Advisory Opinion #61

Parties: Steven C. Pace and City of Holladay
Issued: January 21, 2009

TOPIC CATEGORIES

Nonconforming Uses and Noncomplying Structures
Interpretation of Ordinances

Although the doctrine of lot merger is unknown in Utah, a handful of other states have upheld similar ordinances. An ordinance requiring merger of noncomplying parcels can reasonably be seen to promote the health, safety, and welfare of the City. Since local governments are entitled to deference in their choice of zoning ordinances, it cannot be said that the City's ordinance is invalid.

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ADVISORY OPINION

Advisory Opinion Requested by:	Steven C. Pace
Local Government Entity:	City of Holladay
Applicant for the Land Use Approval:	Steven C. Pace
Date of this Advisory Opinion:	January 21, 2009
Opinion Authored By:	Brent N. Bateman, Lead Attorney, Office of the Property Rights Ombudsman

Issues

May the City require the owner of two or more adjacent lots under common ownership, where those lots were legally created but do not meet the current zoning requirements for lot area, to merge the lots in order to meet the current zoning requirements?

Summary of Advisory Opinion

The City presently permits nonconforming lots. Where two or more adjacent nonconforming lots are under common ownership, the City requires that those lots be merged in order to receive a building permit. The City is entitled to great deference in enacting its land use ordinances. Although there are some questions regarding the legality of Holladay's lot merger ordinance, those questions do not rise to the point where the ordinance can be found to be arbitrary, capricious, or illegal. Accordingly, Holladay's lot merger ordinance is valid.

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 § 13-43-205 of the Utah Code. 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 Stephen C. Pace on November 6, 2008. A letter with the request attached was sent via certified mail, return receipt requested, to Stephanie Carlson, City Recorder for the City of Holladay, at 4580 South 2300 East, Holladay, Utah 84117. The return receipt was signed and was received on November 7, 2008, indicating that the City had received it. The City did not submit a written response to the Request. The OPRO had a telephonic conversation with H. Craig Hall, attorney for the City of Holladay, on December 17, 2008. Mr. Hall indicated that he would contact representatives for the City and determine whether to submit a response. The OPRO had an additional telephonic conversation with Mr. Hall on January 5, 2009, wherein Mr. Hall provided brief general information regarding the zoning history of the Holladay area. No further response was received from the City.

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 received November 6, 2008 by the Office of the Property Rights Ombudsman by Steven Pace, including exhibits.

Background

Steven C. Pace is personal representative of the estate of his mother, Maxine C. Pace. Since approximately 1972, Ms. Pace was the owner of two adjacent but legally separate lots in Holladay City. There appears to be no dispute that the lots were legally created and existing as separate tax entities. It appears that one lot contained a single family dwelling occupied by Ms. Pace until her death. The other lot appears to be vacant.

In 1999, the City of Holladay was incorporated, and a land use code was adopted. The Holladay City land use code presently includes the following ordinance:

> 13.76.050: LOTS IN SEPARATE OWNERSHIP:
>
> Any lot legally held in separate ownership at the time of adoption of this code, which lot is below the requirements for lot area, lot width or frontage for the zone in which it is located and was legally created under the provisions of a previous zoning ordinance, shall be classified as a legal nonconforming lot under this code.

A. In any zone, when a lot lacks sufficient area to meet the minimum required by this code and there is adjacent property under the same ownership, the two (2) parcels shall be combined. If the combined parcels do not meet the minimum requirement and there is sufficient area upon which to construct a residence reasonably comparable to those in the vicinity with required setbacks, the lot may be determined to be legal nonconforming and a single-family dwelling shall be permitted if such lot is in a residential zone.

B. If there is not sufficient area for a buildable area, comparable to the other residences in the area, or of at least thirty feet by fifty feet (30' x 50'), a building permit shall not be issued. (Ord. 07-01, 1-9-2007)

Accordingly, in a letter sent by Paul Allred, Holladay City Community Development Director, to Mr. Pace dated October 13, 2008, the City indicated that a building permit was not available on the second lot, and that the lots would need to be combined as they are both owned by the same entity. Apparently, due to an amendment to the Ordinance on January 9, 2007, it is no longer possible to maintain the nonconforming lot status by causing diverse ownership of the two lots.

Mr. Pace has requested an Advisory Opinion from the OPRO to determine whether Holladay City can require the merger of two adjacent legal nonconforming lots under common ownership.

Analysis

A. The Doctrine of Lot Merger

Section 13.76.050 of the Holladay City land use code establishes legal nonconforming lots within the City. According to its language, any lot held at the time of adoption of the code that does not comply with width or frontage requirements in the zone would be a legal nonconforming lot permitting a single family dwelling to be built. That Ordinance further requires that when such a lot is adjacent to another lot under the same ownership "the two (2) parcels *shall* be combined" (emphasis added). Accordingly, in Holladay City, a property owner may build upon a legal nonconforming lot unless that owner also owns an adjacent lot. The lots must then be combined.

At question is the land use doctrine of lot merger. The doctrine of lot merger arises when the owner of a substandard lot owns other, adjoining property, and the owner is required to merge those lots and treat them as a single lot for zoning purposes. *See* 7-42 ZONING AND LAND USE CONTROLS § 42.03.

Most U.S. courts that have reviewed a local lot merger ordinance have upheld it. *See, e.g., Remes v. Montgomery County,* 874 A.2d 470 (Md., 2005); *Robertson v. York*, 553 A.2d 1259 (Maine, 1989); *Giovannucci v. Board of Appeals*, 344 N.E.2d 913 (Mass. App. Ct. 1976); *McKendall v. Barrington*, 571 A.2d 565 (R.I., 1990). In each of these cases, the reviewing court considered local lot merger ordinances very similar to Holladay's. No cases could be found overturning a local lot merger ordinance similar to Holladay's.

Also noteworthy, however, the cases dealing with lot merger ordinances originate almost exclusively from a few New England states. Lot merger does not appear to be a commonly litigated subject any other region of the country. Lot merger has not been expressly established in Utah.[1] Nevertheless, the fact that several cases exist upholding lot merger ordinances similar to Holladay's, and that no cases have been found overthrowing such an ordinance, inclines in favor of the ordinance.

B. The Wood *Case.*

Conversely, the most on-point Utah case that could be located,[2] *Wood v. North Salt Lake*, 390 P.2d 858 (1964), reaches a different result. In *Wood*, the Utah Supreme Court did not examine the lot merger doctrine specifically, but nevertheless rejected the compulsory combination of non-conforming lots based solely upon common ownership. In *Wood*, a plat was recorded creating several 6000 square foot lots. Sometime after the lots were created, the City adopted an ordinance establishing 7000 square feet as the minimum lot size for a building permit. While the City did not have a compulsory lot merger ordinance as does Holladay, the City argued to the Supreme Court that the Plaintiffs owned more than one adjacent lot, and that the lots could easily be combined in order to comply with the ordinance. The Court rejected this approach. The Court stated that requiring one lot owner to comply with the ordinance simply because that owner owns an adjacent lot, where another owner would be able to build upon her lot because she did not own an adjacent lot "would be objectionable under simple principles touching discrimination." *Id*. at 859:

> It loses sight of the fact that one owning two adjoining lots would be subject to the zoning ordinance, while a neighbor owning but one lot presumably would be either inoculated against the ordinance -- or . . . virtually would be owner of a useless lot for lack of elbow room to expand the area.

Id. Accordingly, the *Wood* court rejected the *effect* that the lot owner faces in Holladay City, where owners have conforming lots unless they are unlucky enough to own an adjacent lot. Holladay City has adopted an ordinance recognizing non-conforming lots. The only reason why the property owner in this case does not have two non-conforming lots is because the lots are contiguous and under the same ownership. The Utah Supreme Court has rejected this result. This inclines against Holladay's ordinance.

C. The City is Entitled to Deference for its Land Use Ordinances

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[1] Lot merger does not appear to be the widespread practice in Utah. No state statute or court case can be found adopting or sanctioning lot merger in Utah. Moreover, an informal, and certainly not comprehensive, review of the ordinances of various Cities and Counties in Utah revealed no adopted ordinance like that of Holladay City's. Several Utah cities and counties have adopted ordinances recognizing nonconforming lots, but none could be found requiring merger of adjacent nonconforming lots as does Holladay's. As stated, this review was not comprehensive, and such an ordinance may exist elsewhere in Utah.

[2] Because neither party submitted any legal argument or authority to the OPRO in support of their position, the OPRO was obligated to rely on its own research in producing a "statement of facts and law supporting the Opinion's conclusions" as required by UTAH CODE §13-43-206(9).

All of the above information should be considered in light of well-established Utah law regarding the passage of land use ordinances generally. Local municipalities have tremendous latitude in adopting land use ordinances. UTAH CODE ANN. 10-9a-801(3) states that, when a court reviews a local land use ordinance:

> The courts shall:
> (i) presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and
> (ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.
> (b) A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if the decision, ordinance, or regulation is reasonably debatable and not illegal.

Accordingly, a land use ordinance is assumed to be valid if it is reasonably debatable to be in the public welfare and not illegal. *Springville Citizens v. Springville*, 1999 UT 25 further illuminates:

> A municipality's land use decisions are entitled to a great deal of deference. *See Xanthos v. Board of Adjustment*, 685 P.2d 1032, 1034 (Utah 1984); *Triangle Oil, Inc. v. North Salt Lake Corp.*, 609 P.2d 1338, 1339-40 (Utah 1980); *Cottonwood Heights Citizens Ass'n v. Board of Comm'rs*, 593 P.2d 138, 140 (Utah 1979); *Naylor v. Salt Lake City Corp.*, 17 Utah 2d 300, 410 P.2d 764 (Utah 1966). Therefore, "the courts generally will not so interfere with the actions of a city council unless its action is outside of its authority or is so wholly discordant to reason and justice that its action must be deemed capricious and arbitrary and thus in violation of the complainant's rights." *Triangle Oil*, 609 P.2d at 1340.

The presumption that local land use ordinances are valid unless they are arbitrary, capricious or illegal, and the standard that an ordinance is not arbitrary or capricious if it is reasonably debatable that it advances the general welfare, is nearly insurmountable. The case of *Harmon City, Inc. v. Draper City*, 2000 UT App 31, ¶18 provides a illustrative quote: "Indeed, we have found no Utah case, nor a case from any other jurisdiction, in which a zoning classification was reversed on grounds that it was arbitrary and capricious." *Id*.

The Holladay City lot merger ordinance is a land use ordinance, and entitled to legislative deference. Reasonable minds could differ regarding whether eliminating nonconforming lots through merger advances the general welfare. Therefore, the Holladay lot merger ordinance meets that standard and must be upheld.

The *Wood* case, discussed above, is the wrench in the works. It can be argued that *Wood* forbids compelling a property owner to merge its legal nonconforming lots in order to bring them into conformity simply because that lot owner is also the owner of an adjoining lot. This certainly raises a question of whether the Holladay lot merger ordinance is legal. Nevertheless, *Wood* can be distinguished because that case was not examining a lot merger ordinance. The result may have been different due to the level of deference to which ordinances are subject. Accordingly, although

it raises questions regarding the legality of Holladay's ordinance, *Wood* does not raise a question sufficient to overcome the high level of deference.

Conclusion

Holladay's lot merger ordinance must be upheld. The *Wood* case, and the fact that the lot merger doctrine has not been adopted in Utah, certainly calls the legality of the ordinance into question. However, several courts throughout the country have examined lot merger ordinances and upheld them. Therefore, the Holladay lot merger ordinance is not clearly illegal. Furthermore, it is reasonably debatable that requiring owners of adjoining nonconforming lots to merge the lots to bring them into conformity advances the general welfare. Therefore, under the well-established standard in Utah for reviewing local land use ordinances, Holladay's ordinance is valid.

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NOTE:

This is an advisory opinion as defined in Utah Code Annotated § 13-43-205. 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.