Advisory Opinion #162

Parties: Tom Baguley; North Ogden City

Issued: August 25, 2015

TOPIC CATEGORIES:

Nonconforming Uses and Noncomplying Structures

North Ogden City acted within its discretion in amending its ordinances regarding home occupations. Even if the decision was based upon the complaints of residents, the decision will be upheld because it is legislative amendment to a zoning ordinance, and meets the "reasonably debatable" standard of review.

Amortization of nonconforming uses is expressly authorized by the Utah Code. The amortization method used by North Ogden satisfies statutory requirements.

Nevertheless, the concept of amortization raises grave concerns with regards to the Takings Clause of the Utah and Federal Constitutions. Depriving an owner of an existing property right requires just compensation. A valid legal nonconforming use is a vested property right in Utah. Simply allowing the use to continue for a specified period only to terminate at some future point fails to justly compensate the property owner for the loss of the right. Although Utah Courts have never addressed the issue, we conclude that unless just compensation is provided, mandatory amortization of a legal nonconforming use likely violates the Takings Clauses found in both the Federal and Utah Constitutions.

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ADVISORY OPINION

Advisory Opinion Requested by:	Tom Baguley
Local Government Entity:	North Ogden City
Property Owner:	Tom Baguley
Type of Property:	Residence/Business
Date of this Advisory Opinion:	August 25, 2015
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

May a local government determine and enforce a time frame to amortize (or phase out) a nonconforming use?

Summary of Advisory Opinion

North Ogden City acted within its discretion in amending its ordinances regarding home occupations. Even if the decision was based upon the complaints of residents, the decision will be upheld because it is legislative amendment to a zoning ordinance, and meets the "reasonably debatable" standard of review.

Amortization of nonconforming uses is expressly authorized by the Utah Code. The amortization method and process utilized by North Ogden City, and applied to Mr. Baguley's use, satisfies those statutory requirements.

Nevertheless, the concept of amortization raises grave concerns with regards to the Takings Clause of the Utah and Federal Constitutions. Depriving an owner of an existing property right requires just compensation. A valid legal nonconforming use is a vested property right in Utah. Simply allowing the use to continue for a specified period only to terminate at some future point fails to justly compensate the property owner for the loss of the right. Although Utah Courts have never addressed the issue, we conclude that unless just compensation is provided, mandatory

amortization of a legal nonconforming use likely violates the Takings Clauses found in both the Federal and Utah Constitutions.

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 Tom Baguley, on May 18, 2015. A copy of that request was sent via certified mail to North Ogden City, at 505 East 2600 North, North Ogden, Utah. According to the return receipt, the Town received the Request on May 27, 2015.

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 Tom Baguley, received by the Office of the Property Rights Ombudsman on May 18, 2015.
2. Response from Jonathan Call, Attorney for the North Ogden City, received on June 8, 2015.
3. Reply from Tom Baguley, sent via email, received on June 17, 2015.

Background

Tom Baguley operates Tom's Auto Service, an automobile repair business on his residential property in North Ogden City. In 2010, automobile repair was allowed as a home occupation business in residential zones, provided the owner obtained a conditional use permit (CUP). Mr. Baguley received a CUP from the City, and has operated his auto repair business in his garage since that time. Many local residents, including Mr. Baguley's neighbors, were opposed to the CUP. They have made numerous allegations that Mr. Baguley did not comply with the terms of the CUP, and that the conditions on the property constituted a nuisance.

The City states that because it received many complaints about other home occupation businesses (in addition to Mr. Baguley's), it decided to revise its ordinances and restrict home

businesses. In March of 2015, the City amended its ordinances, specifically prohibiting auto repair as a home-based business.[1] As a result, Mr. Baguley's business went from an approved conditional use to a legal nonconforming use.[2]

The City acknowledges that Mr. Baguley and other home business owners were entitled to nonconforming use status, and that it would not be fair to the owners to shut down their businesses abruptly. Therefore, the City chose to implement an amortization program, as authorized by the Utah Code.[3] Under this program, the nonconforming businesses are allowed a period of time to amortize, or phase out, their operations. In North Ogden, business owners have been asked to submit certain financial information. From this information, the City determines a reasonable amortization period.[4] In July of 2015, Mr. Baguley submitted his financial information on the City's "Rescinded Home Occupation Asset Amortization Schedule." According to that schedule, the amortization period for his business is 10 years.[5] He objects to the City's amortization approach, and to the ordinance amendment, arguing that the City's action was an improper response to public outcry.

The City responds that it has discretion to amend its zoning ordinances, and that it has authority to implement an amortization program.

Analysis

I. The City Has Broad Discretion to Adopt Zoning Ordinances Intended to Promote the Public Welfare.

The zoning amendments which impacted the existing home businesses of Mr. Baguley and others were valid exercises of North Ogden's zoning authority, regardless of what motivated the City to adopt the amendments. "In zoning, as in any legislative action, the functioning authority has wide discretion. *Its action is endowed with a presumption of validity . . ..*" *Harmon City, Inc. v. Draper City*, 2000 UT App 31, ¶ 12, 997 P.2d 321, 325 (emphasis in original)(*quoting Gayland v. Salt Lake County*, 11 Utah 2d 307, 358 P.2d 633, 636 (1961)). Furthermore, "[i]f an ordinance could promote the general welfare, of even if it reasonably debatable that it is in the interest of the general welfare [it will be upheld]" *Smith Investment Co. v. Sandy City*, 958 P.2d 245, 252 (Utah Ct. App. 1998).

Thus, as long as reasonable debate is possible that an ordinance could promote the public welfare, it is valid regardless of what motivated the action in the first place. In this matter, the

[1] Other types of businesses were also prohibited, including commercial bakeries, furniture manufacturing, kennels, retail sales, etc.
[2] *See* UTAH CODE ANN. § 10-9a-511; *Nonconforming Uses and Noncomplying Structures*.
[3] *See* UTAH CODE ANN. § 10-9a-511(2).
[4] The City indicates that it may implement a six-month period by default if no financial information is submitted.
[5] It is not clear if that is the City's official determination of the amortization period or merely preliminary information. The Asset Amortization Schedule listed all of Mr. Baguley's business assets and investment, and a statement of income. The proposed amortization period was calculated by dividing the total amount of assets by the average annual income.

City amended its zoning ordinance, and restricted the types of home businesses. There appears to be no question that the City acted because of complaints from residents. However, it is reasonably debatable that the ordinance amendments promote the public's health, safety, or welfare. Given the very broad discretion afforded to the City's authority to enact zoning ordinances and the presumption that its ordinances are valid, public outcry prompting ordinance changes does not, by itself, invalidate the ordinance amendments.[6]

II. Amortization of Nonconforming Uses is Authorized by the Utah Code

Under the language of the Utah Code, local governments may require property owners to amortize, or phase out, nonconforming uses over a reasonable time period. A city may require "the termination of all nonconforming uses, except billboards, by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of his investment in the nonconforming use, if any . …" UTAH CODE ANN. § 10-9a-511(2)(b). Amortization allows an owner to continue a nonconforming use, particularly a business use, for a period of time, while encouraging compliance with zoning ordinances. At the end of the amortization period, the right to continue the use terminates. This approach has been used in several states. "The 'amoritization' method has been established by the authorities as a proper method to terminate nonconforming uses. . . . [It] is an aspect of the balancing of the public good against individual harm as part of the city's overall zoning plan and ordinance." *Art Neon Co. v. City and County of Denver*, 488 F.2d 118, 122 (10th Cir. 1973).[7]

The language of § 10-9a-511 establishes a straightforward methodology for amortization. A reasonable time period is determined which allows an owner the opportunity to recover or amortize the investment in a nonconforming use. During the amortization period, the owner may continue the use. A specified time period is required, based on the time needed to recoup or amortize an owner's investment. *See M&S Cox Investments, LLC v. Provo City*, 2007 UT App 315, ¶¶ 33-34, 169 P.3d 789, 797.[8]

North Ogden adopted an ordinance requiring amortization of nonconforming uses, and it established a straightforward formula to calculate the amortization period. The formula used the amount of the Mr. Baguley's investment in the use, including equipment and buildings, and his income from the use. The City's calculated amortization period of 10 years satisfies the statute's reasonableness requirement. The City's approach thus satisfies the requirements of § 10-9a-

[6] This applies to legislative decisions (such as amendments to zoning ordinances), but not necessarily administrative decisions. Public clamor is not a valid reason to deny (or approve) administrative decisions (such as a conditional use permit, nonconforming use, subdivision, etc.). *See Ralph L. Wadsworth Construction. Inc v. West Jordan City*, 2000 UT App 49, ¶ 17, 999 P.2d 1240, 1243.

[7] *See also* Jay M. Zitter, Annotation, *Validity of Provisions for Amortization of Nonconforming Uses*, 8 A.L.R.5th 391 (Discussing amortization in several states).

[8] In *M&S Cox Investments*, the City estimated the fair market rental value of a rental unit, because the owners were renting at below market value, and thus claimed an "infinite" amortization period. The Utah Court of Appeals held that using a reasonable estimate of the nonconforming use's income to determine an amortization period was acceptable. *M&S Cox Investments*, 2007 UT App 315, ¶ 37, 169 P.3d at 797.

511(2)(b), by applying a formula which allows recovery of the investment in the use. *Id.*, 2007 UT App 315, ¶¶ 32-37, 169 P.3d at 797.

III. Amortization Is Most Likely an Unconstitutional Taking of Private Property

Although the Utah Code authorizes amortization of nonconforming uses, the approach most likely violates constitutional protections against taking of private property without just compensation. This question has not been addressed definitively by either Utah or Federal Courts, but the potential violation cannot be overlooked.[9] In *M&S Cox Investments*, the property owner raised the issue that the amortization under review was an unconstitutional taking, but the Utah Court of Appeals declined to address it, because the parties had not properly preserved it in the case being reviewed.[10] In addition, the U.S. Supreme Court has not considered an amortization case.[11] The majority of state courts that have considered the issue concluded that an amortization scheme was not a taking, while a small minority of states determined that such schemes constitute confiscatory takings.[12]

We believe that unique aspects of Utah law demand adoption of the minority view. The analysis used by Pennsylvania's Supreme Court is significant, because of the parallels in Utah case law. The Pennsylvania Supreme Court held that "the amortization and discontinuance of a lawful pre-existing nonconforming use is per se confiscatory and violative of the Pennsylvania Constitution." *PA Northwestern Distributors, Inc. v. Township of Moon*, 584 A.2d 1372, 1376 (Pa. 1991).

Pennsylvania considers nonconforming uses to be a vested property right. "A lawful nonconforming use establishes in the property owner a vested property right which cannot be abrogated or destroyed, unless it is a nuisance, it is abandoned, or it is extinguished by eminent domain." *Id.*, 584 A.2d at 1375. While property may be regulated, "if the *effect* of the law or regulation is to deprive a property owner of the lawful use of his property it amounts to a 'taking,' for which he must be justly compensated." *Id.* (citations omitted).[13]

The court reasoned that mandatory amortization of a nonconforming use is more than mere regulation of a use, it deprives the property owner of a vested right. "If government desires to

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[9] The Office of the Property Rights Ombudsman is charged with the duty to "identify state or local government actions that have potential takings implications and, if appropriate, advise those state or local government entities about those implications." UTAH CODE ANN. § 13-43-203(1)(a)(vi).

[10] The decision in *M&S Cox Investments* was a review of a summary judgment against the property owners. The owners attempted to raise the issue that amortization is unconstitutional to the Court of Appeals. However, the Court noted that the owners asserted that the amortization statute was lawful, and so had failed to properly raise and preserve the issue for review. *Id.*, 2007 UT App 315, ¶ 26, 169 P.3d at 795.

[11] *See* Julie R. Shank, Note, *A Taking Without Just Compensation? The Constitutionality of Amortization Provisions for Nonconforming Uses*, 109 W. Va. L. Rev. 225, 239 (2006).

[12] Shank, 109 W. Va. L. Rev at 236-39. In *Art Neon Co.*, the 10th Circuit held that amortization is a proper method to amortize nonconforming uses in a Colorado case.

[13] Significantly, the Pennsylvania court was reviewing an local action giving the property owner an amortization period to either discontinue the use, or move it to a location where it would be allowed (*i.e.*, comply with the ordinance changes). *PA Northwestern Distributors, Inc. v. Township of Moon*, 584 A.2d 1372, 1373 (Pa. 1991).

interfere with the owner's use, where the use is lawful and is not a nuisance nor it is abandoned, it must compensate the owner for the resulting loss." *Id.*, 584 A.2d at 1376. The court based its conclusion on the Pennsylvania Constitution, which prohibits taking of private property without compensation.[14]

The court also noted important policy considerations supporting its conclusion:

> The law of zoning should be designed to protect the reasonable expectations of persons who plan to enter business or make improvements on property. The possibility that the municipality could by zoning force removal of installations or cessation of business might serve to deter such investors.

Id. (*quoting* Note, *Nonconforming Uses: A Rationale and an Approach*, 102 U. Pa. L. Rev. 91, 103 (1953)). The court agreed with the Missouri Supreme Court that there is no difference between forcing a property owner to phase out a land use and forcing an owner to abruptly stop the use.

> It would be a strange and novel doctrine indeed which would approve a municipality taking property for public use without compensation if the property was not too valuable and the taking was not too soon, and prompts us to repeat the caveat of Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 . . . , that [we] are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Id. (*quoting Hoffman v. Kennedy*, 389 S.W.2d 745, 753 (Mo. 1965)). Finally, the court warned that there is effectively no limit on a government's power to amortize uses, meaning that government would have a "loophole" to escape its obligations under the Takings Clause.

> Although such a zoning option seems reasonable when the use involves some activity that may be distasteful to some members of the public, *no* use would be exempt from the reach of amortization, and *any* property owner could lose the use of his property without compensation. Even a homeowner could find one day that his or her "castle" had become a nonconforming use and would be required to vacate the premises within some arbitrary period of time, *without just compensation*.

Id., 584 A.2d at 1376.

Utah law demands a similar conclusion. The Utah Constitution states that "[p]rivate property shall not be taken or damaged for public use without just compensation." UTAH CONST., Art. I, § 22.

[14] PENN. CONST., Art. I, § 10. ". . . nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."

In order to allege a taking of private property, [a] claimant must possess some protectable interest in property . . .." *Id.* 795 P.2d at 625. Like in Pennsylvania, a nonconforming use in Utah is a type of vested property right. *See, e.g., Swenson v. Salt Lake City*, 16 Utah 2d 231, 234, 398 P.2d 879, 881 (1965) ("[T]he general rule is against retrospective operation of an ordinance, where vested rights are concerned, in existing nonconforming buildings or uses."). In Utah, "a 'taking' is any substantial interference with private property which destroys or materially lessens its value, or by which *the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed*." *Colman v. Utah State Land Board*, 795 P.2d 622, 626 (Utah 1990) (citations omitted)(emphasis added). Accordingly, where an owner has a right *to use* property, and that use right is abridged or destroyed, a taking has occurred.

Forcing a property owner to discontinue a nonconforming use, whether immediately or over a pre-determined period of time is not just a regulation of use, because the property owner has a legal right to that use. Forced discontinuance substantially destroys the owner's right to use and enjoy property. Because a legal nonconforming use is a property right, mandatory amortization of valid nonconforming use is a taking, even if the owner is allowed to continue the use for a period of time. When the government takes property it must provide just compensation.

Voluntary abandonment of a nonconforming use would not constitute a taking, because the abandonment is not forced by government action.[15] Also, nonconforming uses, like all property uses, are subject to regulation to protect the public welfare. Regulation of the use to correct nuisance conditions would thus not be considered a taking. It should be noted as well that the Takings Clause protects existing (or vested) property uses, not speculative future land uses. A local government may prohibit or restrict uses in the future, but not eliminate uses retroactively.[16]

The same policy considerations expressed by the Pennsylvania Supreme Court apply in Utah. Utah's unique Vested Rights Rule provides that property owners may rely on zoning ordinances to allow uses without the threat that the use will be discontinued.[17] As the Pennsylvania court noted, there is nothing preventing a local government from using amortization to eliminate any land use from any property owner simply to accomplish a public purpose. Amortization of a use that properly vested but quickly becomes nonconforming because a local government has buyer's remorse would eviscerate the Vested Rights Rule. The fact that the use is phased out over time rather than immediately should not exempt the action from constitutional limits.

The conclusion that mandatory amortization of nonconforming uses most likely violates the Takings Clause does not leave local governments powerless to regulate nonconforming uses. As has already been stated, nonconforming uses are subject to reasonable regulation, like all land

[15] In a sense, mandatory amortization is like forcing the property owner to abandon the nonconforming use.

[16] The Pennsylvania Court was careful to distinguish between restricting future uses moving forward and phasing out existing uses by retroactively prohibiting them. *PA Northern*, 584 A.2d at 1376. *See also Swenson*, 16 Utah2d at 234, 398 P.2d at 881.

[17] A property owner is entitled to approval of a land use application if a complete application conforms to the zoning ordinances in place when it is first filed. *See Western Land Equities v. City of Logan*, 617 P.2d 388, 396 (Utah 1980).

uses would be. Uses may be voluntarily abandoned and eliminated. Finally, a local government could compensate the property owner, or offer incentives to relocate a nonconforming use to an appropriate location. Nevertheless, we believe that amortization likely violates constitutional takings provisions.

Conclusion

Justice Holmes' warning is relevant today, and particularly applicable to this particular question. "[We] are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Improving communities and neighborhoods should be the objective of any local government. However, a locality's zeal to promote the public welfare must operate within the limits prescribed by the state and federal constitutions. Since nonconforming uses are vested property rights, any substantial interference which destroys a property owner's right to the use must be considered a taking of private property for a public use, which requires compensation under both the Federal and Utah Constitutions.

Thus, although North Ogden appears to have satisfied the basic requirements established in the Utah Code, there is still a likely constitutional violation inherent in a mandatory amortization provision. There is no difference between forcing a property owner to phase out a nonconforming use over time and demanding that the owner discontinue the use immediately. If the local action substantially interferes with a property owners protected interest, the action is a taking.

Local governments are not left helpless, however. Nonconforming uses are subject to regulation, as are all uses. A use may be voluntarily abandoned. A locality may compensate the owner, or it may offer incentives to bring the use into compliance with zoning regulations.

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:

S. Annette Spendlove, City Recorder
North Ogden City
505 E. 2600 North
North Ogden, Utah 84414

On this _____ Day of August, 2015, 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