

Advisory Opinion #60

Parties: M. Ray Taylor and City of Lindon

Issued: January 20, 2009

TOPIC CATEGORIES:

E: Entitlement to Application Approval (Vesting)

R(v): Other Topics (Interpretation of Ordinances)

The term “family-type arrangement” is not defined in the Utah Code, but the meaning can be ascertained by the plain and accepted meaning of the words. The City’s interpretation is allowed a degree of deference, and it should be upheld. Residential facilities for elderly persons may not operate as a business, and must be owned by at least one resident. A proposal to retain ownership and lease the facility to a tenant-owned entity is not consistent with state law.

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



JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Interpretation of Ordinance Language Governing Location and Operation of Residential Facilities for Elderly Persons

Advisory Opinion Requested by: M. Ray Taylor

Local Government Entity: Lindon City

Applicant for the Land Use Approval: M. Ray Taylor, Golden Key Investments, LLC

Project: Residential Facility for Elderly Persons

Date of this Advisory Opinion: January 20, 2009

Opinion Authored By: Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

May a local government deny an application for a residential facility for elderly persons by finding that the proposed facility is not the kind “family-type arrangement” anticipated by the Utah Code?

Summary of Advisory Opinion

The interpretation of the term “family-type arrangement” was reasonable and appropriate. The definition of the words support an interpretation that the phrase means a grouping of individuals living in a single household in a way that resembles or is characteristic of a family, both in numbers and manner of living. The City’s interpretation promotes the intent of the statute of preserving the residential nature of neighborhoods, while providing housing opportunities for the elderly. Finally, the City’s interpretation is entitled to a level of deference, recognizing the expertise of City officials and employees.

In order to be eligible for the protections granted by §§ 10-9a-516 through -519, the facility must be owned by at least one resident. Ownership by a non-resident (or a corporate entity) is not

allowed by the statute, which expressly requires ownership by at least one resident. The facility does not qualify for the status granted by the Utah Code, because proposed operation by a non-profit entity which leases the facility is not allowed.

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 ANN. § 13-43-205. The 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 Ray Taylor on October 27, 2008. A copy of that request was sent via certified mail to Debra Cullimore, Lindon City Recorder. The City received the request on October 30, 2008. The City submitted a response to the Office of the Property Rights Ombudsman, which was received on November 13, 2008. A reply was submitted by Mr. Taylor's counsel, Stevan R. Baxter, which was received on December 9, 2008.

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, filed October 27, 2008 with the Office of the Property Rights Ombudsman by M. Ray Taylor, with attachments.
2. Response from Lindon City, submitted by Adam Cowie, Planning & Development Director, received on November 13, 2008, with attachments.
3. Reply submitted by Stevan R. Baxter, Attorney for Mr. Taylor, received December 9, 2008.
4. Sections 10-9a-516 through 519 of the Utah Code (including definitions); and Chapter 17.30 of the Lindon City Code.

Background

M. Ray Taylor, of Golden Key Investments, LLC, proposed to build the "Golden Years Group Home," (*herein* "Group Home") an assisted living facility for the elderly.¹ Mr. Taylor acquired a one-acre parcel in an area zoned for residential uses. There is a commercial zone to the east parcel, and residential zones, with some homes, on other adjacent properties. As provided in the

¹ For convenience, this Opinion will use Mr. Taylor's name as if he were the owner of the property, rather than the limited liability company.

Utah Code, a “Residential Facility for Elderly Persons” is allowed in any zone that permits residential uses.²

Mr. Taylor proposed a 12,700 square-foot building with eight living units, a large central common area, an eight-car garage, and an office and reception area near the front entrance. The common area includes a kitchen area with a stove, refrigerator, dishwasher, and sink. This kitchen area is not in a separate room. Each living unit includes a bedroom, bathroom, kitchen, and a “family room.” Each unit would have an outside entrance through the kitchens, as well as access through the common area. Residents could access the common area through sliding glass doors.³

The Utah Code regulates residential facilities such as the Group Home. Local governments are to adopt ordinances implementing the standards of the Utah Code, provided that they allow for such facilities in zones which allow residential dwellings.⁴ A residential facility for elderly persons may not be operated as a business, must be owned by a resident (or an immediate family member of a resident), and cannot house more than eight persons.⁵ A facility must also “be consistent with any existing, applicable land use ordinance affecting the desired location.”⁶ Lindon City enacted an ordinance regulating residential facilities for elderly persons which closely follows the Utah Code. The City’s ordinance requires that facilities be at least 3,960 feet ($\frac{3}{4}$ of a mile) apart.⁷

On September 24, 2008, the Lindon City Planning Commission approved Mr. Taylor’s application for the site plan of the Group Home.⁸ The Planning Commission recommended approval of the site plan with the following conditions:

1. That Mr. Taylor submit documentation that the Group Home would not be operated as a for-profit business.

² See UTAH CODE ANN. §§ 10-9a-516 through 519; see also *id.*, § 17-27a-515 through 518 (applicable to counties). A residential facility for elderly persons is “a single-family or multi-family dwelling unit that meets the requirements of Section 10-9a-516” *Id.* § 10-9a-103(38). Such a facility is a permitted use in any zone in which residential uses are allowed; however, if a zoning ordinance allows single-family residences exclusively, a residential facility for elderly persons is a conditional use.

³ An earlier plan called for nine living units, each with a separate garage and outside entrance. The ninth unit was proposed to be used by a live-in caretaker. That plan was revised in response to concerns about the size and nature of the facility.

⁴ *Id.* § 10-9a-517(1). Local governments may require that facilities comply with building, safety, and health codes, provide adequate parking, and be reasonably dispersed. They may also require that an existing building not be structurally altered to become a facility, and that no resident be treated for alcohol or drug abuse, or be involuntary housed at the facility. *Id.* These standards apply even if a local government has not adopted ordinance to implement them. *Id.*, § 10-9a-518(3).

⁵ *Id.* § 10-9a-516. Although it is not a “business,” a facility may charge residents for meals and other operational expenses.

⁶ *Id.*, § 10-9a-516(2)(b). Section 10-9a-517(2) provides that a city may require compliance with land use ordinances applicable to residential dwellings. *Id.*, § 10-9a-517(2)(a).

⁷ See LINDON CITY CODE § 17.70.030.

⁸ The Application was for site plan approval, not a conditional use permit. See LINDON CITY CODE, § 17.70.030(1).

2. That Mr. Taylor submit documentation that the Group Home would be owned by at least one of its residents (or a family member of a resident).
3. That the Group Home comply with state licensing requirements.
4. That the Group Home provide proof of adequate insurance for the Group Home.
5. That the Group Home refuse to accept any resident who would pose a threat to the health and safety of others.
6. That the Group Home house no more than eight residents.
7. That the Group Home submit to an annual review, to ensure compliance with the conditions.
8. Resolution of an access issue with a neighboring property.

The City Council considered the application on October 7, 2008. The Council denied the application, stating that the facility did not meet the “family-type arrangement” anticipated by state and local laws. In the Council’s opinion, the size and design of the building was more akin to an apartment complex rather than a single-family dwelling. The Council noted that each living unit included a kitchen and bathroom, as well as an outside entrance. In other words, the residents could live completely independent of each other. The Council felt that should the facility cease to be used as a residential facility for elderly persons, it did not appear likely that the building could be used as a “traditional” single-family residence. Finally, the Council also expressed concerns that the facility would be operated as a business, which is expressly prohibited.

Mr. Taylor appealed the City Council’s decision to the Lindon City Board of Adjustment, as provided in the City’s Code. In his appeal, Mr. Taylor argued that the City Council’s application of the term “family-style arrangement” was arbitrary. He indicated that he had redesigned the building in response to the City’s concerns, and that the “most commonly used entrance” would be through the facility’s garage and through the common area, rather than the outside entrances for the individual units. The common area would be used for dining and a “living room,” which is conducive to a “family-type arrangement.”

Mr. Taylor pointed out that the City could not hope to regulate the manner in which any persons living together would interact, whether they are a traditional family with parents and children, or a group of adults residing in the same structure. “Lindon City cannot force elderly, single, unrelated individuals . . . to associate in a ‘family-type arrangement’ any more [than] it can force siblings in a traditional family with a father and mother . . . to associate in a ‘family-type arrangement.’”⁹ He also stated that a family with eight children could construct the same building in a residential zone.

⁹ Reply letter from Stevan R. Baxter to the Office of the Property Rights Ombudsman, dated December 9, 2008.

Concerns about the Group Home's ownership and operation were addressed by proposing that the home be run by a non-profit entity, which would lease the property from Mr. Taylor.¹⁰ The non-profit would be owned by the residents of the Group Home, who would be shareholders or co-owners of the organization.¹¹ Mr. Taylor stated that the City's code allows for such an arrangement, because it permits a residential facility for the elderly to be operated as a non-profit.¹²

Despite Mr. Taylor's arguments, the Board of Adjustment upheld the City Council's decision on October 30, 2008. Mr. Taylor submitted a Request for Advisory Opinion on October 27, 2008.

Analysis

I. The City's Interpretation of the Term "Family-Type Arrangement" is Reasonable.

The City's interpretation of the term "family-type arrangement" in its ordinances is a reasonable application of the term. That term is not specifically defined in either the City's ordinances or the Utah Code. Since the City is charged with administering its ordinances, and applying state law, the City may adopt reasonable interpretations of undefined terms in those statutes.

A. Standards of Statutory Interpretation

Statutory interpretation begins with the language of the ordinance. *See Biddle v. Washington Terrace City*, 1999 UT 110, ¶ 14, 993 P.2d 875, 879. The "primary goal . . . is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." *Foutz v. City of South Jordan*, 2004 UT 75 ¶ 11, 100 P.3d 1171, 1174. Statutes should be construed so that "all parts thereof [are] relevant and meaningful." *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996). Furthermore, 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 1208, 1216.

The expertise of local zoning authorities bestows a degree of validity upon their interpretation and application of ordinances:

Due to the complexities of factors involved in the matter of zoning, as in other fields, where courts review the actions of administrative bodies, it should be assumed that those charged with that responsibility . . . have specialized knowledge in that field. Accordingly, they should be allowed a comparatively

¹⁰ The property and building would likely be owned by Golden Key Investments, LLC, or another company, not by Mr. Taylor individually. *See* note 1, *supra*.

¹¹ The specifics of the ownership of the proposed non-profit organization were not explained in the materials submitted for this Opinion. Evidently, residents would be co-owners or trustees of the non-profit. As new residents moved in, they would become co-owners.

¹² Section 17.70.030(2) of the Lindon City Code reads as follows: "A residential facility for elderly persons may not operate as a business (not for profits organization)." The parenthetical phrase is not found in the Utah Code.

wide latitude of discretion; and their actions endowed with a presumption of correctness and validity

Cottonwood Heights Citizens Ass'n v. Board of Commissioners, 593 P.2d 138, 140 (Utah 1979). The Utah Supreme Court further elaborated on this rule and held that zoning agencies are allowed broad discretion in policy and factual decisions, but when a local government interprets the terms of its zoning ordinance, “a better approach is [to] . . . review [the] interpretation of ordinances for correctness, but . . . afford some level of non-binding deference to the interpretation advanced by the local agency.” *Carrier*, 2004 UT 98, ¶28, 104 P.3d at 1216.¹³

B. *The City's Interpretation.*

The Lindon City Council's interpretation and application of the term “family-type arrangement” is consistent with the legislative intent as well as the plain language of the term. Although the intent of the state statute is not expressed, it appears that the Utah Legislature enacted the statute to prohibit discrimination and encourage greater housing opportunities for the elderly. The Utah Code provides that residential facilities for the elderly may not be prohibited in any zone that allows residential dwellings.

The statute, however, limits the kind of “residential facilities” that are eligible for that guarantee. Facilities cannot be operated as businesses, they must be owned by at least one of the residents, no more than eight people may live in facilities, and they must live in a “family-type arrangement.” The statute also requires that a residential facility must have a “residential character.”¹⁴ These limitations indicate a legislative intent to exclude commercial facilities, such as nursing homes, large facilities, and assisted living centers, from the protections provided in the statute. They also show that the statute respects a local government's wishes to promote residential neighborhoods.

Since the term “family-type arrangement” is not specifically defined in either the Utah Code or the City's ordinances, the plain meaning of the term may be ascertained using dictionary definitions.¹⁵ To begin with, Webster's Collegiate Dictionary includes the following definitions of the word “type:” “[A] particular kind, class, or group . . . something distinguishable as a variety.”¹⁶ In addition, the suffix “-type” attached to a word means “made of, resembling, or

¹³In the *Carrier* decision, the court applied that rule to an ordinance interpreted by a “lay” planning commission, rather than by a professional staff. Using the reasoning of the *Carrier* decision, the approach should be the same, however, and the interpretation advanced by the City's zoning staff should be given the same non-binding deference. See *Carrier*, 2004 UT 98, ¶¶ 25-28, 104 P.3d at 1215-16.

¹⁴ See UTAH CODE ANN. §§ 10-9a-517(2)(b) and 10-9a-519(2)(b). Both sections restrict architectural or landscaping alterations to buildings used for residential facilities. It stands to reason that a new building, such as that proposed by Mr. Taylor, must also have a “residential character.”

¹⁵The Lindon City Code provides that “[a]ny words in this title not defined in [Chapter 17.70] shall be as defined in Webster's Collegiate Dictionary.” LINDON CITY CODE, § 17.70.020. Chapter 17.70 governs Group Homes, including Residential Facilities for Elderly Persons.

¹⁶ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 11TH ED. 2003

functioning as;”¹⁷ or “of the specified type; typical or characteristic of . . . reminiscent or imitative of.”¹⁸

The word “family” is defined as “a group of individuals living under one roof and usually under one head;”¹⁹ and “the body of persons who live in one house or under one head.”²⁰ These definitions do not limit “family” to related persons only.²¹ “Family-type” can reasonably mean a group of individuals living together under one roof in a manner that is reminiscent of a traditional family comprised of related persons.

An “arrangement” is state of being “put into a proper order or into a correct or suitable sequence, relationship, or adjustment.”²² Synonyms include “organization, configuration, grouping, disposition.”²³ It does not necessarily mean a formal organization, and it can mean an informal agreement or settlement, especially on personal or social matters.²⁴

Based on this, then, the meaning of the term “family-type arrangement” as it is found in the Utah Code and Lindon City ordinances, is a grouping of individuals living as a single household that resembles or is characteristic of a family, both in numbers and in manner of living. This follows the recognized dictionary meanings of the words, and is also consistent with the intent of the statute.

The Lindon City Council felt that the proposed facility was not a family-type arrangement. The Council noted the size of the building, which at over 12,000 square feet, was larger than nearby homes. The Council also felt that the facility virtually appeared to be an apartment complex, with eight separate units, each with an outside entrance, kitchen, dining area, bathroom, and storage areas. Although the building included common areas, the residents could live in the facility independent of one another, which is not typical of a “family.” The facility also includes a reception area and a staff office, which are things usually found in a business structure, not a residential dwelling.

The City Council also expressed concern that the building would not be compatible as a single-family residence if it ceases to be occupied by elderly residents. Mr. Taylor notes that the building could be used by a large family, at least in theory. However, the size of a building does not always correlate to the number of individuals who occupy it. It is relatively simple to identify extremely large homes with only one or two people living there, or small homes with families of eight or nine. The concern expressed by the City Council was over the compatibility

¹⁷THE OXFORD DICTIONARY AND THESAURUS, AMERICAN EDITION (1996) (definition of “type” in combination with other words).

¹⁸THE OXFORD ENGLISH DICTIONARY, 2ND ED. (1989) (under the separate definition of “-type” as a suffix).

¹⁹MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, 11TH ED. 2003

²⁰THE OXFORD ENGLISH DICTIONARY, *op cit.*

²¹Definitions for “family” also include a “group of objects distinguished by common features,” and “a brotherhood of persons or nations united by religious or political ties.” THE OXFORD DICTIONARY AND THESAURUS, *op cit.*

²²MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *op cit.* (under definition of “arrange”)

²³THE OXFORD DICTIONARY AND THESAURUS, *op cit.*

²⁴MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *op cit.*

of the proposed Group Home in an existing residential neighborhood, not the size of the structure. The City felt that the size and the design of the facility is more like an apartment complex than a single-family dwelling. A review of the proposed floor plans confirms the City Council's conclusion.

Given the definition of the term "family-type arrangement," the intent of the statute, and the deference conceded to the City's interpretation, it is the conclusion of the Office of the Property Rights Ombudsman that the City's application and interpretation of the term is reasonable and acceptable. It is true that "since zoning ordinances are in derogation of a property owner's use of land . . . any ordinance prohibiting a proposed use should be strictly construed in favor of allowing the use."²⁵ However, that provision does not override other rules of statutory interpretation. If a proposed use does not meet the standards of a state statute or local ordinance, it cannot claim the protections of that statute.

II. The Ownership and Operation of the Proposed Facility are not Consistent with State Law.

The proposed ownership and operation of the facility is not the sort which is anticipated by the state statute. "A residential facility for elderly persons may not operate as a business;" and it must "be owned by one of the residents"²⁶ This helps fulfill the intent of preserving residential neighborhoods while still providing housing opportunities for the elderly. It also restricts facilities that are run as business enterprises, again preserving residential neighborhoods.

Mr. Taylor proposes to retain ownership of the Group Home in Lindon, and lease it to a non-profit entity owned by the home's residents. Such an ownership arrangement exempts the proposed facility from the state statute, because the facility must be owned (not leased) by a resident. If the title to the facility (including the building and land) is not in the name of at least one resident, the facility does not qualify for the status granted by the state statutes. In addition, setting up a non-profit entity to operate the facility, even if the entity is owned by the residents, appears to be business, which is prohibited by state law.

The Lindon City Code adds "not for profits organization" as a parenthetical phrase in the paragraph prohibiting residential facilities from operating as businesses. Mr. Taylor argues that his proposed ownership arrangement is thus permitted. It is acknowledged that the City Code can reasonably be read as allowing operation by non-profits, but the Utah Code does not. However, it is not necessary for this Opinion to determine whether the City Code can grant this exemption not found in the state law, because the plain language of both the Utah Code and the

²⁵ *Carrier v. Salt Lake County*, 2004 UT 98, ¶31, 104 P.3d at 1217.

²⁶ UTAH CODE ANN. § 10-9a-516. The facility may also be owned by an immediate family member of a resident, or the title may be placed in trust for a resident.

City's ordinances require ownership of the facility by at least one resident. Any other ownership arrangement is not eligible.²⁷

Conclusion

The interpretation of the term "family-type arrangement" by the Lindon City Council was reasonable and appropriate. The interpretation is supported by accepted definitions of the terms, and it helps promote the intent of the statute, by preserving residential neighborhoods while still providing residential opportunities for the elderly. Since the City's interpretation of the statute is allowed a level of deference, this Opinion concludes that the Lindon City Council properly and reasonably interpreted its ordinance.

The proposed Group Home is not eligible for the protections granted by §§ 10-9a-516 through -519, because the facility is not proposed to be owned by at least one resident. Ownership by a non-resident (or a corporate entity) which leases it to residents is not anticipated by the statute, which expressly requires ownership by at least one resident. Because it is not owned by at least one resident, the Group Home does not qualify as a Residential Facility for Elderly Persons.

Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

²⁷ The language of § 10-9a-516(1) explicitly approves ownership and excludes lease arrangements. (It must be presumed "that each term included in the ordinance was used advisedly." *Carrier*, 2004 UT 98, ¶30, 104 P.3d at 1216. In addition, an omission in an ordinance should be given effect by a presumption that the omission was purposeful. "[T]he expression of one should be interpreted as the exclusion of another." *Biddle v. Washington Terrace City*, 1999 UT 110, ¶ 14, 993 P.2d 875, 879.)

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.

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:

Debra Cullimore, City Recorder
Lindon City
100 N. State Street
Lindon, Utah 84042

On this _____ Day of January, 2009, 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