

# Advisory Opinion #248

Parties: Union Block, LLC, Brigham City

Issued: December 27, 2021

## TOPIC CATEGORIES:

**Compliance with Land Use Ordinances**  
**Entitlement to Application Approval (Vested Rights)**  
**Interpretation of Ordinances**  
**Requirements Imposed on Development**

Cities have the authority and obligation to enforce the state fire code and rules of the state fire marshal within the boundaries of the city. Accordingly, the city may require an applicant to meet all applicable fire code standards, including the requirement to retrofit the first floor of an historic building with a fire suppression system so the second floor may be occupied by residences. The city may require such even where it made an initial determination that did not specify sprinklers would be required on the first floor, and where the first-floor renovations have been completed and the space is now occupied by a retail tenant.

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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, 2<sup>nd</sup> Floor  
Salt Lake City, Utah 84114

(801) 530-6391  
1-877-882-4662  
Fax: (801) 530-6338  
[www.propertyrights.utah.gov](http://www.propertyrights.utah.gov)  
[propertyrights@utah.gov](mailto:propertyrights@utah.gov)



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# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

MARGARET W. BUSSE  
*Executive Director*

JORDAN S. CULLIMORE  
*Division Director, Office of the Property Rights Ombudsman*

### ADVISORY OPINION

Advisory Opinion Requested By: Union Block, LLC

Local Government Entity: Brigham City

Applicant for Land Use Approval: Union Block, LLC

Type of Property: Mixed Use

Date of this Advisory Opinion: December 27, 2021

Opinion Authored By: Marcie M. Jones, Attorney  
Office of the Property Rights Ombudsman

### ISSUE

Can the city require a developer to upgrade the fire suppression system on the first floor an historic building where the first-floor renovations are complete, and is occupied by a retail tenant, and new residential units are now planned for the second floor?

### SUMMARY OF ADVISORY OPINION

Cities have the authority and obligation to enforce the state fire code and rules of the state fire marshal within the boundaries of the city. Accordingly, the city may require an applicant to meet all applicable fire code standards, including the requirement to retrofit the first floor of an historic building with a fire suppression system so the second floor may be occupied by residences. The city may require such even where it made an initial determination that did not specify sprinklers would be required on the first floor, and where the first-floor renovations have been completed and the space is now occupied by a retail tenant.

### 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 David R. Walker, Managing Partner, Union Block, LLC on April 30, 2021. A copy of that request was sent via certified mail to Christa Boss, City Recorder, Brigham City, PO Box 1005, Brigham City, Utah 84302 on May 12, 2021.

## **EVIDENCE**

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

1. Request for an Advisory Opinion was received from David R. Walker, Managing Partner, Union Block, LLC on April 30, 2021.
2. Response submitted by Michael E. Christiansen, City Attorney, Brigham City, dated June 3, 2021.
3. Response submitted by David R. Walker dated June 15, 2021.

## **BACKGROUND**

Union Block LLC (“Union Block”) is renovating the Union Block building, also known as the C.W. Knudson Building, at 57 S. Main Street in Brigham City (the “City”). The building was constructed in 1892 and is listed on the national Register of Historic Places. The renovation work is being completed in three distinct phases with separate building permits and certificates of occupancy applied for and issued for each separate phase as needed.

Phase I – Renovation of the first floor into retail space. A building permit for this work was issued in 2018 and renovations completed in 2019. A certificate of occupancy was issued in 2019 and a tenant currently operates a retail store throughout this space.

Phase II – Restoration/renovation of the front façade of the building. A building permit was issued in 2019 and at the time of submission of the request for Advisory Opinion, the work was approximately 50% complete.

Phase III – Renovation of the second floor into residential units. At the time of submission of the request for Advisory Opinion, a building permit had been issued with a deferral regarding fire suppression.

Regarding Phase III, the Brigham City Fire Marshall and Building Official issued an initial written determination and decision letter for the fire suppression system on June 10, 2020 (the “Initial Determination” letter). That letter was based on information submitted by Union Block identifying the occupancy type for the building, the proposed fire alarm system, measurements from “As Built” architectural drawings and came after several on-going conversations between Union Block and Brigham City regarding this phase of the development.

The Initial Determination identified the applicable sections of the International Fire Code relating to fire suppression systems and indicated that “among other requirements, a fire suppression system must be installed within the second floor (R-2 residential occupancy) area and spaces wherein this occupancy is found.”

Based on the understanding that fire suppression systems would only be required on the second floor, Union Block LLC (“Union Block”) proceeded with the proposed renovation work, on the second floor and had their architect create a more detailed fire suppression plan.

In accordance with Brigham City’s regulations, on or about January 15, 2021, Union Block submitted the detailed fire suppression plans to West Coast Code Consultants, Inc., with whom Brigham City contracts for fire plan review. About a week later, West Coast Code Consultants issued a letter stipulating that for residential occupancy on the second floor, a sprinkler system would be required not only on the second floor, but on the first floor as well. West Coast Consultants maintained this determination despite suggestions from an architect familiar with historic preservation arguing that the International Existing Building Code (“IEBC”) permits some exceptions or allowances for new occupation within existing buildings.

Shortly thereafter, the Chief Building Official for Brigham City issued a Building Safety Division Multi-Family Plan Review, notifying Union Block of outstanding issues which needed to be resolved prior to the issuance of a permit, including making mandatory the installation of a sprinkler system not only the second floor, but also the first floor if the second floor is to be occupied by residences (the “Final Determination” letter). The Chief Fire Official purportedly conveyed to Union Block that “his previous interpretation of code was incorrect.”<sup>1</sup>

The difference between the Initial Determination—requiring fire sprinklers only on the second floor—and the Final Determination—requiring that sprinkling also be added to the first floor—is a huge expense and inconvenience. Union Block is arguing that the Initial Determination was a final decision which cannot later be revoked. Union Block further argues that the Certificate of Occupancy for the first floor has already been issued, and similarly cannot now be revoked.

Brigham City is arguing that the Initial Determination was made with incomplete information, before a fire suppression plan had been drafted or submitted for review. Further, Brigham City asserts it has established regulations governing approval of automatic fire sprinkler systems, which are publicly available on their website, and clearly stipulate that two sets of drawings of the proposed plan must be submitted and are subject to an approved peer review. The City maintains Union Block knew or should have known the Initial Determination was not a final approval because they knew complete plans for the sprinkler system had not been submitted or reviewed. Furthermore, the City argues that Union Block’s submittal of the detailed fire suppression plans for review indicates that they understood the Initial Determination letter was not any sort of final decision.

The City further argues that the Initial Determination stipulated that “*among other requirements*, a fire suppression system must be installed within the second floor (R-2) occupancy and spaces

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<sup>1</sup> Response submitted by David R. Walker dated June 15, 2021.

wherein this occupancy is found.”<sup>2</sup> The Initial Determination did not set forth all requirements on the fire suppression system, but rather set forth the code sections that were required to be followed.

The City notes that Union Block does not dispute the correct application of the International Fire Code and National Fire Protection Association by West Coast Code Consultants, and that Union Block was proceeding with construction at their own risk.

Union Block has requested this Advisory Opinion to determine whether Brigham City can impose the requirement to sprinkle the entire building where a certificate of occupancy has already been issued for the first-floor construction project, and the Initial Determination letter only specifically mentions fire suppression system improvements for the second floor.

## ANALYSIS

### **I. City may require the fire code standards be met, including that the entire building be sprinklered before the second floor can be occupied by residences.**

The Utah legislature has enacted the State Fire Code Act, which is an adoption of national codes including the 2018 edition of the International Fire Code (“IFC”), as modified by the legislature<sup>3</sup>. The 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.”<sup>4</sup> The Utah legislature delegates to local governments the authority to “enforce the state fire code and rules of the state fire marshal in their respective areas.”<sup>5</sup> In accordance with that statutory direction, City adheres to the State Fire Code by ordinance as contained in Brigham City Code Section 5.01.020

In addition to making the relevant sections of code otherwise available to the public, the City has made available online the applicable guidelines for seeking building permit approval to assist land use applicants. Those guidelines state that “each applicant is required to submit two sets of drawings and subject the fire system to a peer review.”<sup>6</sup>

Union Block has argued that they worked with the City extensively throughout this process and relied in good faith upon the Initial Determination letter in moving forward with renovation plans for the second floor. They argue that “Determination and decision letters issued by Building Officials are fundamental to construction planning and development. Reversing such a decision places an unacceptable time and expense burden” on property owners. Accordingly, Union Block argues that the City should be held to only those requirements specified in the Initial Determination.

However, the Initial Determination was issued after Union Block had only submitted preliminary information. At that time, the City did not have the detailed fire suppression plan, nor had the third-

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<sup>2</sup> Response submitted by Michael E. Christiansen, City Attorney, Brigham City, dated June 3, 2021.

<sup>3</sup> UTAH CODE § 15A-1-103; Utah Code Section 15A-1-403.

<sup>4</sup> UTAH CODE § 15A-1-403(1)(a)(ii).

<sup>5</sup> UTAH CODE § 53-7-104, *see also* Osmond Senior Living LLC v. State Dep’t of Pub. Safety, 2018 UT App 218.

<sup>6</sup> Response submitted by Michael E. Christiansen, City Attorney, Brigham City, dated June 3, 2021.

party review been completed. It is apparent the Initial Determination was not a final and complete decision because Union Block later submitted the required detailed fire suppression plans for third-party review. Further, the Initial Determination references the relevant specific international fire code sections which relate to automatic sprinkler systems for residential uses (which require both floors be sprinklered) and stated “among other requirements, a fire suppression system must be installed within the second-floor occupancy. . .”. It is unfortunate that the Fire Marshal and Chief Building Official did not specifically anticipate that the first floor would also need to be sprinklered at that time. Nonetheless, their initial determination did not foreclose the required complete review at a later date.

The required review occurred when Union Block submitted the completed fire suppression plans to West Coast Consultants which resulted in the Final Determination letter requiring that the fire suppression system include sprinklers on both the first and second floors. The City has the authority and obligation to enforce the state fire code and rules of the state fire marshal in their respective areas. As such, the City is obligated to follow the fire suppression system required by the International Fire Code, and, while it may have discretion to make allowances, it is not compelled to reduce those fire and safety systems because the International Existing Building Code may permit some allowance.

Even if the Initial Determination were some sort of final decision, Utah Courts have given deference to municipalities protecting the safety of building occupants. For instance, in *Cloud v. Washington City*<sup>7</sup>, the City “issued a building permit and conducted vigorous inspections throughout the course of construction [of a warehouse] but never expressly mentioned that an automatic sprinkler system would need to be installed for the building to comply with fire code. The completed warehouse did not include an automatic sprinkler system.” Once construction was finalized, the city refused to issue a certificate of occupancy because it did not comply with fire code. The parties attempted to resolve the issue through mediation, proposed waivers, an appeal to the Utah Fire Prevention Board, and several lawsuits. Ultimately, the court held that the warehouse developer had no cause of action and that the City could require the sprinkler system prior to occupancy.

There are many instances in land use law where fairness dictates that ordinances are interpreted in favor of the property owner. For instance, because zoning laws are a derogation of private property rights, any ambiguity in zoning ordinances are interpreted in favor of the property owner.<sup>8</sup> Similarly, Utah has vesting laws which are very protective of property owners whereby a land use applicant is entitled to consideration of an application under the ordinances in place when the application is filed, even if the ordinances are subsequently changed.<sup>9</sup>

Utah courts have determined that interpreting zoning ordinances in favor of property owners and vesting rights at the time of complete application is the “fair” or “equitable” outcome when balancing property owner interests with that of the government. However, in this instance, and others involving fire and safety regulations, we find no similar deference.<sup>10</sup> It appears that in these

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<sup>7</sup> 2012 UT App 348.

<sup>8</sup> See, e.g. *Patterson v. Utah County Bd. Of Adjustment*, 893 P.2d 602 (Utah App. 1995).

<sup>9</sup> UTAH CODE §§ 10-9a-509(1)(a) and 17-27a-508(1)(a).

<sup>10</sup> See, e.g. *Osmond Senior Living LLC v. State Dep’t of Pub. Safety*, 2018 UT App 218.

cases the safety of the future residents supersedes potential financial burdens placed on a developer, even as a result of a permitting authority's oversight.<sup>11</sup>

In this instance, the balance is not just the responsibility of the City to enforce ordinances on the one hand and the investment backed expectations of the owner on the other, but also includes the public interest of safety of the future residents.<sup>12</sup> In this three-way race, the safety of the public wins.

We note that the same state statute that delegates authority and obligation to enforce the state fire code to the City also requires a process by which those decisions may be appealed. "A compliance agency shall establish a method of appeal by which a person disputing the application and interpretation of a [fire] code may appeal and receive a timely review of the disputed issues in accordance with the [fire] codes."<sup>13</sup> Union Block has argued that Steven Cornell, State Historic Preservation Office Architect, believes that the Initial Determination was sufficiently in compliance with International Existing Building Code ("IEBC"). Depending on the strength of these arguments, Union Block may consider seeking relief under this line of reasoning through the appeal process, while recognizing that the fire code often gives significant decision-making discretion to the permitting authority.<sup>14</sup>

Union Block has argued that the City is effectively retroactively revoking their Certificate of Occupancy on the first floor. That is not the case. We are mindful that requiring the installation of fire suppression system on the first floor, which is already occupied, is quite expensive and burdensome. However, whether the first-floor improvements had been completed weeks ago, or years ago, the extra fire suppression system improvements would be necessary for residential occupancy of the second floor. If the second floor remains vacant or is built out as office or retail space, it appears the first floor could remain occupied without further improvements.

In summary, the City has the authority and obligation to enforce the state fire code and rules of the state fire marshal within the boundaries of the City, and the Final Determination letter is within that authority. Accordingly, we find that the City may require the fire code standards be met, including the determination that the entire building be sprinklered before the second floor may be occupied by residences.

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<sup>11</sup> See, e.g. UTAH CODE § 10-9a-509(1)(i) stating that "A municipality 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 . . ." (emphasis added).

<sup>12</sup> See, e.g. *Patterson v. American Fork*, 2003 UT 7 ¶ 27 (finding that the city's ability to protect the public interest in a land development case supersedes the duty to always adhere to formal requirements of applicable land use ordinances).

<sup>13</sup> *Osmond Senior Living LLC v. State Dep't of Pub. Safety*, 2018 UT App 218 quoting Utah Code Section 53-7-204(4)(b).

<sup>14</sup> The scope of this opinion does not include an analysis of whether the fire authority's determination is, in fact, correct. It simply concludes that the City, in this case, may require an applicant to comply with necessary health/safety requirements.

## CONCLUSION

The City has the authority and obligation to enforce the state fire code and rules of the state fire marshal within the boundaries of the City. The determination that the first and second floor be served by fire suppression sprinklers in order for the second floor of a renovated historic building be occupied by residences is within that authority and otherwise lawful.



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.**

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**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 § 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.**