



INSTITUTE FOR JUSTICE

May 13, 2022

Via Email

Mayor David Schmuker
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Members of the Planning and Zoning Board (Mses. Johnson and Wood; Mr. Wilkes)
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RE: Big Water's Unconstitutional Ban on Modestly Sized Homes

Mayor Schmuker, Members of the Town Council, and Members of the Planning and Zoning Board:

The Institute for Justice (IJ) has learned that Big Water's zoning ordinance bans homes smaller than 2,000 square feet in any area zoned RE-2 Ranchette Estates. The Town's only basis for the sq. ft. minimum appears to be its desire to keep the property values up in the RE-2 zone. In fact, in denying Big Water resident Chrissy Rochford's request that the Town consider changing the minimum square foot requirement, the Planning and Zoning board advised that she:

[L]ook into land on the other side of town where the smaller homes are allowed. Or next to land that allows that where [one] could possibly change the zone. There is an agreement with SITLA [School and Institutional Trust Lands Administration] that we would keep the area around Shelter Cove with the larger requirements *to keep the property value up*.

The Town's ban on modestly sized homes is likely unconstitutional, and IJ asks that it be repealed. Americans should be free to build homes in whatever size best suits their needs, so long as they comply with reasonable health and safety standards. We discuss this issue in more detail below.

Relatedly, as also discussed below, the Town seemingly is not complying with its obligations under Utah's Government Records Access and Management Act (GRAMA) regarding requests for information about the ordinance and the agreement with SITLA. Utah Code Ann. §§ 63G-2-101 *et seq.* IJ requests that the Town rectify this immediately by responding to these record requests.

The Institute for Justice

Before discussing those issues, we'd like to introduce the Institute for Justice and tell you a bit about what we do. IJ is a national nonprofit law firm that has fought to protect individuals'

constitutional rights for over 30 years. <https://ij.org/about-us/>. We have litigated our cases at the U.S. Supreme Court ten times, as well as at multiple state supreme courts. One of our areas of expertise is property rights. We have sued dozens of local governments for infringing on individuals' property rights, including through unreasonable and unfair zoning regulations. For example, we recently sued Calhoun, Georgia, for its minimum square footage requirement for new homes of 1,150 square feet. See <https://ij.org/case/georgia-tiny-homes/>. We have also brought multiple lawsuits about violations of public records law. See, e.g., <https://ij.org/case/pa-forfeiture-foia/>.

Big Water's 2,000 square foot minimum requirement obviously is much higher than the 1,150 square foot minimum requirement in Calhoun, Georgia. (The Town's 1,200 square foot minimum for lands zoned R-1 and RE-1 Ranchette Estates also exceeds Calhoun's minimum requirement.) As far as we are aware, Big Water's 2,000 square foot minimum for RE-2 zones may be the highest in the United States.

Big Water's 2,000 Square Foot Minimum Ordinance

The Town's ordinance prevents Big Water resident Chrissy Rochford from building her home. Ms. Rochford, an adventure specialist who guides tourists who have been drawn to the Town's natural attractions, currently lives with her dog and horses under her care in a small RV park in Big Water. However, she wants to build an approximately 1,600 square-foot home where she and her dog can live, and she needs to build that home on land that is large enough for her horses. The only land that fits the bill in Big Water is zoned RE-2, meaning Ms. Rochford cannot build there unless she builds a home that is at least 2,000 square feet. Although she can secure financing for a 1,600 square foot pre-manufactured home, she cannot do so for a 2,000 square foot home. And, even if she could get financing, she wouldn't be able to purchase a 2,000 square foot home for at least two years due to manufacturer delays. When Ms. Rochford has requested that the Town remove this obstacle by amending the ordinance, the Town has responded that it can't because it promised SITLA—in an agreement that no one is able to locate and for which no one is able to provide details or terms—the minimum square foot requirement would remain in place to prop up property values around town. The Town's solution was for Ms. Rochford just to look somewhere else.

The 2,000 square foot minimum likely violates the U.S. and Utah Constitutions, both of which protect substantive due process. Under substantive due process, all laws—including zoning ordinances—must be reasonable and rationally serve legitimate government interests, such as the general welfare and public safety. In contrast, municipalities are prohibited from enacting zoning ordinances that are “unreasonable or irrational,” *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 252 (Utah Ct. App. 1998) (citing 1 Kenneth H. Young, *Anderson's Am. Law of Zoning* § 3A.04 (4th ed. 1996) (explaining such an ordinance “may be found to violate the substantive component of the due process clause”). Put another way, substantive due process protections prohibit zoning ordinances that “do not rationally promote the public health, safety, morals and welfare.” *Id.* (quoting *Patterson v. Utah Cnty. Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995)).

Here, the Town's 2,000 square foot minimum is “unreasonable” and “irrational.” In the Town's own words, the zoning ordinance exists solely to prop up the property values in areas zoned RE-2—where some members of the Town Council currently live. And, even if the Town hadn't clearly stated its property-value rationale for the ordinance, the minimum requirement still wouldn't “rationally promote the public health, safety, morals, [or] welfare.” Several courts have already ruled

to this effect concerning less onerous minimum square foot requirements. *See, e.g., Builders Serv. Corp., Inc. v. Plan. & Planning & Zoning Comm'n of Town of E. Hampton*, 545 A.2d 530, 550 (Conn. 1988) (holding that town's minimum square footage requirement of 1,300 square feet for single family homes was "not rationally related to any legitimate purpose of zoning," including protecting general welfare and safety); *In re Medinger*, 104 A.2d 118 (Pa. 1954) (striking down minimum square footage requirement of 1,800 square feet after finding that it had no connection to public safety or welfare).

Not only have courts ruled that way, it's also common sense. Big Water can't seriously argue that homes smaller than 2,000 square feet are unsafe or unhealthy. That's because even much smaller homes can easily comply with health and safety standards, including the health and safety standards in Big Water's own zoning ordinances. Certainly the 1,600 square foot home that Ms. Rochford would build is not too small to comply with those standards. And yet, the Town rigidly stands by the minimum square foot requirement, which merely forces people to build homes they neither want nor need, makes homes needlessly expensive, and discriminates against people of modest means who cannot afford to build 2,000 square foot estates.

Ms. Rochford's GRAMA Request to Big Water

Finally, Big Water must adhere to its obligations under Utah's GRAMA law. When Ms. Rochford requested the agreement with SITLA that, according to the Town, requires the 2,000 square-foot minimum in RE-2 zones, the Town should have provided a response within 10 business days. *See* Utah Code Ann. § 63G-2-204(4)(b). Failing that, the Town should have explained at that time why "extraordinary circumstances" justified a further delay and should have provided an estimated completion date for the response. *Id.* § 63G-2-204(4)(b)(iv); *see also id.* § 63G-2-204(6) (listing qualifying "extraordinary circumstances"). To date, the Town has not responded to Ms. Rochford's October 2021 GRAMA request for the SITLA agreement. This is a violation of the law.

Therefore, we urge Big Water to repeal the ordinance requiring that homes in RE-2 zones be a minimum of 2,000 square feet and to respond to the GRAMA requests. Doing so would benefit Big Water's residents by removing an unreasonable and irrational obstacle to homeownership and by increasing the transparency of their government's decision-making.

If the Town would like to discuss IJ's concerns and a path forward, please feel free to contact us by phone at (703) 682-9320, or by email at jgay@ij.org and rbelden@ij.org. Thank you for your prompt attention to this matter.

Best regards,



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