Advisory Opinion 293

Parties: Scott Vranes, City of Cottonwood Heights
Issued: August 23, 2024

TOPIC CATEGORIES:

Interpretation of Ordinance
Compliance with Land Use Regulations
Entitlement to Application Approval
Requirements Imposed on Development

A reconstructed and enlarged backyard deck is an accessory structure for which the city code does not regulate a rear yard setback.

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ADVISORY OPINION

Advisory Opinion Requested by:	Scott Vranes
Local Government Entity:	City of Cottonwood Heights
Property Owner:	Scott Vranes
Type of Property:	Residential
Date of this Advisory Opinion:	August 23, 2024
Opinion Authored By:	Marcie M. Jones, Attorney Office of the Property Rights Ombudsman

Issue

Do the city's ordinances subject a backyard deck to a 20' primary building setback or a 3' accessory building setback from the rear property line?

Summary of Advisory Opinion

The property owner recently reconstructed and enlarged a backyard deck without realizing a building permit was required. As built, the deck extends to approximately 5' from the rear property line. The property owner is now working with the city to secure a building permit retroactively and the parties disagree on how close the deck may lawfully be to the rear property line.

The city maintains that the deck must meet the 20' rear yard setbacks imposed on the main building because the deck is attached to the home and therefore part of the main building. The property owner maintains that the deck must instead meet the 3' rear yard setback for accessory buildings. Each argument requires inferring meaning not supported by the language of the code or ignoring contradictory regulations.

There is one interpretation of the code that avoids any conflict, however. This interpretation follows the rules of statutory interpretation to its logical conclusion, including reading the code as a whole, giving each word meaning, and interpreting ambiguity in favor of allowing the proposed use.

The context of the code overall distinguishes a *building* from other *structures* as one that is specifically enclosed. We accordingly find that the deck is *neither* part of the main *building* nor an accessory *building*. Decks are instead an accessory *structure*. Decks are specifically listed as an accessory *structure* in one section of the code, and declaring the deck a *structure* leaves no contradictory guidance in the code.

We therefore conclude that the deck is an accessory structure for which the city code does not regulate a rear yard setback (only height restrictions are provided). Accordingly, the location of the deck is not bound by setbacks in the city code and may be constructed as close to the rear property line as applicable building and fire code allow.

Evidence

The following documents and information with relevance to the issue involved in this Advisory Opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion submitted by Scott Vranes on July 20, 2023.
2. Response letter from Mike Johnson, on behalf of the City of Cottonwood Heights on September 5, 2023.
3. Letter from H. Burt Ringwood, on behalf of Scott Vranes on January 17, 2024.
4. Response letter from Mike Johnson, on behalf of the City of Cottonwood Heights on February 13, 2024.
5. Letter from H. Burt Ringwood, on behalf of Scott Vranes on March 19, 2024.
6. Email response from Scott Vranes dated June 3, 2020.

Background

Scott Vranes (Property Owner) owns a single-family residence in the City of Cottonwood Heights (City). The Property Owner has recently replaced and enlarged a formerly dilapidated backyard deck. Not realizing that a building permit was necessary, the Property Owner substantially completed work when a neighbor noticed and complained to the City who then cited the Property Owner for failure to secure a building permit. The Property Owner immediately stopped construction, opened a dialogue with the City, and retroactively submitted a building permit application.

The permit application was rejected for failure to comply with setback requirements in the City Code for the R-1-8 zone. The deck, as now constructed, extends to within 4’9” of the rear property line.

The City considers the deck part of the primary habitable structure and therefore subject to a 20’ rear setback per City Code 19.26.060(A)(3). The Property Owner instead considers the deck to be an accessory building and therefore subject to a 3’ rear setback in accordance with City Code 19.26.060(B)(3).

The Property Owner and the City have had several good discussions regarding the deck but have come to an impasse. The Property Owner therefore has requested this Advisory Opinion to answer

whether the backyard deck is subject to the primary habitable structure setback of 20' or the accessory building setback of 3'.

Analysis

I. The backyard deck is neither a "building for human inhabitants" nor an "accessory building:" it is an "accessory structure" without established setback requirements.

At the outset we note that the Code lacks the any clear direction that an attached deck must meet the 20' setback requirements of the main building. The various Code interpretations require piecing multiple definitions and details together to form an argument. The reader is advised to pay attention to the distinct use of the words *structure* and *building*. Buildings are a particular type of structure. All buildings are structures, but some structures are not buildings. Also, note when a structure or building is an *accessory* to the main habitable structure, as well as the words *inhabitant* and whether enclosure or shelter is necessary according to a definition.

We begin with the City's interpretation. The City has decided that because the deck is attached to the primary structure it is subject to the 20' rear property line setback, as distinct from an accessory building which is subject to a 3' rear setback.

To determine whether a municipality correctly interpreted and applied its ordinance to a development application, a court will follow established rules of statutory construction. *Foutz v. City of South Jordan*, 2004 UT 75, ¶8. Because the interpretation of ordinances is a pure question of law, local governments are afforded no deference in interpreting their own ordinances; rather, courts review a local government's interpretation of an ordinance for correctness. *Outfront Media, LLC v. Salt Lake City Corp.*, 2017 UT 74, ¶ 12 n.13, 416 P.3d 389, 394 (noting that the court's past practice of affording some level of "non-binding deference" to a local agency's interpretation could not stand in view of subsequent developments in precedent).

Ordinance interpretation begins with an analysis of the plain language of the ordinance. *Carrier v. Salt Lake County,* 2004 UT 98 ¶ 30, 104 P.3d 1208. The primary goal of interpretation is "to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the [ordinance] was meant to achieve." *Foutz*, 2004 UT 75, ¶ 11, 100 P.3d 1171. In doing so, it is presumed that the legislative body used each word advisedly. *Selman v. Box Elder County*, 2011 UT 18, ¶ 18, 251 P.3d 804. "Omissions in statutory language should be taken note of and given effect." *Biddle v. Washington Terrace*, 1999 UT 110, ¶ 14.

Furthermore, "The canon of meaningful variation suggests that '[d]ifferent words used in . . . a similar statute . . . are assigned different meanings whenever possible.'" *Outfront Media, LLC v. Salt Lake City Corp*., 2017 UT 74 quoting SUTHERLAND STATUTES & STATUTORY CONSTRUCTION 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2016); *see also City Ctr. Exec. Plaza, LLC v. Jantzen*, 237 Ariz. 37, 344 P.3d 339, 344 (Ariz. Ct. App. 2015).

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, because such ordinances are in derogation of an owner's common-law right to unrestricted use of

their land. *See, e.g. Patterson v. Utah County Bd. Of Adjustment*, 893 P.2d 602 (Utah Ct. of App. 1995). Furthermore, "provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner." *Id.* 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).

We next apply these established rules of statutory interpretation to the City Code. The plain language of City Code establishes the following setbacks in the (applicable) R-1-8 zone:

> A. Setbacks/yard requirements are intended to provide a description of the required space between *buildings* and property lines. *All buildings intended for human inhabitants* shall maintain a minimum distance from property lines as follows:
>
> 1. Front: 25 feet.
> 2. Sides: On interior lots, a total of at least 20 feet between the two side yards, with no yard of less than 8 feet. On corner lots, at least 20 feet per side yard.
> 3. *Rear: 20 feet.*
>
> B. *Accessory buildings* in the R-1-8 shall maintain a minimum distance from property lines as follows:
>
> 1. Front: Accessory buildings, including detached garages, shall maintain a setback of at least six feet from the main building in the rear yard of the particular property.
> 2. Sides: Three feet on interior lots; 20 feet on the street side of corner lots.
> 3. *Rear: Three feet on interior lots; 20 feet of the street side of corner lots.*
>
> *C. Attached garages shall conform to the rear yard requirements of main buildings.*

Maximum Height Of *Structures*

> A. For uses where the slope of the original ground surface is greater than 15%, or if a slope stability hazard is present on site, the maximum *structure height* shall be 30 feet.
> B. All other properties shall maintain a *maximum structure height* of 35 feet.
> C. No *accessory structure* shall exceed 20 feet in height. For each foot of height over 14 feet, accessory structures shall be set back from property lines an additional foot from the minimum setback to allow a maximum height of 20 feet.

CITY CODE 19.26.060, 070 (emphasis added). In plain English, the setback against the rear property line is 20' for the main building intended for human inhabitants and 3' for accessory buildings. Height restrictions are given for structures generally.

The City Code also includes the following definitions:

> **Main Building:** The building or buildings on a lot which are occupied by the primary use. *CITY CODE 19.040.1610.*
>
> **Building:** Any structure intended for shelter, occupancy, housing, or enclosure for persons, animals, or chattel. When separated by dividing walls without openings, each portion of such structure so separated shall be deemed a separate building. *CITY CODE 19.040.380.*
>
> **Accessory Buildings (Residential):** In a residential district, a subordinate building that is *attached or detached*[1] and used for a purpose that is customarily incidental to the main structure but not involved in the conduct of a business. Examples include, without limitation, the following: a private garage for automobile storage, tool shed, greenhouse as a hobby (no business), home workshop, children's playhouse, storage building, garden shelter, etc. *CITY CODE 19.040.010.*
>
> **Structure:** Anything constructed or erected, the use of which requires location on the ground or which is attached to something having a location on the ground (see also "Building"). *CITY CODE 19.40.2670.*
>
> **Occupancy:** The use or intended use of the land or buildings by proprietors or tenants. *CITY CODE 19.40.1840.*

A. City presents a plausible but indirect argument that the deck is part of the main building and therefore subject to the 20' rear yard setback.

The City maintains that "the main indicator for setback requirements for decks, and for determining whether decks are primary or accessory structures, is whether the deck is structurally attached and connected to the primary structure on the property intended for human inhabitants. . . . a deck . . . should be classified as a separate building only if it was completely separated by dividing walls without opening, which does not appear to be the case here." *Letter from Cottonwood Heights dated September 5, 2023.* The City maintains that because the deck is attached to the home, it is part of the primary structure for setback purposes, rather than needing to meet the 3' accessory building setback requirements. The attachment defines the classification of the deck, according to this line of reasoning. This interpretation is indirect and circuitous, but plausible.

The argument may be pieced together as follows:

[1] It appears that this language in the City Code has since been altered to exclude attached structures. *See* Ordinance 412, dated April 9, 2024. Indeed, the City Code has also been recently updated to include a definition directly on point: "19.04.1905 Ornamental Features. Design elements that serve as an ornament or decoration to the outside of a building. Areas with usable square footage, such as stairwells, decks, cantilevered rooms, bay windows, etc. do not qualify as ornamental features and must meet the standard setback requirements in the underlying zone." Amended by Ordinance 397 on July 11, 2023. Neither change applies to this application, however, because each was adopted after the building permit was submitted.

ARGUMENT	SUPPORT FOR ARGUMENT
Step 1: Deck is a building	**Building:** Any structure intended for shelter, *occupancy*, housing, or enclosure for persons, animals, or chattel. *CITY CODE 19.040.380.* **Occupancy:** The use or intended use of the land or buildings by proprietors or tenants. *CITY CODE 19.40.1840.* The deck is a *structure* which is presumably used or intended for a use which amounts to *occupancy* under this broad definition which automatically makes it a *building*. We note that this interpretation would qualify *any* structure with *any* intended use as a building, which seems inaccurate. For instance, this would make mailboxes, fences, driveways, retaining walls, sport courts, swimming pools, arbors, storage tanks, etc. *buildings*.
Step 2: Two buildings attached by a wall with an opening is one building.	**Building:** Any structure intended for shelter, occupancy, housing, or enclosure for persons, animals, or chattel. *When separated by dividing walls without openings, each portion of such structure so separated shall be deemed a separate building*. *CITY CODE 19.040.380.* Two structures separated by a wall without an opening are separate buildings and the City extends this to infer that two structures separated by a wall with an opening are considered a single building.
Step 3: Deck and home are one building, therefore deck is subject to 20' setback	Code states that "All buildings intended for human inhabitants shall maintain a minimum distance from property lines as follows: . . . Rear: 20 feet." *CITY CODE 19.26.060.* The home is intended for "human inhabitants" and the deck is considered part of the main building because it is attached with a wall with an opening (door), therefore, the deck is also subject to the 20' rear yard setback.

This interpretation is plausible, but has weaknesses, especially when interpreted in favor of allowing the proposed use. The first weakness is just how circuitous and unclear this line of reasoning is.

Next, this interpretation relies on the deck being a *building* rather than a *structure*. The argument relies on the extremely broad definition of *occupancy* which would also make a mailbox, fence, driveway, and retaining wall a *building* which seems wide of the mark. Note also that the definition of *occupancy* does not mention *structures* at all. "The use or intended use of the *land or buildings* by proprietors or tenants." *CITY CODE 19.40.1840.* The Code does not extend *occupancy* to *structures.* This is reasonable because a fence, retaining wall, driveway, mailbox, etc. are not typically considered *buildings* which need to meet setbacks, even if they fulfill their intended use.

Next, this interpretation requires inferring support not included in the Code. The definition of building reads: "Any structure intended for shelter, occupancy, housing, or enclosure for persons, animals, or chattel. *When separated by dividing walls without openings, each portion of such structure so separated shall be deemed a separate building.*" *CITY CODE 19.040.380* (emphasis added). The City is inferring support for the assumption that because two structures adjacent to one another without a door equates to two separate buildings, that two structures adjacent to one another with a door are necessarily considered one building, and that any structure so attached automatically becomes part of the main building. This may be reasonable, but requires inserting language not stated in the Code.

Furthermore, by defining the deck as a *building* rather than a *structure*, many of the qualifications included in the definition of building must be ignored. A building is "any structure intended for shelter, occupancy, housing, or enclosure." *CITY CODE 19.040.380.* The deck lacks elements intended for shelter, housing, or enclosure, which the listed examples all include "a private garage for automobile storage, tool shed, greenhouse as a hobby (no business), home workshop, children's playhouse, storage building, garden shelter." Definition, Accessory Building, *CITY CODE 19.040.010.*

Furthermore, the exact language applying the setback clearly applies only to a restricted subset of *buildings intended for human inhabitants* which distinctly implies shelter, housing, or enclosure. *CITY CODE 19.26.060.* While the Code does not include a definition, The Law Dictionary, featuring Black's Law Dictionary, 2nd Ed., (2024) defines "inhabit" as "One who resides actually and permanently In a given place and has his domicile there." *Ex parte Shaw*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; The Pizarro, 2 Wheat. 245, 4 L. Ed. 226. "The words 'inhabitant,' 'citizen,' and 'resident,' as employed in different constitutions to define the qualifications of electors, mean substantially the same thing; and one is an inhabitant, resident, or citizen at the place where he has his domicile or home." Cooley, Const. Dim. *600. But the terms "resident" and "inhabitant" have also been held not synonymous, the latter implying a more fixed and permanent abode than the former and importing privileges and duties to which a mere resident would not be subject. *Tazewell County v. Davenport*, 40 111. 197.

In short, "inhabitant" requires significantly more than mere leisurely occupation of a space. Consequently, the deck does not meet the requirements of a building "intended for human inhabitants."

Because decks themselves are not for *human inhabitants,* the argument relies on the deck's attachment to the main structure to make it part of the main structure and thus subject to the 20' setback. However, this is not supported by the definition of accessory building in the City Code which specifically states, "In a residential district, a subordinate building that is *attached or detached . . ." CITY CODE 193.040.010* (emphasis added). Additionally, this section of Code does not make any distinction between attached "with an opening" like the definition of building does. This section clearly anticipates that an accessory building may be attached to the primary structure and maintain its definition as a separate improvement. Whether the deck is attached to the home, therefore, does not automatically preclude it from being an accessory building instead of part of the main building.

The Code lacks clear language requiring that any structure attached to the main building shall be subject to the main building setbacks. Indeed, the Code specifically lists only one such attached improvement that is subject to the 20' setback applied to main buildings – namely attached garages. The Code clearly states that "Attached garages shall conform to the rear yard requirements of main buildings." *CITY CODE 19.26.060.* We must assume that the legislative body used each word advisedly. *Selman v. Box Elder County*, 2011 UT 18, ¶ 18, 251 P.3d 804. "Omissions in statutory language should be taken note of and given effect." *Biddle v. Washington Terrace*, 1999 UT 110, ¶ 14. By specifying that attached garages are subject to the 20' setback applied to the main building, we must give meaning to the omission of decks as being subject to the same.

Furthermore, we note that the City has apparently since amended their Code to clarify this point. "City Code 19.04.1905 Ornamental Features" has been added which states "Design elements that serve as an ornament or decoration to the outside of a building. Areas with usable square footage, such as stairwells, decks, cantilevered rooms, bay windows, etc. do not qualify as ornamental features and must meet the standard setback requirements in the underlying zone." This, combined with the definition change in "accessory buildings" to include only "detached" improvements, changes the analysis for building permits applied for after the ordinance changes went into effect, but not here in this case.

In summary, the City's interpretation that the deck is part of the main building because it is attached by a wall with an opening and therefore subject to the 20' main building setbacks instead of the 3' setbacks applicable to accessory buildings is plausible. It has weaknesses, however. This interpretation relies on the overly broad definition of *occupancy* to qualify the deck as a *building* rather than a *structure* (along with fences and mailboxes) and infers language not in the Code to establish that because the deck and main building are connected by a wall with a door, they are considered one building. This argument also ignores the definition of *accessory building* allowing attachment to the main building yet retaining its accessory nature and renders moot the specific language applying the 20' setbacks to an attached garage, without mentioning any other structure or building. This interpretation is plausible but not definitive.

B. *Property Owner presents plausible argument that the deck is an accessory building.*

On the other hand, the Property Owner argues that the deck ought to be considered an accessory building. He acknowledges that the Code does not directly stipulate that decks are accessory buildings, however, he argues that there are other sections where the Code clearly considers them such. For instance, the Property Owner points out that decks are included as an accessory structure under Site Development Regulations for property zoned Planned Development Districts:

> 2. Lot coverage.
>
> a. The following areas are to be included for the purpose of computing lot coverage:
>
> (1) All buildings, including dwellings; and
>
> (2) *All accessory structures*, including sheds, garages, pool structures, carports, *decks*, roof overhangs exceeding 20", platform walkways and similar structures;

CITY CODE 19.51.060(B)(2)(a) (emphasis added). The City Code also includes decks as a part of the landscaping Code: "Gathering areas" means portions of the landscape that are dedicated to congregating, such as patios, gazebos, *decks*, and other seating areas. *CITY CODE 19.70.030(D)* (emphasis added).

As discussed above, the Property Owner also notes that the Code clearly includes "a private garage for automobile storage" in the definition of accessory buildings, which ordinarily would subject it to the 3' accessory building setback. However, the Code makes an exception that "attached garages shall conform to the rear yard requirements of main buildings." The Property Owner argues that it must be presumed "that each term included in the ordinance was used advisedly" *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 602, 606 (Utah Ct. App. 1995) and "[o]missions in statutory language should be taken note of and given effect." *Biddle v. Washington Terrace*, 1999 UT 110, ¶ 14. By specifically calling out an attached garage as an accessory building which must meet the setbacks for the primary structure, the language implies that other accessory buildings which are not mentioned do not.

The Property Owner next maintains that decks are distinct from Buildings of any type in that they lack requisite the "shelter, occupancy, housing, or enclosure" elements contemplated in the definition. *CITY CODE 19.040.380.* The Property Owner points out that "The definition of 'Building' in the City's Ordinances clearly implies an enclosed structure that will provide shelter and housing for humans, animals and chattel. A deck is clearly not designed to provide shelter, housing, occupancy, or enclosure." *Letter from H. Burt Ringwood, on behalf of Scott Vranes on January 17, 2024.* These arguments are also plausible.

However, there is a complication to considering the deck an accessory building. Accessory buildings may extend to within 3' of the rear boundary, but would also need to be a free-standing structure, with a 6' gap between the deck and the home. "Accessory buildings . . . *shall maintain a setback of at least six feet from the main building* in the rear yard of the particular property." *CITY CODE 19.26.060.* This appears to be an absurd or at least unusual result. Backyard decks are typically attached to the home such that you exit a rear door directly onto the deck. And if the deck is defined as an accessory building attached to the main building by a wall with an opening, the two structures are considered one building, and the deck is subject to the 20' rear setback regardless.

In summary, the interpretation put forth by the Property Owner is similarly plausible. Decks are specifically included as an *accessory structure* when considering lot coverage in a separate section of the Code, and the Code clearly allows *attached and detached* accessory buildings, which negates the City's argument that any improvement attached to the main building is subject to the main building setback. Furthermore, he Code states that "attached garages shall conform to the rear yard requirements of main buildings" without mentioning that decks or any other attached improvement must meet the same. This interpretation is also plausible but not definitive.

C. Deck is an accessory structure which is subject to height restrictions, but no defined setback requirements within the applicable code.

We seemingly are left at an impasse. We have been provided with two plausible interpretations, but both have weaknesses. We are asked to hold that the deck is subject to the main building setbacks merely because it is attached to the home despite the Code allowing for attached accessory buildings. An additional complication to this interpretation is that the 20' setback applies only to buildings "intended for human habitation" where the deck is intended for incidental leisure occupation, not residence. Also, attached garages (and only attached garages) are specifically called out as being subject to the main building setback. The omission of decks or any other attached improvement must be given meaning.

On the other hand, we are asked to hold that the deck is an accessory building and therefore required to be set 6' away from the home. Because decks are typically attached to homes, we hesitate to adopt such an unusual interpretation without it being clearly articulated in the Code. Also, decks do not cleanly fit within the definition provided for accessory buildings because they lack elements providing shelter, housing, occupancy, and enclosure." *CITY CODE 19.26.060.*

There is one interpretation of the Code that avoids any conflict. This interpretation follows the rules of statutory interpretation to its logical conclusion. The context of the Code overall distinguishes a *building* from other *structures* as one that is specifically enclosed. *Building* and *structure* are used distinctly and not interchangeably. For example, there are separate and distinct definitions of each. Also, there are several instances in the Code which treat each distinctly. As an example, in the above-mentioned quote of how Lot Coverage is determined, "(1) *All buildings*, including dwellings; and (2) *All accessory structures*, including sheds, garages, pool structures, carports, *decks*, roof overhangs exceeding 20", platform walkways and similar structures; *CITY CODE 19.51.160(B)(2)(a)* (emphasis added).

ALSO, CITY CODE 19.02.090 Building and Use Permits Required uses states "Construction, alteration, repair or removal of any *building or structure*, or any part thereof, as provided or as restricted in this title, shall not be commenced or proceeded upon except after the issuance of a written permit. . ."

Additionally, CITY CODE 19.02.100 Compliance Prerequisite to Permit Issuance states " . . . The director or his designee shall not approve a building permit if any *building, structure or use* of land would be in violation of any of the provisions of this title. . ."

Even the applicable R-1-8 zone which lists setbacks for accessory buildings, restricts the height of structures specifically. "19.26.070 Maximum Height of *Structures* . . . (B) All other properties shall maintain a maximum *structure* height of 35 feet. (C) No *accessory structure* shall exceed 20' in height . . ."

There are several zones where accessory structures, rather than accessory buildings, are regulated. For instance, City Code 19.18.090(C) says "No *accessory structure* shall exceed 20 feet in height . . ." and (D) "*Accessory structures* which meet the minimum side, rear, and front setbacks for main buildings . . ."

The canon of meaningful variation suggests that "different words used in . . . a similar statute . . . are assigned different meanings whenever possible." *Outfront Media, LLC v. Salt Lake City Corp*., 2017 UT 74 quoting SUTHERLAND STATUTES & STATUTORY CONSTRUCTION 2A Sutherland

Statutory Construction § 46:6 (7th ed. 2016); *see also City Ctr. Exec. Plaza, LLC v. Jantzen*, 237 Ariz. 37, 344 P.3d 339, 344 (Ariz. Ct. App. 2015).

We are also reminded that our guidance is to read the Code "in harmony with other provisions in the same statute and with other statutes under the same and related chapters" *Lyon v. Burton*, 2000 UT 19 ¶ 17 and presume that the legislative body used each word advisedly, *Selman v. Box Elder County*, 2011 UT 18, ¶ 18, 251 P.3d 804, and note "[o]missions in statutory language should be taken note of and given effect." *Biddle v. Washington Terrace*, 1999 UT 110, ¶ 14. Also, where reasonably well-informed person could understand these land use ordinances to have more than one meaning, we must strictly construe the Code in favor of the property owner.

Given this distinction between buildings and structures, and decks being included in a list of structures, the choice of the city to specify setbacks apply to accessory structures in some zones and accessory buildings in others, and their lack elements of housing and shelter qualifying them as buildings, we find that decks are indeed *structures*.

Note that by defining the deck as a *structure*, it is not a *building* which is attached to the main building by a wall with an opening, and therefore one building. It remains a distinct, separate *structure* attached to the main building.

Also, the broad definition of *occupancy* does not apply to *structures*. "Occupancy: The use or intended use of the *land or buildings* by proprietors or tenants." *CITY CODE 19.40.1840* (emphasis added). Therefore, under this interpretation, mailboxes, fences, retaining walls, etc. are appropriately not *buildings*.

The height of structures is plainly restricted in the R-1-8 zone "Maximum Height of *Structures* . . . (B) All other properties shall maintain a maximum *structure* height of 35 feet. (C) No accessory *structure* shall exceed 20' in height . . ." CITY CODE 19.26.070. However, setbacks are only provided for *buildings*. "Setbacks/yard requirements are intended to provide a description of the required space between *buildings and property lines*." CITY CODE 19.26.060 (emphasis added). Silence means unregulated. By failing to include setbacks for accessory *structures*, it is implicitly determined that such structures do not need setback regulation. *See Brown v. Sandy City Bd. Of Adjustment*, 957 P.2d 207.

In conclusion, we have followed the rules of statutory interpretation, reading the Code as a whole, giving each word meaning, and erring in favor of allowing the proposed use, and conclude that the deck is an *accessory structure*. The context of the Code overall distinguishes a *building* from other *structures* as one that is specifically enclosed. As such, the deck is neither part of the main building and subject to the 20' rear yard setback nor an accessory building subject to the 3' rear yard setback plus the 6' setback from the home. As an accessory structures, the deck must meet the applicable height restrictions within the R-1-8 zone for accessory structures. There are no applicable setback requirements. Therefore, the deck may remain in its current location.

Conclusion

Decks are neither part of the main building intended for human habitation and subject to the 20' rear yard setback nor an accessory building subject to the 3' rear yard setback plus the 6' setback

from the home. Different words used in a similar statute must be assigned different meanings whenever possible. The Code uses *building* and *structures* distinctly. When read as a whole, we find that decks are accessory *structures*. There are height restrictions within the R-1-8 zone for accessory structures, but no setback requirements. Therefore, the deck may remain in its current location.

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.

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. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

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 and civil penalty provisions, found in § 13-43-206 of the Utah Code, 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.