

Advisory Opinion #213

Parties: Bonnie Timmerman, Virgin Town

Issued: July 30, 2019

TOPIC CATEGORIES:

Conditional Use Applications

The Town approved the applicant's conditional use permit to operate an RV park and campground in reliance on a zoning designation enacted by Town Ordinance 2018-9. As a result of a referendum vote, that ordinance was passed contrary to another town ordinance, and thus in violation of law. While the enactment of the ordinance was never timely appealed, the approval of applicant's conditional use permit was timely appealed. Under Utah law, an affected party that timely brings a claim challenging the approval of a conditional use permit may raise a challenge to the legality of the ordinance itself. Since the Town's decision to approve applicant's conditional use permit was based on an illegal ordinance, a claim brought in district court challenging the permit's approval would survive.

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.



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ADVISORY OPINION

Advisory Opinion Requested By: Bonnie Timmerman

Local Government Entity: Virgin Town

Applicant for Land Use Approval: Zion Sunset Resort, LLC

Type of Property: Agricultural/Resort

Date of this Advisory Opinion: July 30, 2019

Opinion Authored By: Jordan S. Cullimore
Office of the Property Rights Ombudsman

ISSUE

Did Virgin Town lawfully approve a conditional use permit application submitted by Zion Sunset Resort, LLC to operate an RV Park and Campground on property located within the Town?

SUMMARY OF ADVISORY OPINION

Virgin Town approved Zion Sunset Resort's conditional use permit to operate an RV park and campground in reliance on a zoning designation enacted by Town Ordinance 2018-9. As a result of a referendum vote, that ordinance was passed contrary to another town ordinance, and thus in violation of law. While the enactment of the ordinance was never timely appealed, the approval of Zion Sunset Resort's conditional use permit was timely appealed. Under Utah law, an affected party that timely brings a claim challenging the approval of a conditional use permit may raise a challenge to the legality of the ordinance itself. Since the Town's decision to approve Zion Sunset Resort's conditional use permit was based on an illegal ordinance, a claim brought in district court challenging the permit's approval would survive.

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 Bonnie Timmerman on April 10, 2019. A copy of that request was sent via certified mail to John Grow, Mayor for Virgin Town, on April 11, 2019.

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 Bonnie Timmerman on April 10, 2019.
2. Email response submitted by Heath H. Snow, Attorney for Virgin Town, on April 17, 2019.
3. Email with additional information, submitted by Bonnie Timmerman on April 18, 2019.
4. Reply submitted by Heath H. Snow, Attorney for Virgin Town, on May 15, 2019.
5. Response submitted by Bonnie Timmerman on May 29, 2019.
6. Response submitted by Heath H. Snow, Attorney for Virgin Town, on June 4, 2019.
7. Response submitted by Bonnie Timmerman on June 7, 2019.

BACKGROUND

On February 28, 2018, the Virgin Town Council passed Virgin Ordinance 2018-07, expanding the "geographic eligibility area" of the Highway Resort Zone (HR Zone) to include property owned by Zion Sunset Resort, LLC (ZSR). This was necessary because, under the Virgin Town Code, the HR Zone is subject to a location-based restriction. The Town Council may not include land in the HR Zoning District unless the land is located within the geographic eligibility area described in the Town Code. ZSR sought to request application of the HR Zone to its property (ZSR Property), but in order for that to be possible, the Town Council needed to first exercise its legislative authority to expand the HR Zone's geographic eligibility area to include the ZSR Property.

At the same February 28, 2018 meeting, the Town Council passed Virgin Ordinance 2018-9. This ordinance approved a rezone request, submitted by ZSR, to change the zoning designation of the ZSR property from Rural Agricultural (RA Zone) to Highway Resort (HR Zone), in light of the prior expansion of the HR Zone's geographic eligibility area.

On March 5, 2018, eligible sponsors submitted to Virgin Town (Town) referendum petitions on Ordinance 2018-7 and Ordinance 2018-9. These petitions satisfied all the requirements to be placed before the electorate of the Town in the form of Proposition 20 (Ordinance 2018-7), and Proposition 21 (Ordinance 2018-9). This was done on November 6, 2018, during the Town's general election. Ultimately, the voters rejected Ordinance 2018-7, which would have expanded

the Highway Resort Zone's (HR Zone) geographic eligibility area to include the ZSR Property, but accepted Ordinance 2018-9, applying the HR Zone to the ZSR Property.

In light of this result, the Town concluded that “the voters of the Town spoke via populous vote and stated that they did not want to see property south of SR-9 and north of the Virgin be eligible to seek rezonings to the HR Zone from one end of Town to the other (Ordinance 2018-7 rejection), yet they did say that they approved having the [ZSR Property] rezoned from RA to HR (Ordinance 2018-9 acceptance).”

In accordance with this conclusion, the Town, on March 27, 2019, approved a conditional use permit, submitted by ZSR, to construct and operate an RV Park and Campground on the ZSR Property, on the basis that the HR Zone governed the ZSR Property and allowed the use. Bonnie Timmerman (Timmerman) timely appealed this approval and submitted an Advisory Opinion request to this Office. In her Request for Advisory Opinion, Timmerman asserts that Ordinance 2018-9, applying the HR Zone to the ZSR Property, is invalid, regardless of the fact that the Virgin Town voters accepted the referendum on the ordinance, because Ordinance 2018-9 was contingent upon Ordinance 2018-7 passing, which it did not because the voters rejected it via referendum. Since Ordinance 2018-7, expanding the geographic eligibility area of the HR Zone, failed, Timmerman argues the Town lacked authority to enact Ordinance 2018-9, whether by Council action or voter approval.

The Town, on the other hand, contends that because the two ordinances were considered under two separate propositions, they each stand alone, and one cannot be contingent upon the other. The Town further argues that the people may legislate without limitation on their authority, which they did when they accepted Ordinance 2018-9 and applied the HR Zone to the ZSR Property, irrespective of the outcome of the referendum on Ordinance 2018-7.

ANALYSIS

Typically, it is not difficult to determine which of a town's various zoning districts applies to a parcel of land in the town when a property owner applies for a land use permit. Normally, the property owner may simply refer to the town's current official zoning map to locate the property and identify the applicable zoning designation. The present situation is not so straightforward because both ordinances became subjects of referendum petitions.

I. The Referendum Power

Under Section 1(2)(b)(ii) of Article 6 of the Utah Constitution, the legal voters of a town may “require any...ordinance passed by the [town council] to be submitted to the voters thereof, as provided by statute, *before the law or ordinance may take effect*” (emphasis added). The power of an electorate to exercise legislative authority within a jurisdiction and submit a local law to popular vote is an inherent power reserved by the people in the Utah Constitution. *See Krejci v. City of Saratoga Springs*, 2013 UT 74 ¶ 24, 322 P.3d 662.

The Virgin Town electorate exercised this power when it rejected Ordinance 2018-7, but accepted Ordinance 2018-9. The effect of these decisions was to reject the expansion of the HR

Zone's geographic eligibility area to include the ZSR Property, but to nonetheless rezone the ZSR Property to the HR Zone.

II. Application of Ordinance 2018-9 to the Zion Sunset Resort Conditional Use Permit

As indicated above, the Town argues that the two ordinances stand alone and that the rejection of Ordinance 2018-7 does not prevent the enactment of 2018-9 because the town voters, in contrast to the limited power held by a town council, have unrestricted discretion to enact any ordinance, regardless of a law stating otherwise. This simply is not the case. No entity has authority to violate law. Local law, in the form of local ordinances, sets limitations on the exercise of local legislative authority. If local law prohibits an action, the legislative body, whether it be a town council or the electorate via initiative or referendum, must comply with the law. *See* UTAH CODE § 10-9a-509(2) (“A municipality is bound by the terms and standards of applicable land use regulations and shall comply with mandatory provisions of those regulations.”). If the local legislative authority determines that a law does not serve the public interest, it may change the law through the formal legislative processes, but it may not simply disregard or ignore the law, even if the legislative body is the electorate exercising its authority via the referendum process.

Timmerman asserts that since the town's electorate rejected Ordinance 2018-7 the voters then lacked authority to enact Ordinance 2018-9 since the ZSR property wasn't eligible for rezone to the HR Zone under the Town Code. This position is correct. The decision made by the Town's voters to reject Ordinance 2018-7 but approve Ordinance 2018-9, effectively approving the rezone request but not expanding the eligibility area, was a violation of the Town's ordinances. The Town Code plainly prohibits applying the HR Zone to a property unless the property is located within the HR Zone's geographic eligibility area.

The implications of the voters' decision to accept one and reject the other are best illustrated by considering what would have happened had the *Town Council* done this itself, irrespective of the electorate's referendum vote. Had the Town Council approved the zone change but rejected the expansion, the Town would have illegally adopted a zoning ordinance. The zone change would violate the Town's own ordinances requiring expansion of the eligibility area.

We conclude that the result of a referendum accepting a town council's enactment of an ordinance has the same effect as if the town council had enacted the ordinance.¹ The Town, *through its citizens' vote*, violated its own ordinances by approving a zone change outside of the geographic eligibility area of the HR Zone.

There are, however, procedural considerations related to timeliness. A violation such as the one just described does not necessarily void the zoning ordinance, but leaves it subject to a legal challenge. *See* UTAH CODE 10-9a-801(3)(a)(i) (explaining that a land use regulation must be presumed to be valid if it was enacted in accordance with State law). If no legal challenge comes

¹ The Town, citing *Carter v. Lehi City*, 2012 UT 2, 269 P.3d 141, argues that the electorate's authority to legislate is broader and less restricted than a town council's authority to legislate. We distinguish *Carter* from this case to the extent that *Carter* addresses the electorate's initiative power, which is the electorate's power to pass a law of its own accord, where this case involves the electorate's referendum power, which is the power to accept or reject a law passed by the town council. Thus because the voters are weighing in on the Town's action, the effect is as if the Town had done the action itself.

within the proscribed appeal period, the decision will stand. *See* UTAH CODE 10-9a-801(5) (“...a challenge to the enactment of a land use regulation or general plan may not be filed with the district court more than 30 days after the enactment.”).

In the present case, Ordinance 2018-9 was subject to challenge when it officially went into effect on November 28, 2018, after the result of the referendum was formalized. However, no one timely appealed Ordinance 2018-9 on the basis that it violated applicable law. Consequently, the law became applicable and unappealable after the 30 day appeal window lapsed. It would appear that the City contemplated this when it “allowed all appeal periods to run” before approving ZSR’s conditional use permit to construct and operate an RV Park and Campground on March 27, 2019.

Nevertheless, this does not end the analysis. The law allows another means through which an affected party may challenge an illegal ordinance, regardless of when the ordinance went into effect. Utah law provides that an affected party may challenge the legality of an ordinance at the time a land use decision, such as the approval of a conditional use permit, is made in reliance on the subject ordinance. *See Gilmore v. Summit County*, 2010 UT 69, 246 P.3d 102.

In *Gilmore v. Summit County*, the Utah Supreme Court held that once a party has satisfied the Land Use Development and Management Act’s (LUDMA) jurisdictional requirements to bring a claim challenging the legality of a land use decision, the party bringing the claim “may raise *any and all* claims relating to the alleged arbitrary, capricious, or illegal nature” of the decision that adversely affects the party’s interests. *Gilmore v. Summit County*, 2010 UT 69, ¶ 26, 246 P.3d 102 (emphasis added).

In *Gilmore*, an affected party failed to challenge the constitutionality of an ordinance within 30 days of the ordinance’s enactment. Several years after the enactment of the ordinance, the affected party sought approval of a development application that was subject to the ordinance. The local government involved in the case asserted that the ordinance was immune from challenge because its enactment was never timely appealed. Nevertheless, the Court determined that, as stated above, as long as the affected party satisfied jurisdictional requirements to bring a claim, the party could raise any and all claims related to the decision’s asserted illegality.

In *Gilmore*, the affected party claimed the ordinance on which the decision was based was illegal due to constitutionality. Here Timmerman claims that the decision to approve ZSR’s CUP was illegal because the ordinance on which the decision was based was passed in violation of the Town’s ordinances. Since Timmerman is correct that Ordinance 2018-9 was passed in violation of the Virgin Town Code, a claim² asserting as much in Court would survive and could prevail since the RA Zone does not permit RV parks or campgrounds.

² The submitted materials do not present the needed information to determine whether Timmerman, in this case, is an adversely affected party that can meet the jurisdictional requirements for bringing a challenge in district court. If she is not an affected party, then she likely would not prevail on a challenge that the decision was based on an illegal ordinance.

CONCLUSION

The Town approved ZSR's conditional use permit to operate an RV park and campground in reliance on a zoning designation enacted by Town Ordinance 2018-9. As a result of a referendum vote, that ordinance was passed contrary to another town ordinance, and thus in violation of law. While the enactment of the ordinance was never timely appealed, the approval of ZSR's conditional use permit was timely appealed. Under Utah law, an affected party that timely brings a claim challenging the approval of a conditional use permit may raise a challenge to the legality of the ordinance itself. Since the Town's decision to approve ZSR's conditional use permit was based on an illegal ordinance, a claim brought in district court challenging the permit's approval would survive.

Brent N. Bateman, 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.

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 Utah Code § 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.

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Mayor Matthew Spendlove
114 South Mill St.
PO Box 790008
Virgin, Utah 84779

On this 30th day of June 2019, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

Office of the Property Rights Ombudsman