

Advisory Opinion #7

Parties: Nathan Zollinger and Nibley City

Issued: September 6, 2006

TOPIC CATEGORIES:

D: Exactions on Development

R(v): Other Topics (Interpretation of Ordinances)

A local government may require connection to a sewer system, but only if the property is no more than 300 feet from the nearest sewer line. A ban on septic systems should not operate as a “back-door” approach to require hookups to lines more than 300 feet away.

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



JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

Advisory Opinion

Advisory Opinion Requested by: Nathan Zollinger

Local Government Entity: Nibley City

Applicant for the Land Use Approval: Nathan Zollinger

Project: Proposed Single Family Dwelling
Approx. 4080 Hollow Road, Nibley

Date of this Advisory Opinion: September 6, 2006

Issues: Can the City of Nibley require Zollinger to connect to the city sewer system as part of its review of a building permit/conditional use permit application?

Assumed Facts:

1. Nathan Zollinger owns a building lot at approximately 4080 Hollow Road in Nibley City, Cache County.
2. Zollinger applied for a conditional use permit under the city ordinances, which is required as his lot lies within the flood plain.
3. Zollinger also has applied for a building permit.
4. The Nibley Planning Commission denied approval of Zollinger's permits, in part because he refused to connect his new home to the City sewer system.
5. The Nibley City Council denied Zollinger's appeal of the Planning Commission denials in July of 2006.

Review:

The request for an advisory opinion in this matter was received by the Office of the Property Rights Ombudsman on July 7, 2006. A letter with the request attached was sent by certified mail, return receipt requested, to Nibley City on July 10, 2006. The letter was addressed to Larry Ahnder, City Administrator, at the address shown on the Governmental Immunity Act Database at the Utah State Department of Commerce, Division of Corporations and

Commercial Code as required by statute. The letter was received by the City on July 11, 2006. My decision to proceed with the preparation of the opinion was made on July 28, 2006.

Prior to the preparation of this opinion, I discussed the matter with Nathan Zollinger, the applicant and with Larry Ahnder. I also met with Larry and Mayor Gerald Knight at Nibley City on August 4, 2006. Larry drove with me to the property involved where I physically inspected it.

Analysis:

Requirement to Connect to Sewer:

According to Utah Code Annotated, Section 10-8-38(2)(a):

In order to defray the cost of constructing, reconstructing, maintaining, or operating a sewer system or sewage treatment plant, a municipality may:

(i) require connection to the sewer system if the sewer is available and within 300 feet of the property line of a property with a building used for human occupancy;

and

(ii) make a reasonable charge for the use of the sewer system.

In the case of *Harding v. Alpine City*, the Utah Supreme Court held:

We find that the statute (U.C.A. 10-8-32(2)(a)) limits the City's powers, for, as plaintiff points out, if the City were permitted to reach beyond 300 feet the words "300 feet" in the statute would have no meaning. The enactment of an ordinance requiring sewer hookups from all properties lying within 500 feet of a sewer line is clearly beyond the City's powers . . .

656 P.2d 985 (Utah 1982). (Citation to statute added) As a matter of law, with a case exactly on point, the Utah Supreme Court has resolved this issue. Nibley may not require Zollinger to connect to the sewer if his property lies more than 300 feet from the city sewer lines.

The City appears to have an ordinance prohibiting the installation of septic tanks within the area where the Zollinger property is located. Under the *Harding* precedent, the City cannot require a property owner to connect to the city sewer if the sewer is more than 300 feet from his property. If by ordinance, the City bans all septic tanks in the same area, then it could be claimed that the city has "back-doored" a mandatory connection in violation of state law. That would not be allowed under *Harding*. The City simply cannot require Zollinger to connect to its sewer system so long as his property lies more than 300 feet from a city sewer line.

The remedy to this restriction is straightforward. If the City considers it a matter of significant health and safety to have the Zollinger home connected to the sewer, it should bring the sewer line within three hundred feet of Zollingers property line. Zollinger would then have to connect if the Nibley ordinances require such a connection within that distance.

Since Zollinger's time to appeal the city council decision to court has passed, he must originate a new building permit/conditional use permit application. The City could not legally condition approval on connection to the City sewer system nor deny the permits based solely on his refusal to connect to City sewer.

Craig M. Call, Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, 13-42-205. 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.

MAILING CERTIFICATE

Utah Code Annotated Section 13-43-206(10)(b) requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with U.C.A. Section 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:

Larry Ahnder, City Administrator
Nibley City
625 West 3200 South
Nibley, UT 84321

On this Sixth day of September, 2006, 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.

Craig M. Call, Office of the Property Rights Ombudsman