

Advisory Opinion #194

Parties: Ross Ford, Utah Homebuilders Association; Summit County

Issued: February 22, 2018

TOPIC CATEGORIES:

Requirements Imposed Upon Development Compliance with Mandatory Land Use Ordinances

Local governments possess broad authority to regulate the use of land and buildings within their boundaries. This authority is limited by State law. Since State law does not expressly prohibit local governments from regulating where fireplaces may be allowed or prohibited, the County may prohibit solid fuel burning devices in all new construction.

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.



The Office of the Property Rights Ombudsman
Utah Department of Commerce
PO Box 146702
160 E. 300 South, 2nd Floor
Salt Lake City, Utah 84114

(801) 530-6391
1-877-882-4662
Fax: (801) 530-6338
www.propertyrights.utah.gov
propertyrights@utah.gov



GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

FRANCINE A. GIANI
Executive Director

BRENT N. BATEMAN
Lead Attorney, Office of the Property Rights Ombudsman

ADVISORY OPINION

Advisory Opinion Requested By: Ross Ford, Executive Officer, Utah Home Builders Association

Local Government Entity: Summit County

Type of Property: Residential

Date of this Advisory Opinion: February 22, 2018

Opinion Authored By: Jordan S. Cullimore
Office of the Property Rights Ombudsman

ISSUE

May Summit County prohibit wood burning fireplaces in all new residential construction within the Snyderville Basin?

SUMMARY OF ADVISORY OPINION

Local governments possess broad authority to regulate the use of land and buildings within their boundaries. This authority is limited by State law. Since State law does not expressly prohibit local governments from regulating where fireplaces may be allowed or prohibited, Summit County may prohibit solid fuel burning devices in all new construction within Snyderville Basin.

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 Ross Ford on November 15, 2017. A copy of that request was sent via certified mail to Thomas C. Fisher, County Manager, Summit County, at 60 North Main Street, Coalville, Utah. The County received the request on November 20, 2017.

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 Ross Ford on November 15, 2017.
2. Reply from David L. Thomas, Attorney for Summit County, received November 22, 2017.
3. Response from Ross Ford, received November 27, 2017.

BACKGROUND

In 2015, Summit County adopted an ordinance prohibiting the installation of solid fuel burning devices, such as wood burning fireplaces, in all new construction. The Home Builders Association of Utah (HBA), a trade association representing home builders and associated industries, has requested this advisory opinion. The HBA asserts that Summit County's ordinance violates State law. The HBA argues that the County's ordinance prohibiting wood burning devices in residential construction is illegal and unenforceable because certain provisions of the State Construction Code already address the construction and installation of wood burning fireplaces.

ANALYSIS

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

[C]ounties may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that they consider necessary or appropriate for the use and development of land within the unincorporated area of the county or a designated mountainous planning district, including ordinances, resolutions, rules, restrictive covenants, easements, and development agreements governing uses, density, open spaces, structures, buildings, energy-efficiency, light and air, air quality, transportation and public or alternative transportation, infrastructure, street and building orientation and width requirements, public facilities, fundamental fairness in land use regulation, considerations of surrounding land uses and the balance of the foregoing purposes with a landowner's private property interests, height and location of vegetation, trees, and landscaping, unless expressly prohibited by law.

UTAH CODE § 17-27a-102(1)(b). This authority, based in the interest of the public health, safety, and welfare, and promoting the standards of the community, is broad and subject to very deferential discretion. While local government discretion to impose land use regulations is broad, it also has limits. Local authority to enact ordinances governing land use and development only exists “unless expressly prohibited by law.” *Id.* Where State law expressly prohibits a local government’s action, the action will be invalid.

Mr. Ford argues that Summit County exceeded its authority when it enacted the following County Ordinance prohibiting installation of solid fuel burning devices in new construction:

10-4-2: ENVIRONMENTAL CRITERIA

- A. Air Quality: Developments which produce emissions to the air shall, at a minimum, demonstrate compliance with all state air quality standards, as evidenced by the issuance of any permits required for their emissions by the state.
 - 1. Solid Fuel Burning Devices Prohibited: The installation of a solid fuel burning device in any development within the Snyderville Basin planning district is prohibited.
 - 2. Burning Of Certain Materials Prohibited: The burning of the following materials within the Snyderville Basin planning district is prohibited:
 - a. Garbage,
 - b. Treated wood,
 - c. Plastic products,
 - d. Rubber products,
 - e. Waste petroleum products,
 - f. Paints and paint solvents,
 - g. Coal, or
 - h. Any other material not intended by a manufacturer for use as fuel in a wood burning fireplace, wood burning heater, or outdoor wood burning device.
 - i. Open burning of building materials, rubbish or garbage, except ordinary yard waste when permitted by the fire district.
 - 3. Exceptions To Solid Fuel Burning Device Prohibition: The prohibition set forth in subsection A1 of this section does not apply to:
 - a. The installation of a solid fuel burning device where the device acts as the sole source of heat for a structure, and said device meets the applicable minimum EPA requirements for clean burning devices as set forth in title 40, part 60, subpart AAA of the code of federal regulations, as amended, "Standards Of Performance For New Residential Wood Heaters", which regulations are incorporated herein by this reference ("EPA standard"); or
 - b. The installation of a solid fuel burning device where natural gas or propane service is unavailable, and said device meets the EPA standard.

4. Upgrades To Existing Solid Fuel Burning Devices: Existing solid fuel burning devices which do not meet the EPA standard may be upgraded to a device that does meet the EPA standard without violating this subsection A.
5. Wood Fired Pizza Ovens: A wood fired pizza oven utilized in a restaurant which receives an approval to operate from the Summit County health department is exempt from this subsection A.
6. Home Heating Rebate Program; There is hereby granted a carbon footprint rebate ("rebate") of up to one hundred dollars (\$100.00) toward any Summit County building permit fee for each development activity which results in the elimination of an existing solid fuel burning device; or the replacement of such device with an electric or gas fueled fixture, or with an approved solid fuel burning device meeting the EPA standard as set forth in subsection A4 of this section. Such rebate shall be granted upon approval of the building permit or permits for the remodeling activity resulting in the elimination or replacement of the existing solid fuel burning device. (Ord. 847, 8-5-2015)

SUMMIT COUNTY CODE § 10-4-2.

Mr. Ford asserts this provision is unlawful and that the County may not prohibit wood burning stoves¹ because the State Construction Code makes it illegal to do so. Utah Code § 15A-1-204(8) states that, except in limited circumstances not applicable to this case, a county “may not, after December 1, 2016, adopt or enforce a rule, ordinance, or requirement that applies to a subject specifically addressed by, and that is more restrictive than, the State Construction Code.”

The State Construction Code has adopted the 2015 International Residential Code (“2015 IRC”) as the applicable building code for residential construction in Utah. *See* Utah Code 15A-2-103(1)(b). Chapter 10 of the 2015 IRC addresses construction and installation of fireplaces.² Mr. Ford argues that since the 2015 IRC addresses installation of fireplaces in residential construction, any attempt by the County to prohibit fireplaces is “expressly prohibited by law.” *See* UTAH CODE 17-27a-102(1)(b).

While it is true that Chapter 10 of the 2015 IRC regulates *how* fireplace must be constructed or installed when permitted, it does not expressly address *where* fireplaces may be allowed or prohibited within the state.

Mr. Ford references this Office’s Advisory Opinion #189, which concluded that local governments may not require fire sprinklers in residential construction except in accordance with Utah Code § 15A-5-203(1)(a). This provision expressly addresses circumstances in which local governments may require fire sprinkler systems in residential construction. A similar State Code

¹ Mr. Ford, in his Request for Advisory Opinion, briefly indicates that the County is expanding the prohibition to gas fireplaces. The County, in its response, has indicated that the ordinance only applies to solid fuel burning fireplaces, and that gas fireplaces are allowed.

² *See* Chapter 10, 2015 International Residential Code, at <https://codes.iccsafe.org/public/document/IRC2015/chapter-10-chimneys-and-fireplaces>.

provision addressing circumstances in which a local government may prohibit fireplaces does not exist. State law does not expressly prohibit local governments from dictating where fireplaces may be allowed or prohibited within their borders. Accordingly, Summit County may prohibit the installation of solid fuel burning devices pursuant to its broad authority to regulate the use of land and structures under LUDMA. As with fire sprinklers, State legislation directly addressing this matter may be the best way to accomplish the Homebuilder's objectives.

CONCLUSION

Local governments possess broad authority to regulate the use of land and buildings within their boundaries. This authority is limited by State law. Since State law does not expressly prohibit local governments from regulating where fireplaces may be allowed or prohibited, Summit County may prohibit solid fuel burning devices in all new construction within Snyderville Basin.

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

NOTE:

This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

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

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

MAILING CERTIFICATE

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

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

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

Thomas C. Fisher, County Manager
Summit County
60 North Main
Coalville, Utah 84017

On this 23rd Day of February, 2018, 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