

Advisory Opinion #127

Parties: Stephen Miles and Bountiful City

Issued: July 31, 2013

TOPIC CATEGORIES:

K: Compliance with Mandatory Land Use Ordinances

Q: Nonconforming Uses and Noncomplying Structures

Other Topics: (v) Interpretation of Ordinances

A city may require a developer to bring a noncomplying building into compliance with the existing city code as a condition to approving an addition to the building when the city has a legal ordinance conditioning the ability to continue operating a noncomplying building on not making any additions or enlargements to the building.

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: Stephen Miles

Local Government Entity: Bountiful City

Applicant for the Land Use Approval: Legacy House of Bountiful, LLC

Type of Property: Assisted Living Facility

Date of this Advisory Opinion: July 31, 2013

Opinion Authored By: James S. Wright
Office of the Property Rights Ombudsman

Issue

May a city require the owner of a noncomplying structure to bring it into compliance with the current code as a condition to approving an addition to the building even if the addition complies with current code requirements?

Summary of Advisory Opinion

The Bountiful City Land Use Ordinance (the “Land Use Ordinance”) allows a noncomplying building to continue without complying with current code requirements so long as no additions, enlargements or structural alterations are made to it. Utah law grants municipalities the ability to enact land use ordinances unless otherwise expressly prohibited by applicable law. This Land Use Ordinance provision is legal because it does not otherwise violate Utah law. In this case, Bountiful City (“Bountiful” or the “City”) may require Legacy House of Bountiful, LLC (“Legacy House”) to bring its noncomplying building into compliance with the current parking requirements as a condition to approving an addition to the building because the Ordinance conditions the ability to maintain a noncomplying structure on not making any additions, expansions or structural alterations to the noncomplying building.

Review

Under the provisions of UTAH CODE ANN. § 13-43-205, a party may file a Request for an Advisory Opinion with the Office of the Property Rights Ombudsman (“Office”) at any time prior to the rendering of a final decision by a local land use appeal authority. An Advisory Opinion provides an early review of significant land use questions before any duty to exhaust administrative remedies arises so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. This review hopefully 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 Advisory Opinion, may have some effect on the long-term cost of resolving such issues in the courts.

The Office received a Request for an Advisory Opinion from Stephen Miles on April 10, 2013. A copy of that request was sent via certified mail to Kim J. Coleman, Bountiful City Recorder, at 790 South 100 East, Bountiful, Utah 84010. The City received that copy on April 11, 2013.

Evidence

The Office reviewed the following relevant documents and information in preparing this Advisory Opinion:

1. Request for an Advisory Opinion submitted by Stephen Miles and received by the Office on April 10, 2013.
2. E-mail and attachment submitted by Tanya Bascom and received by the Office on May 6, 2013.
3. Response and attachments from Bountiful City submitted by Russell Mahan and received by the Office on May 3, 2013 (“Mahan Letter”).

Background

Legacy House operates an assisted living facility (the “Facility”) on the northwest corner of Center Street and 100 East in Bountiful pursuant to a conditional use permit it received in 1997. In 2005, Legacy House expanded the Facility after receiving an amendment to the conditional use permit.

Bountiful amended the parking requirements applicable to buildings like the one housing the Facility after the 2005 expansion. That building no longer meets the parking requirements set forth in the Land Use Ordinance and is now a legal noncomplying structure. Mahan Letter, p. 3. Legacy House desires to further expand the Facility by adding an additional 17 assisted living units to the existing structure. It seeks site plan approval and a conditional use permit for this addition.

The Bountiful Planning Commission (“Planning Commission”) has held two hearings so far to review the site plan and conditional use permit application. The Planning Commission has

requested additional information about the project from Legacy House and has continued the hearing to give Legacy House time to procure this information.

Various concerns came up at these hearings relating to the expansion project, including concerns about the adequacy of the parking at the Facility. The City staff believes that the Planning Commission has the authority to require Legacy House to bring the entire Facility into compliance with the current parking requirements as a condition to approving the expansion project. Legacy House believes it must only meet the current parking requirements for the new addition to the building and that the Planning Commission cannot require it to bring the entire building into compliance with current parking requirements as a condition of approval of the addition.

Analysis

The Bountiful Land Use Ordinance Allows the City to Require the Facility to Comply with Current Parking Requirements as a Condition to Approving Its Expansion.

Bountiful's Land Use Ordinance explicitly conditions the right to continue any "nonconformity" (as defined in the Land Use Ordinance) without complying with current Land Use Ordinance requirements on not making any additions, enlargements or structural alterations to the nonconformity. The Land Use Ordinance states:

- A. Continuation. A nonconformity in any zone may be continued as provided *so long as no additions or enlargements are made thereto and no structural alterations are made therein*, except as provided in this Chapter or as may be required by law. If any nonconformity is removed from the property on which it is located, it shall not be replaced unless it conforms to the current provisions of this Title.

Land Use Ordinance § 14-2-4-2(A) (emphasis added).

Based on the plain language of this ordinance, if any additions, enlargements or structural alterations to a nonconformity occur, the nonconformity loses its legal right to continue without complying with current legal standards. In addition, nothing in Chapter 2 of the Land Use Ordinance provides an exception to this general rule for the building where the Facility operates. This means that in this case, § 14-2-4-2(A) of the Land Use Ordinance allows Bountiful to require Legacy House to bring the entire building into compliance with the current parking requirements as a condition to its expansion and alteration because it is a lawful ordinance and the building is a "nonconformity" under that ordinance.

A. The Ordinance Is Legal under Utah Law.

Pursuant to UTAH CODE ANN. § 10-9a-102(2), Utah law expressly grants municipalities the broad ability to enact ordinances relating to buildings and land use regulation unless "expressly prohibited by law." This statute states:

(2) To accomplish the purposes of this chapter, municipalities may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that they consider necessary or appropriate for the use and development of land within the municipality, including ordinances, resolutions, rules, restrictive covenants, easements, and development agreements governing uses, density, open spaces, structures, buildings, energy efficiency, light and air, air quality, transportation and public or alternative transportation, infrastructure, street and building orientation and width requirements, public facilities, fundamental fairness in land use regulation, considerations of surrounding land uses and the balance of the foregoing purposes with a landowner's private property interests, height and location of vegetation, trees, and landscaping, unless expressly prohibited by law.

UTAH CODE ANN. § 10-9a-102(2). This statute grants Bountiful the authority to enact § 14-2-4-2(A) of the Land Use Ordinance because that ordinance deals with land use regulation. In addition, no other Utah law expressly prohibits this Bountiful ordinance.

Another Utah statute, UTAH CODE ANN. § 10-9a-511 provides parameters on how municipalities regulate nonconforming uses and noncomplying structures. Nothing in that statute prohibits Bountiful from requiring that a noncomplying structure comply with applicable law as a condition to allowing an expansion of the building. In addition, no Utah case law or statute can be found to prohibit Bountiful from enacting § 14-2-4-2(A) of the Land Use Ordinance. This means § 14-2-4-2(A) of the Land Use Ordinance is a lawful ordinance and Bountiful may follow its provisions.

B. The Facility Building Is a “Nonconformity” Under the Land Use Ordinance.

The Land Use Ordinance defines “nonconformity” as:

NONCONFORMITY: Is a general term to collectively describe a ***noncomplying structure***, nonconforming lot, nonconforming sign, nonconforming use, and/or any other item that legally existed before the current land use (zoning) designation of the property where the said item is located, and that, because of subsequent land use ordinance changes does not conform to the regulations that now govern the use of the land.

Land Use Ordinance § 14-3-102(189) (emphasis added). It defines a “noncomplying structure” as:

NONCOMPLYING STRUCTURE: (Also “NONCONFORMING STRUCTURE” or “NONCONFORMING BUILDING”) A structure that legally

existed before its current land use designation; and because of one or more subsequent land use ordinance changes, does not conform to the setback, height restrictions, or other regulations, excluding those regulations which govern the use of land.

Land Use Ordinance § 14-3-102(185).

In this case, the building housing the Facility no longer meets the parking requirements applicable to buildings of its type because of a change to the Land Use Ordinance that occurred after the Facility legally commenced operating and was expanded. This fact makes it a “noncomplying structure” under the Land Use Ordinance, and therefore also a “nonconformity” under § 14-2-4-2(A) of that ordinance by definition. Given that the building housing the Facility is a nonconformity under the Land Use Ordinance, § 14-2-4-2(A) of that ordinance applies and conditions any continuation of the noncomplying structure on not making any additions, expansions or structural alterations to the building. This means Legacy House loses the right to continue operating the Facility under the old parking requirements if it expands the building and Bountiful can lawfully require Legacy House to bring the entire building into compliance with the current parking requirements as a condition to approving any addition, expansion or structural alteration to the building.

Conclusion

Under the Bountiful Land Use Ordinance, the building where the Facility operates is a “nonconformity” because it no longer complies with parking requirements adopted after the Facility began legally operating. This ordinance specifically conditions the Legacy House’s right to continue operating the Facility in the noncomplying building without having to comply with the updated parking requirements on not making any additions or enlargements to the building. This ordinance is legal under Utah law. This means Bountiful has the right to require the Legacy House to bring the entire building where it operates the Facility into compliance with current parking requirements as a condition to approving any expansion of that building.

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.

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. § 63G-7-401.

These provisions of state code require the delivery of the Advisory Opinion to the agent at the address 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.

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

Kim J. Coleman, City Recorder
City of Bountiful
790 South 100 East
Bountiful, Utah 84010

On this _____ day of July, 2013, I caused the attached Advisory Opinion to be delivered to the foregoing 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