon. The parcel is identified as “Lot 23” of Silver Lake Estates subdivision, and is owned by Spencer and Elizabeth Greer. (*hereafter* the “Ciel Parcel”) The subdivision was platted in 1972, but there has been no development on Lot 23. The lot is about 2/3 of an acre, with a small stream flowing across one side. The stream flows into Silver Lake, which feeds Big Cottonwood Creek, an important water source for the Salt Lake Valley. The stream and its accompanying wetlands cover about 4/5 of the lot, with only about 5000 square feet not considered wetland.¹

For planning purposes, the Ciel Parcel is under the direct jurisdiction of Salt Lake County, which has adopted the “Foothills and Canyons Overlay Zone” (FCOZ) to govern development of the area. In addition to the County’s zoning ordinances, use of the parcel is regulated by the Salt Lake County Board of Health.² The stream and wetlands are subject to the Federal Clean Water

¹ The property owners obtained a “Wetlands Delineation Study” from Granite Environmental. This study analyzed the property, and determined the boundary of the wetland area. It appears that all parties accept the study’s conclusions about the wetland boundary.

² Like Salt Lake County, the Board of Health restricts building within 50 feet of a wetland area, but allows for reduction of the setback when necessary. The Board of Health also regulates the placement of cesspools and septic tanks, and limits animals within the watershed. It is not clear, however, if the Board of Health has objected to the home on Lot 23.

Act, which is administered by the U.S. Army Corps of Engineers. The wetland areas are also subject to regulation by the State of Utah, through its Department of Environmental Quality.

The County's FCOZ ordinance requires a 50-foot setback from any wetland areas, but the County planning staff may reduce that setback to 25 feet, as long as no more than 500 square feet of the area between 25 feet and 50 feet is used for a building.³ With this restriction, a 25-foot reduction would leave a possible building area of about 1,000 square feet on the Ciel Parcel. Another obstacle faced by the property owners is obtaining access across the wetland area to the parcel's buildable portion. Any disturbance of the wetlands, even temporary, requires permission from the Corps of Engineers.

For some time, the owners of Lot 23 have hoped to build a home on the parcel, but they have been prevented from developing the parcel due to concerns about the impact on the wetland area. In 2009, they applied for a variance to reduce the 50-foot setback to zero. The County objected to a variance which would completely eliminate the setback, but suggested a 10 foot setback, which would allow construction of a fair-sized building while still protecting the wetlands. The property owners submitted a revised building plan, which could be built with a minimum 12 foot setback.⁴ The County's Board of Adjustment approved the setback in June of 2009.⁵

In May of 2012, the Army Corps of Engineers granted a permit to fill a small portion of the wetland area for a driveway to the proposed home. The permit would allow the permanent loss of .017 acres (740.5 square feet) of the wetland. The materials submitted for this Opinion do not explain the nature or extent of the driveway design. One of the conditions imposed on the permit require compliance with the Utah Department of Environmental Quality's water quality regulations.⁶ The materials submitted for this Opinion did not include those regulations, or if any specific approval is required from the state.

In addition to county, state, and federal regulation, the parcel also falls under the jurisdiction of Salt Lake City. Although the upper part of Big Cottonwood Canyon is some distance from its boundaries, the City asserts regulatory authority over the mountainous areas within Salt Lake County, because the City receives most of its culinary water from the streams which flow from the canyons above the Salt Lake Valley's east side. The City asserts jurisdiction over the western slope of the Wasatch Mountains within Salt Lake County from City Creek Canyon to Little Cottonwood Canyon to protect its water resources and ensure clean water for the residents of the

³ This setback reduction is allowed under the FCOZ, and may be granted by the County's staff. It is not necessary for the property owner to obtain a variance. Without the reduction, no building is allowed in the 50-foot setback, reducing the potential building area on the Ciel Parcel to about 375 square feet. That area, however, would be further reduced by setbacks from the property boundaries, which are particularly necessary in the canyon to accommodate snow and stormwater runoff without burdening adjacent properties.

⁴ Because the wetland boundary is irregular, one corner of the building would be 12 feet from the wetland boundary, with the majority of the building about 14 feet from the boundary.

⁵ The materials submitted by the City indicate that the setback was reduced to 20 feet, not 12. The City also states that approval from the City was a condition imposed on the variance.

⁶ The Corps of Engineers added 7 conditions to the permit, including recording covenants to protect the wetland area, before and after photos of the project area, compliance with state water quality regulations, inspection, and certification of compliance.

City.⁷ The City bases its authority on § 10-8-15 of the Utah Code, which provides that cities may regulate uses around water sources, including entire watersheds. The City's jurisdiction is acknowledged by Salt Lake County, which provides for City approval in the FCOZ ordinance.⁸

After receiving the variance from Salt Lake County, the property owners sought permission from Salt Lake City.⁹ In October of 2009, the City responded, and indicated that it would only agree to a setback of 25 feet from the wetland boundary. The City also objected to the driveway design, stating that it preferred a design with little or no impact on the wetland, suggesting that the driveway could be built on piers or culverts that would allow water to flow underneath the driveway, rather than permanently filling a portion of the wetland.¹⁰ A third objection was raised to a proposed basement for the home, because of potential contamination of the water. However, it appears that the owners may have decided not to include a basement.¹¹

The City notes that it has had no contact with the property owners since the autumn of 2009. According to the materials submitted for this Opinion, the City has not changed its position since then. It believes that the owners may build an acceptable home on the property if the setback were 25 feet from the wetland boundary. In addition, the City feels that its proposal for the driveway is a reasonable alternative to permanently filling the wetland.¹² The property owners feel that the City has overstepped its authority, and its conditions for the home unreasonably limit the uses for the property.

Analysis

I. The City Has Regulatory Authority Over the Big Cottonwood Canyon Watershed in Order to Protect its Water Resources From Contamination.

The City has authority to regulate building and other activities on the Ciel Parcel in order to protect water sources from becoming polluted or contaminated. Section 10-8-15 of the Utah Code grants cities authority over water sources used to supply culinary and irrigation water, including jurisdiction over territory outside of city limits:

⁷ Other communities in Salt Lake County also rely on the canyon streams for water. *See also* SALT LAKE COUNTY CODE OF ORDINANCES, § 19.72.020(B)(2) (Salt Lake City has jurisdiction over the canyons in the eastern part of Salt Lake County).

⁸ SALT LAKE COUNTY CODE OF ORDINANCES, § 19.72.020(B)(2) ("Recognition of Salt Lake City Extraterritorial Jurisdiction").

⁹ According to the City, this permission was sought in 2009. The Corps of Engineers granted its permit in May of 2012.

¹⁰ The City's letter states that permanently filling the wetland would impact the downstream areas, leaving them dry. This letter was issued prior to the Corps of Engineers permit, so it is not clear if the approval granted by the Corps would allow water to flow past the obstruction.

¹¹ The materials submitted by the City, and the City's October, 2009 letter indicate that the owners had decided against a basement. However, the letter from the owner's attorney somewhat indicates that the owners may wish to include a basement. Since there was very little discussion of the basement in the materials submitted, this Opinion will presume that a basement is not an issue.

¹² The City simply proposed that the driveway be erected on piers or culverts, which would allow water to flow. The City did not submit an alternative design showing how these alternatives could be built, nor did it address the fill permit granted by the Corps of Engineers.

[Cities] may construct or authorize the construction of waterworks within or without the city limits, and for the purpose of maintaining and protecting the same from injury *and the water from pollution* their jurisdiction shall extend over the territory occupied by such works, and over all reservoirs, streams, canals, ditches, pipes and drains used in and necessary for the construction, maintenance and operation of the same, and over the stream or source from which the water is taken, for 15 miles above the point from which it is taken and for a distance of 300 feet on each side of such stream and over highways along such stream or watercourse within said 15 miles and said 300 feet; *provided, that the jurisdiction of cities of the first class shall be over the entire watershed*, except that livestock shall be permitted to graze beyond one thousand feet from any such stream or source; and provided further, that each city of the first class shall provide a highway in and through its corporate limits, and so far as its jurisdiction extends, which may not be closed to cattle, horses, sheep or hogs driven through any such city, or through any territory adjacent thereto over which such city has jurisdiction, but the board of commissioners of such city may enact ordinances placing under police regulations the manner of driving such cattle, sheep, horses and hogs through such city, or any territory adjacent thereto over which it has jurisdiction. *They may enact all ordinances and regulations necessary to carry the power herein conferred into effect, and are authorized and empowered to enact ordinances preventing pollution or contamination of the streams or watercourses from which the inhabitants of cities derive their water supply*, in whole or in part, for domestic and culinary purposes, and may enact ordinances prohibiting or regulating the construction or maintenance of any closet, privy, outhouse or urinal within the area over which the city has jurisdiction, and provide for permits for the construction and maintenance of the same. In granting such permits they may annex thereto such reasonable conditions and requirements for the protection of the public health as they deem proper, and may, if deemed advisable, require that all closets, privies and urinals along such streams shall be provided with effective septic tanks or other germ-destroying instrumentalities.

UTAH CODE ANN. § 10-8-15 (emphasis added). Since Salt Lake City is a “city of the first class,” it is entitled to assert jurisdiction over the entire watershed that supplies its water.¹³ The statute allows the City to “enact ordinances preventing pollution or contamination of the streams or watercourses . . .” Like all municipal governments, the City may

pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and

¹³ “A municipality with a population of 100,000 or more is a city of the first class” UTAH CODE ANN. § 10-2-301(2)(a). The population of Salt Lake City is approximately 190,000 people. Under the authority of § 10-8-15 the City’s jurisdiction includes the western slope of the Wasatch Mountains from City Creek Canyon to Little Cottonwood Canyon.

good order, comfort, and convenience of the city and its inhabitants, and for the protection of property in the city.

Id., § 10-8-84(1).¹⁴ Furthermore, “[w]hen the State has granted general welfare power to local governments, those governments have independent authority apart from, and in addition to, specific grants of authority to pass ordinances which are reasonably and appropriately related to the objectives of that power.” *State v. Hutchinson*, 624 P.2d 1116, 1126 (Utah 1980). There is thus ample authority to support the City’s assertion that it has jurisdiction over the watershed of Big Cottonwood Canyon, so that it may protect its water supply from pollution and contamination. In order to carry out its specific power to protect water resources, the City’s authority encompasses the right to regulate placement and design of buildings and other improvements.

The regulatory authority to protect water resources has existed for some time. In 1915, the Utah Supreme Court upheld Salt Lake City’s authority to prevent a property owner from allowing his horses to graze near a stream that supplied the City’s water. The Court concluded that a statute similar to § 10-8-15 authorized the City to assert extra-territorial jurisdiction over the stream, and restrict activities on the property.¹⁵ Fifteen years later, the Court again upheld a city’s extra-territorial jurisdiction over streams, which allowed regulation of private property.¹⁶

This does not mean, however, that the City’s authority is unlimited. In the first place, the City may only exercise those powers conferred by the state.

Local governments, as subdivisions of the State, exercise those powers granted to them by the State Legislature, . . . and the exercise of a delegated power is subject to the limitations imposed by state statutes and state and federal constitutions. A state cannot empower local governments to do that which the state itself does not have authority to do.

Id., 624 P.2d at 1126. Secondly, while the general welfare provision is considered an extremely broad grant of authority, “personal and property rights recognized by general law and guaranteed by organic provisions cannot unreasonably be restrained” *Id.*, 624 P.2d at 1125 (*quoting* 6 McQuillan, *Municipal Corporations* §§ 24.43-.44 (3d rev’d ed. 1969)). “Organic provisions” refers to constitutional protections, including protections against taking of private property for public purposes.¹⁷

¹⁴ Note that § 10-8-84 grants authority to carry out the powers conferred by Chapter 10-8, which includes the powers granted in 10-8-15.

¹⁵ *Salt Lake City v. Young*, 45 Utah 349, 145 P. 1047 (1915). The statute cited was Comp. Laws 1907, subd. 15, section 206, which is very similar to § 10-8-84. *See id.*, 45 Utah at 350, 145 P. at 1049.

¹⁶ *Bountiful City v. De Luca*, 77 Utah 107, 292 P. 194 (1930).

¹⁷ *See Colman v. Utah State Land Board*, 795 P.2d 622, 630 (Article I, § 22 of the Utah Constitution (*i.e.*, the takings clause) is “self-executing,” meaning that it is not dependent upon specific legislation). The Utah Supreme Court in *DeLuca* explored the possibility that a regulation intended to protect water resources may be so restrictive as to constitute a taking of the affected property.

II. The Setback and Design Restrictions are Valid, If They are Reasonably and Appropriately Related to Protecting Water Sources from Contamination

The City's regulations affecting the placement of buildings and the design of the driveway are valid, if they are reasonably and appropriately related to the City's objective of limiting contamination of its water resources. The required setback from the wetland boundary is an appropriate means to limit contamination, because it separates the building and other activities from the wetland itself. All parties seem to acknowledge, however, that a 50-foot setback would severely restrict a building on the property. Both Salt Lake County and Salt Lake City appear to accept a reduction in the setback, although the amount of the reduction is disputed.¹⁸ That discrepancy in the setback reduction will need to be resolved, so that the property owner has an opportunity to present a building design that might work. The setback reduction may also include reasonable conditions on the building meant to protect the wetland area.

While the City has jurisdiction to approve the driveway design, that jurisdiction stems from the City's interest in protecting its water sources from pollution, and not protection of the wetland habitat. The state and federal governments have authority to protect wetlands. Cities do not. Section 10-8-15 of the Utah Code provides that cities are "authorized and empowered to enact ordinances preventing pollution or contamination of the streams or watercourses from which the inhabitants of cities derive their water supply" UTAH CODE ANN. § 10-8-15. This authority may be considered quite broad, but it nevertheless must be focused on preventing pollution or contamination.

The City objects to filling a portion of the wetland (not the stream) to support the driveway, because water could not flow through the filled area into the downstream wetland.¹⁹ This objection is problematic if the City's concern is not to prevent pollution, but to preserve wetlands. Even if the wetland is filled for the driveway, the amount of water in the area would not change.²⁰ Other than some initial disturbance due to construction, the water would not necessarily be polluted if a portion of the wetland area were filled.²¹ The City would be within its authority to impose conditions that would prevent contaminated runoff from the driveway, but for the purpose of protecting its drinking water source, not to protect the habitat.

In addition, the Army Corps of Engineers has already granted permission to fill a portion of the wetland for the driveway. The City has not explained how its authority includes power to

¹⁸ The materials submitted by Salt Lake City indicate that it would be willing to consider reducing the setback from 50 to 25 feet, but the City has not approved any reduction.

¹⁹ See Letter from Jeffry T. Niermeyer to Scott Balling and Walter J. Plumb, dated October 1, 2009. The response letter from Salt Lake City, dated September 28, 2012, echoes this assertion.

²⁰ The water comes from naturally-occurring precipitation, which would not change if the home and driveway were built. The water would continue to flow downstream around the obstruction. It does not appear that the property owners intend to block the stream or divert water from the system and prevent the City from using it.

²¹ It is not clear from the materials submitted for this Opinion whether the fill would completely dam the wetlands, or if there would still be an area beneath the driveway that would not be disturbed. It is also not clear that the downstream wetlands rely on flow from the upstream wetlands, or if the water comes from other sources. This Opinion presumes that the fill would not affect the flow of the stream itself, but only the wetland areas along the bank.

override a permit from the federal government. Along with the Federal Government, the state has regulatory authority, which is referenced in the permit from the Corps of Engineers. The City has also not explained how it may override any state approval for the anticipated work.²²

While preservation of wetland habitat and prevention of water pollution are laudable objectives, the City's authority stems only from its interest in preventing pollution, and not habitat protection. The state and federal governments have asserted their authority over the wetlands, and have not conveyed that authority to cities. The City is within its authority to require conditions intended to eliminate or minimize pollution of the water, but that authority does not include habitat protection.

That being said, this Opinion suggests that the property owners consider the City's proposed alternatives to the driveway support. Using piers or culverts seems to be as practical as filling a portion of the wetland, and each alternative appears to be satisfactory to the City. In addition, either alternative seems to have less impact on the wetland habitat. It is not known if pursuing these alternative methods will affect the approval already granted by the Corps of Engineers, but if the impact on the wetland is less, it stands to reason that the Corps would not object.

Conclusion

Salt Lake City has authority over the Wasatch Mountain watersheds that provide its water supply. The Utah Code provides that cities may assert jurisdiction over watershed areas to protect water sources, even if those areas are not within the limits of the city. This statutory authority is fairly broad, and empowers Salt Lake City to regulate building and other activities in order to protect its water resources from pollution and contamination.

The City's authority is not without limits, however. The City's jurisdiction stems from its interest in protecting water sources from pollution, not preserving wetland habitat. Thus, the City may impose regulations and conditions intended to eliminate or minimize pollution, but it should not be able to use its regulatory authority as a means of protecting wetlands, especially when federal and state authorities already have asserted jurisdiction.

The City's setback requirement is a valid means of protecting its water resources, and is harmonious with regulations imposed by Salt Lake County and the Salt Lake County Board of Health. The City has indicated that it will consider a reduction in the setback to allow a home to be built.

The City's objections to the driveway design, particularly permission to fill a small portion of the wetland to support the driveway, is more problematic. The objection does not appear to be based on the City's interest in preventing pollution. It has also not been shown that the City has authority to overrule federal and possible state authority over the wetland area. However, the

²² Other than the reference cited by the Corps of Engineers, there were no materials from the State of Utah submitted for this Opinion which concerned the proposed construction.

alternative designs proposed by the City should be considered by the property owner, as they appear to be practical approaches acceptable to the regulatory agencies involved.

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 Utah 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 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 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 be awarded reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the Advisory Opinion to the date of the court's resolution.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Christine Meeker, City Recorder
Salt Lake City
451 South State, Room 415
Salt Lake City, UT 84111

On this _____ day of February, 2013, 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