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State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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ADVISORY OPINION

Advisory Opinion Requested by: Bob Mason

Local Government Entity: Centerville City

Property Owner: Bob Mason

Type of Property: Commercial

Date of this Advisory Opinion: July 16, 2014

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

Issues

Did an approved site plan for a building expansion grant permission to store vehicles and equipment on the property?

Summary of Advisory Opinion

The approval granted by the City did not specifically include approval for storage on the property. The site plan considered by the City's Planning Commission was for a building expansion. Although storage on other areas of the parcel was discussed, there was no specific approval for the use, other than the City's agreement to defer required improvements. It cannot be said that the approval granted included storage without eventual compliance with City ordinances.

Vehicle and equipment storage is incidental and subordinate to the primary use conducted on the property, and so a degree of such storage is allowable as an accessory use. Vehicle storage on the property is subject to the City's zoning ordinances, including installation of any required improvements. Since vehicle storage is allowed as an accessory use, nonconforming use analysis would not apply.

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 Bob Mason on March 14, 2014. A copy of that request was sent via certified mail to Marsha L. Morrow, City Recorder for the City of Centerville, at 250 North Main, Centerville, Utah. According to the return receipt, the City received the Request on March 19, 2014.

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 Bob Mason, received by the Office of the Property Rights Ombudsman on March 14, 2014.
2. Response submitted on behalf of the City of Centerville, by Lisa G. Romney, City Attorney, received on April 4, 2014.
3. Reply submitted by Mr. Mason, with photographs, received on April 14, 2014.
4. Response from City, received on April 17, 2014.

Background

Bob Mason owns "Tri-City Performance," located 461 South 800 West (the Frontage Road) in Centerville.¹ Tri-City sells and services motorcycles, ATVs, and snowmobiles.² The area at the heart of the dispute between Mr. Mason and the City is a fairly large portion of the Tri-City parcel, located south of the main building (behind the building, but still adjacent to the Frontage Road (the "Southern Portion"). Mr. Mason claims that the City had already given approval for storage on that Southern Portion, and that he is entitled to maintain the same use.³ The City, on the other hand, disputes that it approved any uses on the Southern Portion, and that Mr. Mason must obtain approval and comply with City requirements. Those requirements evidently include

¹ 800 West is the frontage road running parallel to Interstate 15.

² According to its website, the dealership is called "Tri-City Performance." It appears that it was originally called "Tri-City Polaris," which is the name used for the approvals granted in 1996. For the sake of clarity, this Opinion will simply use the name "Tri-City."

³ Mr. Mason also claims that his use is entitled to nonconforming status.

installation of a curb and gutter, extension of utility lines, landscaping and paving of the area used for storage.

Mr. Mason obtained zoning approval to enlarge an existing building on the parcel in 1996. In August of that year, the City's Planning Commission approved the final site plan. The approval included the following language:

No paving of the gravel storage area would be required at this time based on the findings that preliminary direction to the applicant that it would not be necessary, that the gravel has been well maintained, and that the gravel would be adequate for drainage.

Minutes of the Centerville City Planning Commission, August 28, 1996, pg 2.⁴ At the 1996 meeting, the staff reported that the storage area was "for non-customer use," and that an extension agreement for "the undeveloped area along" the Frontage Road had been agreed to by Mr. Mason.⁵

The City's staff report for the proposal notes that only a portion of the Tri-City property was being developed. That report also identifies an "inventory storage area" that was graveled, although the report indicates that this storage area included part of the parking area for the business. The purpose of the application was "to make space for [a] shop maintenance area and for storage of inventory." See Staff Report, "Preliminary Site Plan – Tri-City Polaris," May 8, 1996.

Following approval of the new site plan, Mr. Mason completed expansion of the Tri-City building, including required landscaping. In 2000, the City Council addressed allegations that Mr. Mason had undertaken "expansions" and unauthorized uses on the Tri-City site. Specifically, the City staff complained that an open porch connected to the main building had been enclosed without a building permit, other accessory buildings had been installed, and that "storage facilities" had been brought onto the property.⁶ See City Council Minutes, City of Centerville, October 3, 2000, pp 5-6.

In November of 2000, Fred Campbell, of ESI Engineering, reviewed the plans and agreements pertaining to the Tri-City parcel, at the request of the City. Among other problems, Mr. Campbell noted the following:

⁴ Tri-City's main building is located near the intersection of Porter Lane and the Frontage Road, and faces the northbound lanes of Interstate 15. A site plan and building had been approved in 1992, and the 1996 application was primarily for an expansion of that building. According to Mr. Mason, the site had been used for storage by a previous owner since the 1960s or 1970s.

⁵ The Planning Commission granted an extension to comply with the City's requirement that some areas of the parcel be paved, and that improvements be installed. The City indicated that it agreed to delay installation of the improvements until the Southern Portion was developed, "or upon demand of the City." Response from City of Centerville, April 17, 2014, pg. 1. An extension agreement was one of the Planning Commission's requirements. However, neither party submitted a copy of that agreement.

⁶ The type of "storage facilities" was not explained in the City Council Minutes.

It appears that the site is being used for more than originally approved by the City. It is recommended that the original site plans be compared with the site in its existing use. [The City] should tally the number of storage units, accessory buildings, and etc. that are being used along with any and all expansion that appears to be without City approval.

Letter, Fred Campbell, ESI Engineering, to Paul Allred, City of Centerville, (November 8, 2000).⁷

Paul Allred, then the City's Director of Community Development, met with Mr. Mason about the unauthorized activities on the parcel. In a memorandum to the City's mayor, Mr. Allred stated that he explained to Mr. Mason that expansions and alterations to the site needed City approval. A specific concern for the City was the contention that Mr. Mason was allowing customers to store trailers and vehicles on the property.⁸ The memorandum notes that such storage (at least that not directly associated with the primary business) was not allowed under the City's zoning ordinances. The memorandum further states that Mr. Mason acknowledged he had allowed customers to store trailers and vehicles on the site. It appears that these concerns were resolved at that time.⁹

In 2014, the City again alleged that Mr. Mason was using the Southern Portion of the Tri-City property without proper authorization from the City. A Notice of Violation was issued, informing Mr. Mason that

[d]evelopment on the south side of your property is being utilized without the required approval and other required permits of authorization required by the Zoning Ordinance. Additional information was provided to the property owner in November and December of 2013 showing that all past **OFFICIAL** approvals did not specify the Southern portion of your property being developed, therefore the southern portion of the property is in violation of the Zoning Ordinance.

Notice of Violation, Code Enforcement # 2014-001(February 13, 2014) (emphasis in original).¹⁰ The "additional information" refers to discussions and correspondence between the City and Mr. Mason. In December of 2013, the City explained its position that no uses had been approved on the Southern Portion, and that Mr. Mason was in violation of the City's ordinances. The City denied that approval to use the Southern Portion was included in the 1996 site plan approval; it

⁷ The letter noted problems with stormwater drainage, incomplete landscaping, and installation of lighting without approval. Mr. Campbell provided engineering services to the City. The copy of the ESI letter provided for this Opinion was incomplete.

⁸ It appears that the vehicles being stored were not directly associated with the Tri-City business. In other words, Mr. Mason was allowing the public to store items on the property.

⁹ Mr. Mason received a building permit for the porch enclosure in October of 2000. The materials submitted for this Opinion do not include any further information regarding uses on the southern parcel in the fall of 2000.

¹⁰ The Notice cited § 12-23-060 of the City's zoning ordinance, which prohibits development or other uses without approval or authorization.

also reviewed the actions taken in 2000. Finally, the City indicated that Mr. Mason could apply for approval to use the Southern Portion, subject to the City's requirements.¹¹

Analysis

I. The 1996 Site Plan Approval Did Not Include Specific Approval for Any Activity on the Southern Portion of the Tri-City Property.

Because there is no documentation showing approval of any type of storage on the Southern Portion of the Tri-City property, it must be concluded that the use was not approved. In 1996, the City's Planning Commission discussed whether Mr. Mason should be required to pave areas which then had gravel. It appears from the information provided for this Opinion that the discussion focused on the parking area north and west of the building (along Porter Lane and the Frontage Road), as well as the Southern Portion (which faces only the Frontage Road).

The City maintains that the discussion concerned only on the parking area adjoining the building, and not the Southern Portion, but the records provided refers to both areas. The staff report mentions "the gravel area on the site where Mr. Mason parks trailers and equipment," and the "undeveloped area along the Frontage Road." See Staff Report, "Tri-City Polaris – Final Site Plan," August 28, 1996. This "undeveloped area" clearly refers to the Southern Portion. Mr. Mason indicated that the entire property had been used for vehicle storage for many years before the original Tri-City building was constructed. Based on these records, it appears that in 1996 the City's staff and Planning Commission were aware that a portion of the property was being proposed (if not actually used) for some type of vehicle storage.

This awareness, however, does not constitute approval of the use. The City's staff proposed a requirement that the "gravel storage area" be paved. Mr. Mason objected, stating that paving the area had not been brought up during the initial discussions with the City, and that the gravel was well maintained, providing adequate drainage. The Planning Commission overruled the staff's recommendation, and agreed that paving would not be required at that time, but it did require an extension agreement for improvements on the Frontage Road, adjoining the Southern Portion of the property. See Minutes of the Centerville City Planning Commission, August 28, 1996, at 2 (Motion approving Tri-City's application). Although vehicle storage on the Southern Portion was mentioned by the Planning Commission in 1996, it cannot be said that the discussion constituted approval of any uses on the property.

Uses on the Southern Portion are subject to the City's zoning regulations, because all property is subject to local zoning control. "[A]n owner of property holds it subject to zoning ordinances enacted pursuant to a state's police power." *Western Land Equities v. Logan*, 617 P.2d 388, 390 (Utah 1980). Any uses on the Southern Portion would be subject to the City's ordinances, including any required approvals and any required improvements to the property. In short, while

¹¹ This suggests that Mr. Mason could obtain approval for at least some of the uses he wants. As discussed below, the City's zoning ordinance provides that uses which are "accessory" to an allowed use may also be carried out along with the primary use.

the Planning Commission was aware that the property owner proposed to use the Southern Portion as a storage area, it only agreed to defer required improvements on that part of the parcel, not to waive those requirements altogether.

II. Vehicle and Equipment Storage is Accessory to the Primary Use, Subject to Regulation by the City.

A. Vehicle and Equipment Storage is an Accessory Use.

A degree of vehicle and equipment storage on the Southern Portion is allowed as accessory to the primary use. This does not mean that such storage is automatically approved without further regulation, however, only that it is *allowed*. Section 12-34-040 of the City Code allows “Accessory Uses” in commercial zones: “Permitted and conditional uses set forth in the Table of Uses Allowed shall be deemed to include accessory uses and activities that necessarily and customarily associated with and incidental and subordinate to such uses.” CENTERVILLE MUNICIPAL CODE, § 12-34-040(b).¹²

The primary use on the Tri-City parcel is vehicle rentals or sales, and vehicle and equipment service; specifically, sales and service of motorcycles, ATVs, and snowmobiles.¹³ Storage of vehicles, either being offered for sale or being repaired, along with storage of other needed equipment, is “incidental and subordinate” to that primary use. A degree of vehicle and equipment storage is therefore an acceptable accessory use on the parcel.¹⁴

B. Storage on the Property is Subject to Regulation by the City.

Although vehicle and equipment storage is allowed as an accessory use, it is not exempt from regulation. “Accessory uses shall be subject to the same regulations that apply to permitted and conditional uses in the same zone except as otherwise expressly provided in [Title 12].” *Id.*, § 12-34-040(b)(1). In other words, an accessory use is subject to the same regulation as the primary use. On the Tri-City property, if improvements were required when the structure was approved, then the same regulations would apply to the accessory use, including paving, landscaping, and other improvements on the Frontage Road. The City evidently agreed to defer those requirements, but it did not waive them completely.¹⁵

Finally, since the accessory use of vehicle storage is incidental and subordinate to the primary use of vehicle sales and rental, it only includes storage of vehicles and equipment associated with the primary use. The primary business focuses on sales and service of recreational vehicles.

¹² Along the same lines, an Accessory Use is defined as “[a] use incidental and subordinate to a permitted or conditional use and located on the same lot or parcel as such use.” CENTERVILLE MUNICIPAL CODE, § 12-12-040 (Definition of “Use, Accessory”).

¹³ The City does not dispute that sales and service of vehicles is approved on the parcel. These uses are listed as either permitted or conditional in the City’s commercial zones. *See id.*, ch. 12-36 “Table of Uses Allowed.”

¹⁴ Structures which are accessory to a property’s primary use are also permissible. *See id.*, § 12-55-070. The City noted that Mr. Mason has installed storage structures on the parcel.

¹⁵ As has already been discussed, neither party submitted a copy of the extension agreement that was required by the 1996 site plan approval. The terms of that agreement may indicate how and when the requirements are to be met.

Other types of vehicles (including automobiles) would not be permitted.¹⁶ In addition, storage of other items not directly associated with the business is not allowed, and storing vehicles or equipment belonging to other people is also not allowed.¹⁷

III. Nonconforming Use Analysis is not Applicable, Because Accessory Uses Are Allowed on the Tri-City Parcel.

Because the City's Code allows some vehicle storage as an accessory use, nonconforming use analysis does not apply to the Tri-City parcel. Mr. Mason claims that the uses he wishes to carry out on the Southern Portion of the parcel are entitled to nonconforming use status. However, since it appears that the uses are related to the primary use of vehicle sales and service, nonconforming analysis would not apply.

Uses which were established when allowed, but are prohibited because of subsequent ordinance changes may continue despite the prohibition:

"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).¹⁸ Regardless of what was approved by the Planning Commission in 1996, and regardless of whether Mr. Mason has complied with the City's requirements, storage of vehicles and equipment is now allowed as an accessory use. Nonconforming analysis cannot apply, because the regulations that now govern the use of the land allow at least some form of vehicle and equipment storage. To the extent that the use sought by Mr. Mason is not prohibited, nonconforming use status is not available.¹⁹ It is therefore unnecessary to evaluate the matter as a nonconforming use.²⁰

¹⁶ Cars and trucks used for the business could be parked on the parcel, but those not directly associated with the business should not be allowed.

¹⁷ A vehicle being repaired may be temporarily stored on the parcel, but long-term storage of vehicles not currently being repaired, and which do not belong to Tri-City, would not be allowed.

¹⁸ See also UTAH CODE ANN. § 10-9a-511

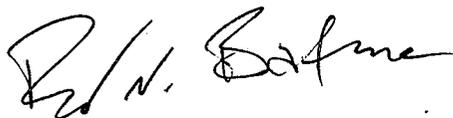
¹⁹ The question presented for this Opinion was whether the Southern Portion of the parcel could be used without complying with City requirements, because of the site plan approvals granted in 1996. There was no information provided which indicates that storage (as an accessory use) was not allowed at that time. However, that is not relevant, because storage (within certain parameters) is allowed as an accessory use under the City's current ordinances.

²⁰ There was no information presented to indicate that storage activity outside the parameters of an allowed accessory use was undertaken at a time when the City's ordinance would allow such storage. Without that information, it is impossible for this Opinion to evaluate whether such a use would be eligible for nonconforming status.

Conclusion

The site plan approved in 1996 did not include specific approval of any use on the Southern Portion of the Tri-City parcel. Although vehicle storage on that area was discussed, the City only agreed to defer improvements required on that portion of the property. The entire property, including any uses conducted on it, remains subject to the City's zoning ordinances.

A degree of vehicle and equipment storage is allowed on the Southern Portion, because such storage is accessory to the primary use of the property. Since the primary use is sales and service of recreational vehicles, storage of those types of vehicles is incidental and subordinate to that use, and thus allowed under the City's ordinances. This accessory use, however, is subject to the same zoning requirements as the primary use would be. Since vehicle storage is allowed under the City's ordinances, nonconforming use analysis would not apply.



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

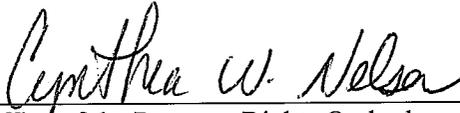
Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

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:

Marsha L. Morrow
City Recorder
City of Centerville
250 North Main
Centerville, Utah 84014

On this 16th Day of June, 2014, 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