

# Advisory Opinion #46

Parties: Garland Hirschi and Town of Rockville

Issued: July 15, 2008

## TOPIC CATEGORIES:

Q: Nonconforming Uses and Noncomplying Structures

R(viii): Other Topics (Appealing Land Use Decisions)

The Property Owner cannot operate a gravel or rock quarry on the properties. Such a use is prohibited under the current zoning ordinance. The 1997 decision denying nonconforming use status must stand. The Property owner cannot appeal that decision now, and cannot submit a new claim that the properties are entitled to nonconforming use status.

## 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.



The Office of the Property Rights Ombudsman  
Utah Department of Commerce  
PO Box 146702  
160 E. 300 South, 2<sup>nd</sup> Floor  
Salt Lake City, Utah 84114

(801) 530-6391  
1-877-882-4662  
Fax: (801) 530-6338  
[www.propertyrights.utah.gov](http://www.propertyrights.utah.gov)  
[propertyrights@utah.gov](mailto:propertyrights@utah.gov)



JON M. HUNTSMAN, JR.  
*Governor*

GARY R. HERBERT  
*Lieutenant Governor*

# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

### ADVISORY OPINION

Advisory Opinion Requested by: Garland Hirschi

Local Government Entity: Town of Rockville

Applicant for the Land Use Approval: Garland Hirschi

Project: Commercial Use of Gravel Pit

Date of this Advisory Opinion: July 15, 2008

Opinion Authored By: Brent N. Bateman, Lead Attorney, Office of the Property Rights Ombudsman

### Issue

Is Mr. Hirschi entitled to use his property as a gravel pit as a pre-existing nonconforming use?

### Summary of Advisory Opinion

Under Utah law, a decision by a land use authority must be appealed within the time period permitted by ordinance. Failure to appeal within that time period renders that decision final. In 1997, Mr. Hirschi applied to have the use of his property as a gravel pit recognized by the Town. The Town determined that use was not a valid nonconforming use and thus prohibited under Town ordinance. Without regard to whether that decision was correct, that decision became final when the time to appeal that decision passed. As a result, the decision by the Town in 1997 that the use of the property as a gravel pit is not a legal non-conforming use remains valid and final. Absent a significant change in circumstance, the Town cannot approve additional applications for that use.

### 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. The 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.

The request for this Advisory Opinion was received from Christopher W. Edwards, Mr. Hirschi's legal counsel, on October 30, 2007. A letter with the request attached was sent via certified mail, return receipt requested, to Mayor Dan McGuire, Town of Rockville, at P.O. Box 630206, Rockville, UT 84763. The Town's legal counsel, Russell J. Gallian, submitted a response, which was received by the Office of the Property Rights Ombudsman on December 12, 2007. Mr. Edwards submitted a reply, received on June 2, 2008. Mr. Gallian then gave a final response that was received June 13, 2008.

## **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, submitted by Christopher W. Edwards, Counsel for Garland Hirschi, and received by the Office of the Property Rights Ombudsman, October 30, 2007.
2. Letter dated December 4, 2007 from Russell J. Gallian, Counsel for the Town of Rockville, with attachments.
3. Letter dated May 28, 2008 from Christopher W. Edwards.
4. Letter dated June 10, 2008 from Russell J. Gallian, Counsel for the Town of Rockville, with attachments.
5. Letter dated September 14, 2007 to Christopher W. Edwards from Russell J. Gallian, Counsel for the Town of Rockville.
6. Letter dated August 17, 2007 to Town of Rockville from Christopher W. Edwards.
7. Letter dated August 27, 2007 to Russell J. Gallian from Town of Rockville, with attachments.
8. Town of Rockville, Utah Land Use Code, adopted February 17, 1999.
9. Town of Rockville, Utah Zoning Ordinance adopted January 17, 1990.

## **Background**

The Town of Rockville, Utah became incorporated in 1987 and adopted its first land use ordinances in 1990. At that time, the ordinances created an Open Space ("OS") designation that gave no conditional or prohibited uses but instead limited all permissible uses to livestock grazing, recreation facilities, emergency equipment routes, single family dwellings, or public utilities and transmission lines. None of these uses encompass gravel pits.

Garland Hirschi owns a piece of property in Rockville that was zoned OS when the first ordinances were adopted. He indicates that the property has been continuously used as a gravel

pit for the past 85 years and he has submitted a history of those who have used the gravel pit over the years, along with approximate time frames.

In 1997, Mr. Hirschi applied for a conditional use permit, an excavation permit and a business license in order to run a gravel excavation business at the property. After reviewing his applications, the Town's Planning and Zoning Commission ("PZC") determined that the property's use as a gravel pit was prohibited under the OS ordinance and did not qualify for legal nonconforming status. In response to Mr. Hirschi's claim that the use was grandfathered, the PZC stated that the use was not continuous because the quarry had been inactive for several years. The PZC cited the Town's land use ordinance, which states that a nonconforming use lapses when it is abandoned for a year. The PZC gave no further evidence to show the quarry was inactive or how long it had been inactive. Nevertheless, the Town Council accepted the PZC's recommendation and denied the permits.

On July 17, 1997, the Town sent Mr. Hirschi a letter regarding its decision. The letter gave Mr. Hirschi two options to pursue if he still wished to operate a commercial gravel pit on his property. First, he could appeal the recommendation of the PZC directly to the Town Council. No instructions on how or when to appeal were included. Second, he could apply for a zone change.<sup>1</sup> On August 7, twenty-one days after the date of the Town's letter, Mr. Hirschi submitted a written request for the Town to put him on the Town Council meeting's agenda for August 20. The request did not mention an appeal, but stated that he wanted to discuss his applications to operate a gravel pit. The Town put Mr. Hirschi on the agenda for the next PZC meeting, held on August 19.<sup>2</sup> Mr. Hirschi did not attend this meeting, and accordingly, the PZC did not discuss the commercial use of Mr. Hirschi's quarry. No appeal of the Town's decisions occurred.

In 1999, Rockville amended its ordinances, adopting the most current version of its land use code. These amendments in part updated the OS designation, specifically naming gravel pits as a prohibited use.

In 2007, Mr. Rick Davis applied for an excavation permit to screen and remove material for landscape rock on Mr. Hirschi's land. The PZC recommended denial, stating that the current Rockville Code specifically prohibited gravel pits in that zone. Although Mr. Davis stated that his use was merely to screen gravel, not to create a pit, he agreed that his purpose fit the Code's definition of a gravel pit. The Town subsequently accepted the PZC's recommendation, and also reminded Mr. Hirschi of his previously denied application.

Mr. Hirschi appealed the PZC's 2007 determination to the Town. In early 2008, the Town Council held a Hearing on Appeal and sustained the denial of the permit. The Council agreed with the PZC's determination that gravel pits are prohibited in an OS zone, stating that Mr.

---

<sup>1</sup> This option appears to remain available to Mr. Hirschi.

<sup>2</sup> It is unknown whether Mr. Hirschi was placed on the PZC agenda in response to his request to be placed upon the Town Council agenda. It is also unknown whether Mr. Hirschi was ever placed upon the Town Council agenda, or if Mr. Hirschi attended the meeting on the Town Council on the 20<sup>th</sup>, or if a Town Council meeting even occurred on August 20<sup>th</sup>.

Hirschi's attorney did not submit appropriate evidence to support a nonconforming use claim. The Town then directed Mr. Hirschi to continue any further appeal with the civil court system.

Mr. Hirschi requested this advisory opinion before the Town held its Hearing of Appeal.

## Analysis

### I. The Town's 1997 Determination Remains in Force

The Town of Rockville's 1997 determination became final when no appeal was made. Utah statute requires all municipalities to institute an appeals process for citizens to appeal municipal land use decisions. UTAH CODE ANN. § 10-9a-701(1)(b).<sup>3</sup> Citizens are then required to exhaust this process if they wish to continue to district court with their complaints. *Id.* § 10-9a-801(1).<sup>4</sup> Even more importantly, such a decision becomes final in the absence of an appeal, once the time for appeal expires. *Brendle v. City of Draper*, 937 P.2d 1044, 1047-48 (Utah Ct. App. 1997). In *Brendle*, the City was not allowed to hear an appeal or change its initial decision after the final date for appeal had expired. *Id.* Therefore, an unappealed municipal land use decision is final.

Mr. Hirschi's claim that the use of his land as a gravel pit is a grandfathered, nonconforming use is precluded by the Town's previous determination to the contrary. A nonconforming use must be "maintained continuously since the time the land use ordinance governing the land changed."<sup>5</sup> UTAH CODE ANN. § 10-9a-102(28)(b). Both Utah statute and Rockville Code provide that a use loses nonconforming status if it is abandoned for a year or more. *Id.* § 10-9a-511(4)(c)(ii); Rockville, Utah, Land Use Code, Chapter 6-10 (1990). When Mr. Hirschi applied for several permits in 1997, he asked the Town to recognize his claim of a nonconforming use. At that time, the PZC made its determination that Mr. Hirschi's property did not qualify for a nonconforming use. The Town accepted the recommendation, denied Mr. Hirschi's permits and, on July 17, 1997, sent him a letter informing him of his option to appeal. At this point, an appeal would have been appropriate and necessary to retain a claim of nonconforming use for the gravel pit.

Mr. Hirschi's letter asking to be placed upon the Town Council agenda may have been adequate to trigger an appeal. However, no appeal ever took place. Mr. Hirschi has not claimed that the Town refused to hear his appeal. In fact, the town did place Mr. Hirschi on the agenda for the PZC meeting on August 19. Mr. Hirschi did not attend that meeting. Nothing in the record

---

<sup>3</sup>§ 701(1) states: "Each municipality adopting a land use ordinance shall, by ordinance, establish one or more appeal authorities to hear and decide. . . (b) appeals from decisions applying the land use ordinances."

<sup>4</sup>§ 10-9a-801(1) states: "No person may challenge in district court a municipality's land use decision made under this chapter, or under a regulation made under authority of this chapter, *until that person has exhausted the person's administrative remedies* as provided. . ." (emphasis added).

In addition, there is a time limitation for filing in district court. § 10-9a-801(2)(a) states: "Any person adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local land use decision is filed." And § (6) states: "The petition is barred unless it is filed within 30 days after the appeal authority's decision is final."

<sup>5</sup>A nonconforming use must also "legally exist before its current land use designation." UTAH CODE ANN. § 10-9a-103(28)(a).

indicates that any party attempted to bring further appeal of the Town's decision. Because the decision was not appealed within the time frame required by law, the Town's determination became final. Current Rockville ordinance allows ten days to appeal a decision,<sup>6</sup> which is the minimum amount of time required by state statute. Rockville, Utah, Land Use Code, § 1.33.C (1999); UTAH CODE ANN. § 10-9a-704(1). Mr. Hirschi did not appeal the decision at any time. The Town's decision to deny a conditional use permit may or may not have been correct. However, it is final. Because no appeal occurred, the Town's determination remains in force: that the use of Mr. Hirschi's land as a gravel pit is not a valid nonconforming use.

## **II. The Town Cannot Currently Grant Any Permits or Licenses That Allow the Use of Mr. Hirschi's Land as a Gravel Pit**

The Town cannot presently grant Mr. Hirschi's property legal nonconforming use status as a gravel pit because it cannot reverse the finality of the 1997 decision. In *Brendle*, once the time for appeal expired, the City did not have jurisdiction to go back and hear another appeal and change its prior decision. *Brendle v. City of Draper*, 937 P.2d at 1047-48. Should different circumstances arise, the Town could consider other applications for the use of Mr. Hirschi's property. For example, it could approve an application for some use other than a gravel pit, or it could approve an application that differed significantly from previous applications to the extent that the previous decision would not preclude approval. However, the question of whether the gravel pit is permissible as a legal nonconforming use is closed.

### **Conclusion**

Currently, Mr. Hirschi is not legally entitled to use his property as a gravel pit. The Town's determination that his use is not a valid nonconforming use became final when it was not appealed. In addition, current zoning ordinances prohibit the use of his property as a gravel pit. Since the Town cannot recognize the use as nonconforming and the use is prohibited by ordinance, the Town must deny any applications that request permission to use his property as such. As a result, Mr. Hirschi must look at other alternatives in order to use his property.

Brent N. Bateman, Lead Attorney  
Office of the Property Rights Ombudsman

---

<sup>6</sup>It is unknown whether the 1990 ordinance also mandated that an appeal be commenced within ten days.

**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. § 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:

Dan McGuire  
Mayor  
188 W Main St.  
Rockville, Utah 84763-0206

On this \_\_\_\_\_ Day of July, 2008, 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