

Advisory Opinion #250

Parties: Scott Bracken, Weber County

Issued: January 20, 2022

TOPIC CATEGORIES:

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

The 75-foot building setback required by the Weber County stream corridor ordinance applies to naturally occurring, year-round streams. The watercourse running along the rear property line of the subject property is manmade and conveys water only a few months of the year. Furthermore, while the Stream Map does offer a conflicting depiction of “stream,” such ambiguity is interpreted in favor of the property owner. Therefore, according to the plain language of the county ordinance defining a “stream”, the 75-foot building setback does not apply to the watercourse in this case.

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ADVISORY OPINION

Advisory Opinion Requested By: Scott Bracken
Local Government Entity: Weber County
Applicant for Land Use Approval: Scott Bracken
Type of Property: Residential
Date of this Advisory Opinion: January 20, 2022
Opinion Authored By: Marcie M. Jones, Attorney
Office of the Property Rights Ombudsman

ISSUE

Did Weber County correctly interpret applicable county code provisions when it imposed a 75-foot stream setback from a manmade irrigation channel which is dry several months of each year?

SUMMARY OF ADVISORY OPINION

The 75-foot building setback required by the Weber County stream corridor ordinance applies to naturally occurring, year-round streams. The watercourse running along the rear property line of the subject property is manmade and conveys water only a few months of the year. Furthermore, while the Stream Map does offer a conflicting depiction of “stream,” such ambiguity is interpreted in favor of the property owner. Therefore, according to the plain language of the county ordinance defining a “stream”, the 75-foot building setback does not apply to the watercourse in this case.

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 Scott Bracken on September 27, 2021. A copy of that request was sent via certified mail to Ricky D. Hatch, CPA, Counter Clerk / Auditor Weber County, 2380 Washington Boulevard, Suite 320, Ogden, Utah 84401 on September 28, 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, submitted by Scott Bracken on September 27, 2021.
2. Response letter submitted by Steve Burton, Principal Planner, Weber County Planning Division on November 2, 2021.
3. Documents submitted by Scott Bracken on November 10, 2021.

BACKGROUND

Scott Bracken ("Bracken") purchased a parcel of land in Eden, Utah on which he plans to build a residence. The lot is bordered by a watercourse that runs along the rear boundary line. Bracken designed home building plans using a 50' building setback from this rear property line as required on the recorded subdivision plat and in the relevant zoning ordinances. Bracken submitted a building permit request to Weber County Planning Division ("County") depicting the same.¹

The County reviewed and denied the building permit application asserting the plans did not properly depict a 75-foot stream corridor building setback from the adjacent watercourse as required by the County's Stream Corridor Ordinance² (the "Stream Corridor Ordinance").

Bracken maintains that the stream corridor ordinance does not apply to that particular watercourse because it is a manmade irrigation channel and does not meet the definition of "stream" provided in the Weber County Land Use Code.

In a letter provided by Bracken, the Wolf Creek Irrigation Company ("Irrigation Company") states that the channel was dug as a way to carry water from the diversion of Wolf Creek stream to the Wolf Creek collection water. It is based upon a diversion of water from a stream, but is not itself a natural watercourse. Further, the Irrigation Company is allowed to take water from the actual stream for only part of each year – from March 1 until October 31. Thus, Bracken and the Irrigation Company maintain that the channel is a manmade collection reservoir used for irrigation purposes, which does not meet the County's definition of "stream." Additionally, according to the Irrigation Company, the channel does not convey water "year-round" as required by the Stream Corridor Ordinance. According to the Stream Corridor Ordinance, naturally occurring ephemeral streams which do not run year-round require only a 50' setback. Bracken has provided photos of the channel in a dry state to show that water is not present year-round.

¹ Bracken has submitted several iterations of building permit applications and variance requests in an attempt to receive approval. It is not necessary or helpful to the analysis to go through details of the various applications.

² Weber County Code § 104-28-2(b)(1).

In opposition, the County maintains that the watercourse is depicted as a stream on the map which accompanies the Stream Corridor Ordinance and therefore, the 75-foot stream setback has been properly applied.

Bracken has requested this Advisory Opinion to determine if Weber County is correctly interpreting county ordinances to designate the channel in question as a stream, and whether it may therefore impose the 75-foot building setback required by the Stream Corridor Ordinance on his development application.

ANALYSIS

Ordinance interpretation requires application of the canons of statutory construction.³ An analysis of the plain language of the ordinance always comes first,⁴ with the primary goal “to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve.”⁵ If the plain language of an ordinance is sufficiently clear, the analysis ends there.⁶

Note that where a reasonably well-informed person could understand a land use ordinance to have more than one meaning, the ordinance should be strictly construed in favor of the property owner, since such ordinances are in derogation of an owner’s common-law right to unrestricted use of their land.⁷

It is also important to recognize that meaning must be given to words which are missing as well as those included. It must be presumed “that each term included in the ordinance was used advisedly”⁸ and “[o]missions in statutory language should be taken note of and given effect.”⁹

To summarize, we will review the plain language of the ordinance, reading any ambiguity in favor of the property owner and giving meaning to each term to determine whether the watercourse running at the rear boundary of Bracken’s property is in fact a stream to which the 75-foot building setback required by the Stream Corridor Ordinance applies.

I. By the plain language of the ordinance, and in consideration of the evidence presented, the identified channel is not a stream

The Stream Corridor Ordinance is within Part II Land Use of the Weber County Code (the “County Code”, or, simply “Code”). That section begins with “General Provisions” which provides guidance for how to use and apply the Code and also includes a section labeled “Definitions” (the “Definitions”). If there is any question as to how the Definitions should be used, the section labeled

³ *Foutz v. City of South Jordan*, 2004 UT 75, ¶8.

⁴ *Carrier v. Salt Lake County*, 2004 UT 98 ¶30.

⁵ *Foutz*, 2004 UT 75, ¶11.

⁶ *General Construction & Development, Inc. v. Peterson Plumbing Supply*, 2011 UT 1, ¶ 8.

⁷ *Patterson v. Utah County Bd. Of Adjustment.*, 893 P.2d 602 (Utah Ct. of App. 1995).

⁸ *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 602, 606 (Utah Ct. App. 1995).

⁹ *Biddle v. Washington Terrace*, 1999 UT 110, ¶ 14.

“Applicability” states “When used in this Code, the following words and phrases have the meaning ascribed to them in this section, unless the context indicates a different meaning.”¹⁰

Furthermore, the General Provisions also give guidance on the “Rules of Construction.” It states “[t]he words used in this Code shall be construed to effect the intended purposes. *Definitions of various words and phrases used throughout the Code are provided in this title. . .*” (*emphasis added*).¹¹ It goes on to say that “Other definitions may be found in specific sections of the Code and apply only to that section or portion of the Code. . .”¹² and later “[s]ome sections of this Code contain separate definitions sections intended primarily for use in connection with the relevant section or portion of the Code.”¹³

Therefore, by the plain language of the Code, the Definitions section provides the applicable definitions of words used in the Code. If an alternate definition is required for a particular section or subsection of Code, it will be defined separately there.

With that guidance, we next look to see whether, and how, “stream” is defined. The definition for “stream” occurs only once in the Code.¹⁴ According to the Definition provided:

The term "stream" means those areas where surface waters flow sufficiently to produce a defined channel or bed. A defined channel or bed is indicated by hydraulically sorted sediments or the removal of vegetation litter or loosely rooted vegetation by action of moving water. The channel or bed need not contain water year-round. *This definition is not meant to include stormwater runoff devices or entirely artificial watercourse unless they are used to store or convey pass through stream flows naturally occurring prior to construction of such devices.* Stream watercourses where the definition may apply are those that appear on the U.S. Geological Survey Quad maps *excluding irrigation canals and ditches.* For instance, an irrigation canal following a natural or jurisdictional watercourse would not be exempt, but others would be exempt.¹⁵ (*emphasis added*).

According to the Code, entirely artificial watercourses are not considered “streams.” The Irrigation Company has stated that the disputed watercourse was manmade and created to convey irrigation water. Based on that portion of the definition, and the presented evidence, the disputed channel is not considered a stream, and the Stream Corridor Ordinance would not apply.

Note further that while the definition of “stream” does not require water be present year-round, the Stream Corridor Ordinance does. According to the Irrigation Company, irrigation water flows through the channel for only seven months of the year. Likewise, Bracken has provided photos of the channel where it is completely dry, indicating this is not a year-round watercourse. Therefore,

¹⁰ Weber County Code § 101-2-1.

¹¹ Weber County Code § 101-1-6(a).

¹² Weber County Code § 101-1-6(a).

¹³ Weber County Code § 101-1-6(b)(9).

¹⁴ The Stream Corridor Ordinance is detailed in Chapter 104 – Ogden Valley Sensitive Lands Overlay Zone, which does not include any definitions pertinent only to that Section. (Weber County Code § 104-28).

¹⁵ Weber County Code § 101-2-20.

the 75' building setback required for year-round streams would not apply to the subject watercourse based on this requirement as well.

Because the Code states that the meaning of those words provided in the Definitions section applies unless an alternate meaning is provided in a particular subsection, and because “stream” is not otherwise defined in the Code, the conclusion that the identified canal is manmade and therefore not a “stream” according to the Definition, appears definitive. However, before ending our analysis, we must nonetheless determine whether “the context indicates a different meaning” as provided by the Applicability section of the Code.¹⁶

II. By the overall context of the ordinance, the identified channel is not a stream

The Stream Corridor Ordinance is a subsection of the Code. This subsection does not provide its own definitions; therefore, it relies on the Definitions provided earlier in that overall section of the code. There is, nonetheless, context which might indicate a separate definition of “stream” could apply to the Stream Corridor Ordinance.

The text of the Stream Corridor Ordinance clearly requires that “Structures, roads, or parking areas shall not be developed or located with 75-feet on both sides of a year-round stream, as determined from the high-water mark of the stream.”¹⁷ That much seems clear. The Stream Corridor Ordinance is prefaced by a Purpose and Intent subsection which includes a thumbnail roughly 4 inches by 5 inches of Ogden Valley Sensitive Lands Stream Corridors map (the “Stream Map”). The thumbnail covers the entire county and is therefore unreadable, but the ordinance does include text which reads “the Ogden Valley Sensitive Lands Maps [including the Stream Map] are available from Weber County.”¹⁸

Once obtained from Weber County, one can “zoom in” on the Stream Map and see that the disputed watercourse is clearly highlighted in blue, and then locate the legend which clearly states that the blue highlighting identifies areas as a “stream or braided stream”. It is from this context that the County has determined the watercourse in question is a “stream.” Because the channel is labeled as a “stream or braided stream,” on the Stream Map, the County argues, the 75-foot building setback applies.

Bracken argues, and the County has not protested, that the highlighting on the Stream Map is not accurate. Moreover, it appears that the Stream Map is not intended to be dispositive. The Stream Map includes the following disclaimers on the legend:

“This is not an official map, but for reference use only. The data was compiled from the best sources available, so various errors from the sources may be inherent on the map. All boundaries and features therein should be treated as such. For official boundary information, the pertinent County department or Municipality should be

¹⁶ See Weber County Code § 101-2-1. Applicability which states “When used in this Code, the following words and phrases have the meaning ascribed to them in this section, *unless the context indicates a different meaning.*” (*emphasis added*).

¹⁷ Weber County Code § 104-28-2(b)(1).

¹⁸ Weber County Code § 104-28-1(c).

contacted. This map is a representation of ground features and is *not a legal document of their locations*. The scale represented is approximate, nonexistent, or has been changed, so this is *NOT a Survey or Engineering grade map and should by no means be used as such*. This map is not intended for all uses. Weber County is not responsible or liable for any derivative or misuses of this map.” (*emphasis added*).

Further, the text of the Stream Corridor Ordinance itself does not even imply that the Stream Map should be dispositive. The Stream Corridor Ordinance is silent on how it should be used. The Stream Map is only mentioned in the prior “Purpose and Intent” subsection, and even then, only to say “the Ogden Valley Sensitive Lands Maps [including the Stream Map] are available from Weber County.”¹⁹

In contrast, in the immediately following section regulating important wildlife habitat areas includes specific directions for how the corresponding map should be used. That sections states both that “Limitations in areas of wildlife habitat *as shown on the Ogden Valley Sensitive Lands Wildlife Map*”²⁰ and also “when development occurs in *mapped important areas*, the state division of wildlife resources (DWR) may provide written recommendations . . .”²¹

Noting that “[o]missions in statutory language should be taken note of and given effect”²² the Stream Corridor Ordinance failing to mention the map must be given meaning, particularly where the immediately following subsection includes language making use of that corresponding map obligatory. Therefore, based on the lack of language in the Stream Corridor Ordinance indicating the Stream Map is dispositive, and the disclaimer language on the Stream Map itself, there is no clear indication how the Stream Map should be applied.

The Utah courts have given us direction on how to interpret ordinances which include conflicting or imprecise language—where any ambiguity remains, the ordinance should be read in favor of the property owner. “A statute is ambiguous if it can be understood by reasonably well-informed persons to have different meanings.”²³ In this case, a reasonably well-informed person could read the Definition of stream and determine the subject watercourse is *not* a stream because it is intermittent and manmade, yet then look at the Stream Map and determine that it *is* a stream because the legend indicates that it is. Therefore, the ordinance, when taken as a whole, includes some ambiguity.

Utah case law stipulates that, regarding land use regulations, any ambiguity must be “liberally construed in favor of the property owner” because “zoning ordinances are in derogation of a property owner’s common-law right to unrestricted use of his or her provisions.”²⁴ Further, zoning “provisions therein restricting property uses should be strictly construed, and provisions permitting

¹⁹ Weber County Code § 104-28-1(c).

²⁰ Weber County Code § 104-28-3(a)(1)(a).

²¹ Weber County Code § 104-28-3(b).

²² *Biddle v. Washington Terrace*, 1999 UT 110, ¶ 14.

²³ *Miller Welding Supply, Inc. v. Utah State Tax Comm’n*, 860 P.2d 361, 362 (Utah App. 1993) (quoting *Sneddon v. Graham*, 821 P.2d 1185, 1187 (Utah App. 1991)),

²⁴ *Patterson v. Utah County Bd. Of Adjustment*, 893 P.2d 602 quoting *Sammons v. Village of Batavia*, 53 Ohio App. 3d 87, 557 N.E.2d 1246, 1249 (Ohio App. 1988); see 83 Am. Jur. 2d *Zoning & Planning* § 977 (1992).


property uses should be liberally construed in favor of the property owner.”²⁵ Therefore, where a reasonably well-informed person could find two different building setbacks applying to the watercourse in question – one that is 50’, as detailed on the plat and in the zoning code, and one that is 75’ which is indicated on the Stream Map – the one which least restricts the property owner’s use of the land must be used.

In conclusion, while there may be some remaining ambiguity where the Definition of “stream” conflicts with the conclusion one gets from using the Stream Map, the overall context does not clearly indicate that the Stream Map should override the definition of “stream” explicitly included in Definitions. This decision is supported by the practice of construing any ambiguity in favor of the property owner.

Accordingly, because the watercourse running along the rear of Bracken’s property is apparently manmade, it does not meet the definition of “stream” in the Definitions section of the County Code. Furthermore, while the Stream Map does provide an alternate interpretation, ambiguity is interpreted in favor of the property owner. As such, by the plain language of the ordinances, and in light of the evidence presented, the 75-foot building setback established in the Stream Corridor Ordinance does not apply and the County may not lawfully apply it to this property when reviewing a land use application.

CONCLUSION

The 75-foot building setback required by the Weber County Stream Corridor Ordinance applies to naturally occurring, year-round streams. As the watercourse running the along the rear property line of the subject property is manmade and conveys water only a few months of the year, the 75-foot building setback does not apply.



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²⁵ *Id.*

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 § 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.