

Advisory Opinion 255

Party: Troy Belnap / Cedar Hills

Issued: May 11, 2022

TOPIC CATEGORIES:

Compliance with Land Use Ordinances

Interpretation of Ordinances

Requirements Imposed on Development

Cedar Hills may not lawfully require the property owner to secure an easement agreement as a condition of receiving a building permit for a fence and a retaining wall because their ordinances do not require such.

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



SPENCER J. COX
Governor

DEIDRE M. HENDERSON
Lieutenant Governor

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: Troy Belnap
Local Government Entity: Cedar Hills
Applicant for Land Use Approval: Troy Belnap
Type of Property: Residential
Date of this Advisory Opinion: May 11, 2022
Opinion Authored By: Marcie M. Jones, Attorney
Office of the Property Rights Ombudsman

ISSUE

Where a property owner has applied for a building permit to construct a fence and retaining wall within a public utility easement, has the city lawfully conditioned approval on requiring the property owner to sign an easement agreement that apportions liability for use of the easement?

SUMMARY OF ADVISORY OPINION

The City has adopted an ordinance requiring property owners seeking to build a “dwelling, main building, or permanent accessory building” within an easement to secure an easement agreement as a condition to receiving a building permit.

The property owner in question has requested a building permit for a retaining wall and a fence within a public utility easement. Because fences and retaining walls are not a “dwelling, main building, or [a] permanent accessory building” the relevant ordinance does not apply. Accordingly, the City may not lawfully require the property owner to secure an easement agreement as a condition of receiving the requested building permit.

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 Troy Belnap on July 22, 2021. A copy of that request was sent via certified mail to Colleen A. Mulvey, City Recorder, City of Cedar Hills, 10246 North Canyon Road, Cedar Hills, Utah 84062 on August 6, 2021.

EVIDENCE

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

1. Request for Advisory Opinion, Troy Belnap on July 22, 2021.
2. Reply submitted by H. Craig Hall, Esq. representing Cedar Hills, dated August 19, 2021.

BACKGROUND

Troy Belnap ("Belnap") has submitted a building permit application for landscaping improvements proposed for his residence located in Cedar Hills ("City"). The improvements include a 6' fence and a 4' block retaining wall which will be built, at least in part, within a public utility easement.

The City is requiring Belnap to secure an easement agreement with the easement holder as a condition of building permit approval. The required easement agreement stipulates that Belnap will assume all liability and costs associated with replacing the fence and retaining wall should they be damaged by utility companies during the course of using the public utility easement.

Belnap does not wish to assume this liability and responsibility. Belnap maintains that the easement is a public utility easement and liability should be borne by the appropriate utility company.

Belnap has therefore submitted a Request for Advisory Opinion to determine whether the City's requirement that Belnap secure an easement agreement as a requirement for issuing a building permit for the proposed fence and retaining wall is lawful.

ANALYSIS

- I. City Code requires easement agreement for construction of a dwelling, main building, or permanent accessory building within an easement (not for a fence or retaining wall)**

The City has recently passed Ordinance No. 05-04-2021A regulating construction in recorded easements.¹ This Ordinance added language to the City Zoning Regulations stipulating that:

“No dwelling, main building, or permanent accessory building shall be located within a recorded easement area unless the property owner either produces evidence satisfactory to the Zoning Administrator that the easement has been abandoned or vacated, or executes a recordable document, in an application approved by the Chief Building Official and Public Works Director or their designees, providing that (i) the property where the structure will be placed is subject to an easement (ii) the owner of the easement expressly approves the placement of the structure within the easement boundaries, (iii) the property owner acknowledges that the structure may be required to be relocated, and (iv) the property owner will bear all costs of moving the structure, including damage to the property, in the event an easement needs to be accessed”² (emphasis added).

The requirement clearly applies only to the construction of a “dwelling, main building, or permanent accessory building” within a recorded easement.

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

In this case, the language of the relevant ordinance is quite clear, and the requirements apply to the construction of a “dwelling, main building, or permanent accessory building” within an easement. The City’s Zoning Ordinance includes the following relevant definitions⁷:

DWELLING UNIT: one or more rooms in a building designed for living purposes (bathing, eating and sleeping), and occupied by one family.

BUILDING: a roofed and completely walled structure built for permanent use.

ACCESSORY BUILDING: a subordinate building, the use of which is incidental to that of the main building, including, but not limited to, detached garages and storage sheds greater than one hundred twenty (120) square.

Therefore, according to the definitions, the relevant ordinance only applies to structures which include a roof and are completely walled. As neither the fence nor the retaining wall Belnap

¹ Passed and approved May 4th, 2021.

² Cedar Hills Zoning Regulations 10-2-40.

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 Cedar Hills Zoning Code Section 10-2-1 Definitions.

proposes include a roof, this ordinance would not apply to the building permit application Belnap has submitted.

Because the language of the relevant regulation does not apply to Belnap's building permit application, the City may not lawfully require Belnap to enter into an easement agreement assuming liability and responsibility for the proposed fence and retaining wall to be constructed in the public utility easement.⁸

CONCLUSION

The City has adopted an ordinance requiring property owners seeking to build a "dwelling, main building, or permanent accessory building" within an easement to secure an easement agreement as a condition to receiving a building permit.

The property owner in question has requested a building permit for a retaining wall and a fence within a public utility easement. Because fences and retaining walls are not a "dwelling, main building, or [a] permanent accessory building" the relevant ordinance does not apply. Accordingly, the City may not lawfully require the property owner to secure an easement agreement as a condition of receiving a building permit.

Jordan S. Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

⁸ Because the relevant ordinance does not apply to the current building permit application, we have refrained from analyzing whether a fictional or possible future ordinance requiring a signed easement agreement between the property owner and the easement holder in connection to the installation of a fence and/or retaining wall in a public utility easement would be lawful. We note, however, that UTAH CODE § 54-3-27 (2)(b) addresses and apportions liability between public utility users and property owners for improvements within easement areas.

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.