

Advisory Opinion #123

*This Advisory Opinion has been reconsidered and superseded in part by
Advisory Opinion #140.*

Parties: Central Bank and City of Saratoga Springs

Issued: April 30, 2013

TOPIC CATEGORIES:

Nonconforming Use and Noncomplying Structures

The party claiming a nonconforming use has the burden of proving that a use is entitled to nonconforming status. The relevant inquiries are when was the use established, and was the use allowed under the zoning ordinances in place at that time. The existence and permissibility of a use must be proven by factual evidence, and cannot be presumed or implied.

If the language of a prior ordinance is no longer available, reliable testimony or documentary evidence may be used to determine the uses that were allowed.

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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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by: Central Bank
By: John Brems, Attorney for Central Bank

Local Government Entity: City of Saratoga Springs

Applicant for the Land Use Approval: Central Bank

Type of Property: Agricultural

Date of this Advisory Opinion: April 30, 2013

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

Issues

May a property owner claim the right to nonconforming use status based on a zoning ordinance in place when construction on facilities began?

Summary of Advisory Opinion

Nonconforming use status is granted to a property use that was established or initiated when the use was allowable under local ordinances, but which would now be prohibited because of subsequent ordinance changes. A nonconforming use cannot derive from a use that was never allowed. The relevant ordinance is the one in place when the use was initiated. Even if construction of facilities associated with the claimed use began under prior ordinances, the use itself must be established when the ordinances in place would allow it.

The claimant for nonconforming use status has the burden of proving that the use was established when allowed by applicable zoning ordinances. The existence of the use, as well as its permissibility under prior ordinances, cannot be implied or presumed, but must be proven by factual evidence. Without such proof, the claimant is not entitled to nonconforming use status.

If the language of a previous ordinance cannot be determined with certainty, the allowable uses under that ordinance may be determined by reliable testimony or documentary evidence. The relevant inquiry is whether the use claimed as nonconforming was established when such a use would be allowable.

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. 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 John Brems, Attorney for Central Bank on November 6, 2012. A copy of that request was sent via certified mail to Mark Christensen, City Manager for the City of Saratoga Springs, at 1307 N. Commerce Drive, Saratoga Springs, Utah. 84045. The City received that copy on November 7, 2012.

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, with attachments, submitted by John Brems, Attorney for Central Bank, received by the Office of the Property Rights Ombudsman on November 6, 2012.
2. Response from the City of Saratoga Springs, submitted by Kevin Thurman, City Attorney, received December 11, 2012.
3. Reply from John Brems, received January 22, 2013
4. Response from the City, received March 5, 2013.
5. Reply from John Brems, received April 3, 2013.

Background

Central Bank owns lots 8, 9, and 10 of the “Sage Hill Subdivision,” located near the intersection of 8400 North and Sagehill Drive in Saratoga Springs (the “Parcel”). The subdivision was approved in 1994 by Utah County, because the property was not yet located within the City. In 1999, the previous owner obtained a building permit to construct a horse barn on the Parcel. At that time, the zoning for the area was “RA-5” (Residential/Agriculture), and, according to the Utah County Zoning Ordinance, barns, riding arenas, and at least one family dwelling were permitted uses. The previous owner began construction on the barn, which was quite large (approximately 84,000 s.f., or nearly two acres). The barn was evidently part of a development called “Coyote Creek,” extending over all three lots within the Parcel, with landscaping and a

parking area in front of the barn.¹ The barn itself included over 70 horse stalls, an area for horseshoeing, a wash station for horses, restrooms, and a large central arena with seating for spectators. The building design was approved by Utah County, which inspected the building as it was constructed.

In May of 1999, as construction on the barn began, the City of Saratoga Springs annexed territory which included the Sage Hill Subdivision. As part of the annexation, the City rezoned the Parcel as “RS-1.”² Even though the City assumed jurisdiction over the Parcel, Utah County officials continued to inspect and approve the barn as it was constructed, until it was finished in April of 2001. The County’s building officials acted with the approval and cooperation of the City’s building department.

In 2002, the City realized that it had not issued a Certificate of Occupancy, and so it approached the property owner about completing that process. According to the City’s building official, the owner of the Parcel had expanded the building to include commercial horse boarding and training, and the building was being rented out for meetings or receptions. At the City’s request, the owner provided a site plan, which indicated that the building had stables, an arena, offices, a meeting room, restrooms, and storage areas. The building plan also showed a large entryway, or lobby. The City states that the Parcel was being used as a commercial reception facility in 2002, but evidently the City received assurances that such commercial activity would cease.

The City eventually issued a Certificate of Occupancy for the barn, although it noted that the structure included offices, meeting rooms, and the lobby that the City maintains were not part of the original plans. The City maintains that its approval in 2002 was for a private horse barn only, and not for a commercial facility.³

The City states that it received information that the facility was being rented for receptions and other meetings, that two apartments or living quarters had been built, and that the Parcel was again being used as a horse boarding and training facility. The owners even advertised the facility as a “horse hotel.” After inspecting the property, the City determined that there were two apartments or living quarters in the building, that the entryway had been rebuilt and expanded to accommodate large meetings, two new offices had been built along with an “observation room” overlooking the arena, and that the facility was used for commercial horse training and boarding,

¹ The total area of the Parcel is approximately 15 acres (three lots at 5 acres each). However, it appears that the three lots were not combined into one parcel.

² The Bank’s assertion that the City designated the zoning for the Parcel as “RM” appears to be mistaken. A map submitted by the Bank, which shows the zoning for the territory annexed into Saratoga Springs in May of 1999 shows that the Parcel was within the RS-1 zone. The City was not able to produce its previous zoning ordinances, so it is unclear what uses were permitted in the RS-1 zone. The current zoning is “RR” (Rural Residential). Horse stables are conditional uses within the RR zone, and private riding arenas are permitted.

³ Neither the City nor the Bank submitted evidence that a business license was granted for commercial activity on the Parcel.

along with meetings and receptions.⁴ The City issued a Notice of Unsafe Condition for the building on November 2, 2011.⁵

In November of 2011, Central Bank foreclosed on the Parcel, and assumed ownership. Presumably, the Bank wishes to sell the property, but the Notice of Unsafe Condition and the City's objections to commercial uses on the Parcel hinder the Bank's sales efforts.⁶ Throughout 2012, the City and the Bank met to discuss what would be needed to bring the property into compliance. In June of 2012, the City proposed three possible scenarios: (1) Abandon any commercial activity, remove the living quarters and trainer rooms, and the barn could be used as a private horse barn by the owner of the property.⁷ (2) Obtain approval for use as a commercial facility for horse boarding and training, which would require changes to the City's zoning ordinances, along with substantial changes to the building.⁸ (3) Obtain City approval for use as a commercial facility, with additional approval for the living quarters.⁹

The Bank maintains that commercial use of the barn was permitted under prior ordinances, and that since the Parcel has been continuously used for commercial horse boarding and training, it is eligible for nonconforming use status. The City, on the other hand, disputes that commercial activity on the Parcel was ever permitted, and so any horse boarding must be for the personal use of the property owner. The City also objects to the living quarters which have been installed in the barn building. Although residential uses have always been allowed on the Parcel, the City maintains that the living quarters should not have been built without proper approval, and may not be allowed in the barn structure.¹⁰

⁴ The materials submitted for this Opinion do not describe the living quarters in detail, so it is not known whether they are "complete" residential units, with kitchen and bathroom facilities, or if they are simply sleeping quarters. It is also not explained why the living quarters were installed in the first place.

⁵ The City explains that the additional facilities, in particular the living quarters, were not approved or inspected for compliance with Uniform Building Code. Because there is a question of compliance, the City considers the facility unsafe until it can be shown that it complies with building requirements. The materials submitted for this Opinion also state that two "trainer rooms" were built on the east side of the barn. Other than the City's objection, no other information about the trainer rooms was submitted.

⁶ This presumption is implied from the materials submitted for this Opinion. The Bank has not directly stated that it plans to sell the Parcel.

⁷ Supposedly, a home could be built on the property (or at least on one of the lots).

⁸ The City states that its current zoning ordinance would not allow the facility to be used for commercial horse boarding. In addition, if the building was to be used as a commercial facility, several changes would need to be made to ensure fire suppression, structural safety, plumbing and electrical upgrades, etc. The living quarters would need to be removed. Additionally, the building would be required to connect to the City's sewer system (it has been using a septic system, apparently with approval), and the City's culinary water system. The facility uses an on-site well for its water. The well may continue to supply secondary and irrigation water, as long it has proper approval from the State Engineer's Office.

⁹ This would require the same building upgrades as Scenario 2, with additional improvements for the living quarters.

¹⁰ It appears that the City would consider approving at least one of the living quarters in the building as a single-family residence, as long as building code requirements were met.

Analysis

To Qualify For Nonconforming Status, the Claimant Must Prove That the Use Was Established When Allowed Under Applicable Zoning Ordinances.

A. *Nonconforming Use Status.*

A land use which was lawfully established under prior land use ordinances, and which has been maintained despite ordinance changes which would otherwise prohibit the use qualifies for nonconforming status:

"Nonconforming use" means a use of land that:

- (a) legally existed before its current land use designation;
- (b) has been maintained continuously since the time the land use ordinance governing the land changed; and
- (c) because of one or more subsequent land use ordinance changes, does not conform to the regulations that now govern the use of the land.

UTAH CODE ANN. § 10-9a-103(32). Nonconforming status permits the property owner to continue the use, even though it would otherwise be prohibited. "Except as provided in this section, a nonconforming use or noncomplying structure may be continued by the present or a future property owner." *Id.*, 10-9a-511(1)(a).¹¹ In essence, a nonconforming use is a type of vested property right, and any decision to terminate a valid nonconforming use must respect the property owners' rights.¹²

Nonconforming status is conferred if a use was established when allowed by a local land use ordinance. A use that was not allowed cannot be eligible for nonconforming status even if there is no question that it has been maintained continuously since it was first established. "A nonconforming use may not be established through a use which from its inception violated a zoning ordinance." *Town of Alta v. Ben Hame Corp.*, 863 P.2d 797, 802 (Utah 1992). The Utah Code grants authority and discretion to local governments to provide for "the establishment, restoration, reconstruction, extension, alteration, expansion, or substitution of nonconforming uses upon the terms and conditions set forth in the land use ordinance." UTAH CODE ANN. § 10-9a-511(2)(a).¹³

¹¹ A noncomplying structure is a building that once complied with regulations governing the size or placement of buildings, but which no longer complies because of ordinance changes. Such structures are allowed to remain despite the noncompliance. A structure's noncompliance, however, does not necessarily grant nonconforming status to a use associated with the building. See UTAH CODE ANN. § 10-9a-103(31)

¹² "[T]here is a trend increasingly looking with disfavor upon nonconforming uses. Such trend, however, at least theoretically, or constitutionally, cannot, or at least, should not destroy property rights, or continued lawful use of one's property . . ." *Rock Manor Trust v. State Road Comm'n*, 550 P.2d 205, 206 (Utah 1976).

¹³ *But see Hugoe v. Woods Cross City*, 1999 UT App 281, ¶ 8, 988 P.2d 456, 458. ([B]ecause zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein should be strictly construed in favor of the property owner). *Hugoe* concerned expansion of a commercial nonconforming use.

B. The Barn Structure was Established Under the County's RA-5 Zoning Ordinance.

Because of the unique timing of the building permit approval and the City's annexation of the Parcel, an important preliminary question for this Opinion concerns when the structures and uses in question were established. The previous owners obtained a building permit to construct the facility from Utah County on April 13, 1999. At that time, the City was already in the process of annexing territory which included the Parcel. In fact, the building permit includes the following note: "Annexed into Saratoga Springs." The City approved the annexation on May 11, 1999, and assumed jurisdiction over the territory shortly thereafter. Thus, by the time the building was constructed and actually being used, the Parcel was under the City's jurisdiction, even though the building permit had been issued by Utah County.

Both the City and the Bank seem to agree that Utah County's RA-5 zoning ordinance, in place during the Spring of 1999 when the application for the building permit was submitted, should apply to the structure on the Parcel. Using the building permit application date is proper because it gives a definite date upon which to determine the applicable zoning ordinance. It is also consistent with the vested rights doctrine, which grants the right to approval of a land use application that complies with zoning ordinances in place on the date of the application.¹⁴ Finally, it is appropriate because most land development requires a significant investment of resources prior to a permit application, as well as time to process and approve the application. An owner's investment should not be jeopardized simply because the governing land use authority changed only weeks after the owner applied for and received development approval. For these reasons, this Opinion agrees that the barn facility was established as a lawful structure under Utah County's RA-5 ordinance.¹⁵ This does not mean, however, that the barn is exempt from all regulation; only that the size and placement of the building must be recognized according to the county's RA-5 zone regulations, even if it does not comply with the City's current zoning requirements. Any subsequent improvements to the building must conform to the City's building codes.¹⁶

C. It Has Not Been Proven That Claimed Land Uses Were Established Under the RA-5 Zone or the City's Ordinances.

Unlike structures, land uses on the Parcel were not established when the previous owners applied for a building permit. Since the Bank is asserting the right to continue a nonconforming use, it has the burden of establishing the legal existence of the use. See UTAH CODE ANN. § 10-9a-511(4)(a). The Bank's arguments that commercial horse boarding and training was established as a legally existing use are summarized as follows:

¹⁴ See UTAH CODE ANN. § 10-9a-509(1); see also *Western Land Equities v. City of Logan*, 617 P.2d 388 (Utah 1980).

¹⁵ The City's current zoning ordinance allows private riding arenas (but not commercial arenas) in the RR zone. Livestock may be kept, based on a formula of 2 large animals (such as horses) per ½ acre.

¹⁶ Expansion of the building may possibly be restricted, if the expansion makes the building noncompliant, or if the City decides to prohibit expansion that would make the building be "more noncompliant." See UTAH CODE ANN. § 10-9a-511(2) (Expansion of a use may be regulated).

- Use of the barn for commercial purposes should have been “presumed” when it was first proposed, based on the size of barn, the number of stables, and the capacity of the septic system.
- “Agriculture” was a permitted use under the RA-5 zone. Agricultural use encompasses several types of commercial activity, including boarding and training livestock.
- Since the City cannot locate a copy of the zoning ordinance which governed uses on the Parcel in 1999, “the City did not have use restrictions. . . . [t]herefore, the use was legally permitted by the City at the time of annexation.”¹⁷
- In 2002, the City issued a certificate of occupancy, which noted the commercial activity on the Parcel, and which included a reference that the lobby and office area had been installed, allowing those additions as “incidental uses.”
- In 2012, a letter from the City’s building official states that the “building is being run as a commercial facility that presently has horse boarding, horse training, horse showing, and is being advertised as a horse hotel.”¹⁸

1. Uses must be established, not implied or presumed.

To qualify for nonconforming status, it must be conclusively shown that a use was established when allowed under governing zoning ordinances. A use cannot be “presumed” to exist based on the size or configuration of buildings. That approach was rejected by the Utah Supreme Court in *Utah County v. Young*.¹⁹ In that case, a property owner received a building permit to construct an extremely large barn, which included an auction block, bleachers, restrooms, audio equipment, and electrical wiring usually found in commercial buildings. The building permit simply approved the building as a barn. Utah County building inspectors visited the site, and approved construction of the building as it was built. Upon completion, the owner began using the building for commercial auctions. Business or commercial uses were not allowed in the zone where the property was located, and Utah County prosecuted the owner for a violation of county ordinances. On appeal, the property owner argued that the county’s building inspectors should have known of the intended use, based on its size and the specific additions, such as bleachers and restrooms. Since the building was approved, the county waived any right to enforce its ordinances.²⁰

The Utah Supreme Court rejected the owner’s argument that the county could not enforce its ordinances, holding that the owner was aware that a commercial operation was not allowed, and could not claim the right simply by constructing a building and arguing that it would be unjust to prevent the business from operating. The Court explained that the property owner knew that the barn structure was allowed under the county’s ordinances, but that commercial activity was not permitted. As support, the Court cited a case from Georgia, where a property owner received a

¹⁷ Response letter from John Brems, dated March 22, 2013. However, the map showing the zoning designations enacted as part of the annexation process show that the Parcel was within an “RS-1” zone, not an RM zone.

¹⁸ Letter from Mark Chesley, “History of this project,” dated March 26, 2012.

¹⁹ 615 P.2d 1265 (Utah 1980).

²⁰ The property owner’s argument was based on zoning estoppel, the legal theory that government bodies are bound by representations made concerning land uses, even if the representations conflict with zoning ordinances. *See Young*, 615 P.2d at 1266-67.

building permit for a combination “storage building, workshop and barn,” which was allowable under the locality’s ordinances. After completing the building, the owner began operating a commercial kennel in the structure. The Georgia Supreme Court held that since the building’s owner should have been aware of local zoning ordinances, he could not presume that commercial kennels were allowed simply because private kennels were permitted. *Young*, 615 P.2d at 1268 (citing *Maloof v. Gwinett County*, 200 S.E.2d 749 (Ga. 1973)).

Although the *Young* decision was primarily focused on zoning estoppel, its reasoning applies to the situation under consideration in this Opinion, and that reasoning leads to the conclusion that establishment of a lawful use cannot be presumed. Like the property owners in *Young* and *Maloof*, the Bank argues that the barn’s use for commercial activity should have been presumed due to the size and design of the structure. And, like those property owners, the previous owners should have been aware of the county’s and the City’s zoning ordinances, and therefore cannot argue that commercial use should have been presumed because of the size and design of the barn under construction.²¹

2. Permitted uses must be interpreted as part of the language of the entire ordinance.

The next relevant question concerns whether commercial horse boarding and training, along with the other alleged business activities, were ever allowed under zoning regulations that governed the Parcel, and whether such uses were established when allowed.²² The Bank may not rely upon the County’s RA-5 ordinance to establish any use, because the City assumed jurisdiction and changed the zoning for the Parcel shortly after the previous owners obtained the building permit for the barn.²³ The current language of the City’s RR zone lists “agriculture” as a permitted use. Moreover, raising livestock is also listed as a permitted use, although the number of animals allowed is based on the size of the property. However, this does not automatically mean that a commercial horse boarding and training facility is an allowable use, because the RR zone also includes specific prohibitions on types of agricultural activity.

Although “agriculture” is a permitted use, its interpretation must be read as part of the entire ordinance. The Bank notes several agricultural activities that are “for-profit,” including production and sale of crops, fruits and vegetables, livestock, fur-bearing animals, etc. However, concluding that “agriculture” encompasses any activity involving crops or livestock, including commercial horse boarding, is not supportable when the zoning ordinance is read as a whole. A statute is interpreted according its plain language, and “its provisions [are read] in harmony with other statutes in the same chapter.” *Selman v. Box Elder County*, 2011 UT 18, ¶ 18, 251 P.3d 804, 807. The specific terms of the current RR zone limit the scope of allowed agricultural uses.

²¹ Under Utah County’s RA-5 ordinance, a property owner could obtain permission to carry out a “premises occupation,” which allowed business activity associated with agricultural production. A premises occupation required approval from the county, and would be granted if several conditions were met, including maintaining a business license. The Bank does not claim that the Parcel was approved as premises occupation.

²² A nonconforming use cannot derive from a use which violated a zoning ordinance. *See Town of Alta*, 863 P.2d at 802.

²³ As explained earlier, the structure is allowed, based on the county ordinances, but the legitimacy of any uses must be based on the City’s ordinances in effect when the use was established.

For example, the number of animals that can be raised is limited, and commercial riding arenas and equestrian centers are prohibited. This illustrates that the scope of agricultural activities is limited by the specific terms of the zoning ordinance.²⁴

To sum up, the Bank cannot claim the right to commercial horse boarding on the Parcel based on a broad reading of the term “agriculture.” Agriculture is a permitted use under the City’s current ordinances, but the term is limited and modified by other language in the ordinance, and the City has stated that a commercial horse boarding facility is not allowable under its current zoning ordinances.²⁵

3. The Parcel’s owners are not entitled to claim nonconforming use status simply because the City cannot produce its prior ordinance.

The Bank’s claim that the City had no use restrictions for the Parcel because the City does not have a copy of its past ordinances is misplaced. Although it would be preferable for the City to have copies of its past ordinances, failure to produce the prior ordinance is not proof that there was no regulation. There was an ordinance in place beginning in May of 1999, when the City annexed and zoned the territory. The annexation ordinance zoned the Parcel as RS-1, and the available information on that ordinance refers to size and setback requirements for that zone, indicating that there was an ordinance in place.²⁶ If the language of the ordinance is not available, reliable testimony and documentation may be used to ascertain what uses were allowed.

With that in mind, reliable evidence gives some understanding about the acceptable uses in the RS-1 zone. In 2002, the City finally issued a certificate of occupancy for the barn. The City’s building official stated that there was evidence that the Parcel was being used as a horse boarding and training business, as well as being rented out for meetings. This shows commercial use on the Parcel as early as 2002, but it also shows that the City objected to the commercial activity, possibly because it was not allowed under the City’s zoning ordinances. The City also states that the previous owner agreed to cease the business activity, again indicating that it was prohibited.

In addition, the City’s statements from 2002 and its analysis from 2012 simply state that the Parcel was being used for a commercial business, and that the City objected to that use. There does not appear to be a dispute that the previous owner boarded and trained horses in the barn as a commercial venture. The dispute is whether such a use was at any time allowed under the City’s zoning ordinances. The City’s 2012 analysis, tracing the history of the parcel, does not constitute approval of the use, but only states that the use was carried out.

²⁴ See SARATOGA SPRINGS MUNICIPAL CODE, § 19.04.06 (Permitted and Conditional Uses in Residential Zones). The example using the City’s current RR zone is used to illustrate that point, and is not a conclusion that the RR zone language has always governed activity on the Parcel.

²⁵ The City’s zoning ordinance allows livestock in the RR zone, as well as private riding arenas. The City maintains that the Parcel could be used to raise horses, but not to board horses which do not belong to the property owner.

²⁶ The minimum lot size for the RS-1 zone is 1 acre, which is the same as the current RR zone. Neither the City nor the Bank submitted any evidence showing when the zoning for the Parcel changed from RS-1 to RR. The annexation ordinance included a table showing minimum lot sizes and setbacks for various zones, including RS-1.

Admittedly, this is not conclusive proof that commercial horse boarding was prohibited, any more than it is proof that such a use was ever allowed. However, this does show that the City had a zoning ordinance in place, and that it found the commercial business to be objectionable. At this point, that is all the information on the City's previous zoning ordinance that is available.

D. The City's Current Zoning Permits a Residence on the Parcel.

Because the City's current zoning allows at least one residence on the Parcel, it is not necessary to determine if the living quarters in the barn are entitled to nonconforming use status. While installing an apartment or living quarters in a barn is out of the ordinary, it is not out of the question. From the materials submitted, it appears that the City does not object to a residential unit in the barn, provided it meets minimum building code standards. The City is within its rights to require compliance with its building code, to help protect the public's safety and welfare. In addition, a residence could be constructed on the Parcel as a separate building, in which case the barn would be considered an accessory building, possibly affecting the types of uses allowed there.

E. The Bank Has Not Shown That the Use Was Established When It Was Allowed Under the City's Ordinances.

Nonconforming uses are generally disfavored, and so should not be approved without solid evidence that a property owner is entitled to that status. Moreover, the property owner claiming the entitlement has the burden of proving that the use qualifies as nonconforming. With those general principles in mind, the only available conclusion is that the Bank has not shown that commercial horse boarding and receptions were established when such uses were allowed under the City's ordinances. Perhaps the best solution would be to rezone the Parcel to allow operation of a commercial equestrian center, thus eliminating any questions of whether the use would be allowed. A single family residence is permitted under the City's zoning ordinances, but any residence must meet the City's building code.

Conclusion

Nonconforming status may be conferred on a use that was established when allowed, but would be prohibited due to subsequent ordinance changes. The relevant inquiry concerns when the use was initiated, and if the use would have been allowed under the zoning regulations in place at that time. The existence of a use and its permissibility cannot be implied or presumed, but must be proven by factual evidence.

The uses listed in a zoning ordinance do not stand alone, and must be interpreted as part of the entire statute. A general category, such as "agriculture," is modified by specific provisions also found in the ordinance. If the language of a previous ordinance is not available, reliable testimony and documentary evidence may be used to show what uses were allowed.

Any uses and new construction must comply with local building ordinances and other health and safety regulations, even if a use qualifies for nonconforming status. Uses which are permitted under current regulation do not need nonconforming use status.

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 Utah 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 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 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 be awarded 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:

Mark Christensen, City Manager
City of Saratoga Springs
1307 N. Commerce Drive
Saratoga Springs, UT 84045

On this _____ day of April, 2013, 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