Advisory Opinion #16

Parties: Cindy Cromer and Salt Lake City
Issued: June 22, 2007

TOPIC CATEGORIES

Compliance with Mandatory Provisions of Land Use Ordinances
Nonconforming Uses and Noncomplying Structures

The City did not correctly interpret its ordinance. Uses on noncomplying lots (other than single family dwellings) are prohibited unless side yard requirements are met. The City contention that the prohibition only applies to new construction, was not supported by the language of the ordinance.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Interpretation of Ordinance Governing Allowable Uses on a Noncomplying Lot

Advisory Opinion Requested by:	Cindy Cromer
Local Government Entity:	Salt Lake City
Applicant for the Land Use Approval:	Robert L. Bunnell
Project:	Conversion of a Single Family Residence into a Boarding House for Seven Residents.
Date of this Advisory Opinion:	June 22, 2007
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

I. Did the Salt Lake City planning staff correctly interpret and apply Section 21A.38.100 of the Salt Lake City Code?

II. Were the conditions imposed by the Salt Lake City Planning Commission allowable under Section 10-9a-507 of the Utah Code?

Summary of Advisory Opinion

This Advisory Opinion was requested to evaluate Salt Lake City's interpretation and application of a City ordinance, § 21A.38.100, which governs uses on noncomplying lots. This Opinion concludes that Salt Lake City did not correctly interpret that ordinance. Section 21A.38.100 restricts uses on noncomplying lots. Uses other than single family dwellings are prohibited unless

side yard requirements are met. The City contends that prohibition only applies to new construction, but the City's interpretation is not supported by the language of the ordinance.

The person requesting this Opinion argues that a "minimum lot width" requirement ought to be read into § 21A.38.100. The ordinance does not contain a "minimum lot width" requirement, and there is no authority to interpose one.

Because this Opinion concludes that the proposed conditional use was prohibited, it does not express any conclusions as to whether the conditions approved are allowable.

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 U.C.A. §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 Cindy Cromer on May 2, 2007. A letter with the request attached was sent via certified mail, return receipt requested, to Kendrick Cowley, Salt Lake City Recorder, at 415 S. State, Room 415, Salt Lake City, Utah 84111. The return receipt was signed and was received on May 11, 2007, indicating that Mr. Kendrick had received it. A response was received from the Salt Lake City Attorney's Office on May 31, 2007.

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 filed May 2, 2007 with the Office of the Property Rights Ombudsman by Cindy Cromer
2. Letter from Cindy Cromer to the Office of the Property Rights Ombudsman, Dated April 11, 2007
3. Letter from Cindy Cromer to George Shaw and Louis Zunguze (Salt Lake City Planning and Community Development), dated March 29, 2007
4. Letter from Cindy Cromer to "Members of the Planning Commission," dated April 18, 2007
5. Letter from Cindy Cromer to Office of Property Rights Ombudsman, dated April 23, 2007

6. Timeline for Petition 410-06-28 (Request For Conditional Use Approval for a Rooming House), prepared by Cindy Cromer
7. Letter from Lynn H. Pace, Salt Lake City Attorney's Office, received May 31, 2007.

Statutes and Ordinances

1. Sections 10-9a-507 and 10-9a-511 of the Utah Code
2. Section 21A.24.010 of the Salt Lake City Code, "General Provisions"
3. Section 21A.24.120 of the Salt Lake City Code, "RMF-30 Low Density Multi-Family Residential District"
4. Section 21A.24.190 of the Salt Lake City Code, "Table of Permitted and Conditional Uses for Residential Districts."
5. Section 21A.38.030 of the Salt Lake City Code, "Determination of Nonconforming Use Status"
6. Section 21A.38.080 of the Salt Lake City Code, "Moving, Enlarging, or Altering Nonconforming Uses of Land and Structures"
7. Section 21A.38.100 of the Salt Lake City Code, "Noncomplying Lots"
8. Section 21A.54.030 of the Salt Lake City Code, "Categories of Conditional Uses"
9. Section 21A.54.060 of the Salt Lake City Code, "Procedures"
10. Section 21A.62.040 of the Salt Lake City Code, "Definitions" (Selections)

Assumed Facts

1. It is assumed that the property located at 149 S. 900 East is a "legal complying lot," as provided in § 21A.38.100, because the lot was created prior to enactment of the zoning restrictions that make it nonconforming.

2. It is further assumed that the structure on the lot does not conform with side yard requirements.

Background

This Opinion concerns a conditional use application to convert an existing single-family residence into a rooming or boarding house for seven adults. The home is located at 149 South 900 East in Salt Lake City. The home is located in the "RMF-30" zoning district, which is a "low density multi-family residential district" The home is located on a lot that does not meet the lot width requirement, although it does meet the minimum area requirement. The lot was created prior to the lot width requirement in the zoning ordinance.

The property owner, Robert Bunnell, acquired the property, and began renovation work in March of 2006. The City ordered him to stop, because he had not obtained proper permits. Mr. Bunnell proposed using the home on the lot as a rooming house. Because the proposed use is a conditional use in the RMF-30 zone, Mr. Bunnell submitted an application for conditional use approval to the City Planning Commission. In September of 2006, the Planning Commission denied the

application. The Land Use Appeals Board remanded the matter back to the Planning Commission, with instructions to "identify with specificity any anticipated detrimental impact or inconsistency with applicable standards" and also identify reasonable conditions which would mitigate the detrimental impacts.

The Planning Commission originally scheduled the matter for January of 2007, but questions about the sufficiency of notice delayed action until February. At the February meeting, the property owner asked for more time to consider the expense of installing fire sprinklers and other modifications necessary for compliance with the Americans with Disabilities Act. The matter was rescheduled for April 11, 2007.

At the April meeting, the Planning Commission approved the application, and imposed conditions. At the next meeting, the Commission moved to reconsider the application in order to revisit some of the conditions. On May 23, 2007, the Planning Commission approved the application with the following conditions:

1. Standard permit plan review is required for compliances with Building Code, Fire, Engineering, Public Utilities and Transportation.

2. The conditional use approval is for use as a rooming house only. Any subsequent permit that may be required from the city or non-city agency shall be complied with.

3. Landscaping be improved and maintained in a manner that complies with Salt Lake City Ordinance, Chapter 21A.48, Landscaping.

4. The Rooming House is limited to a maximum occupancy of seven.

5. The rear yard area used for vehicle parking shall be comprised of hard surfacing, shall include no more than five parking spaces and the applicant will also provide green space in the rear yard, as approved by the Planning Director.

6. If a change in use other than a conversion back to a single family dwelling occurs, the owner must make an application for a new conditional use to be heard by the Planning Commission.

7. The existing cedar fence on the north side of the property will be replaced with a six foot (6') solid masonry wall. The proposed wall design and material shall be reviewed and approved by the Planning Director prior to construction.

8. All necessary City Code regulations and requirements must be completed within six (6) months of the Planning Commission approval. If the code requirements are not completed within the required six (6) months, the conditional use approval shall become null and void.

9. Applicant will be required to comply with all applicable State and Federal housing laws.

10. The conditions of approval shall be recorded against the property in the office of the Salt Lake County Recorder.

(Adapted from May 24, 2007 letter from Lynn H. Pace of the Salt Lake City Attorney's Office).

Analysis

I. Did Salt Lake City Correctly Apply § 21A.38.100 of the City Code?

The first question addressed in this Opinion concerns whether the City correctly interpreted and applied § 21A.38.100 of its Code, which governs activity on noncomplying lots. Ms. Cromer, the person requesting this Opinion, has suggested that the City should have applied this ordinance to prohibit the proposed conditional use, while the City maintains that the ordinance allows the proposed conditional use.

Section 21A.38.100 of the Salt Lake City Code reads as follows:

> A lot that is noncomplying as to lot area or lot frontage that was in legal existence on the effective date of any amendment to this title that makes the existing lot noncomplying shall be considered a legal complying lot. Legal complying lots in residential districts shall be approved for the development of a single-family dwelling regardless of the size of the lot subject to complying with all yard area requirements of the R-1/5,000 district. Legal complying lots in residential districts shall be approved for any permitted use or conditional use allowed in the zoning district, other than a single-family dwelling, subject to complying with all lot area and minimum yard requirements of the district in which the lot is located. Legal complying lots in nonresidential districts shall be approved for any permitted use or conditional use allowed in the zoning district subject to complying with all yard requirements of the district in which the lot is located.

According to the staff analysis accompanying the conditional use application, lots in the RMF-30 zone must be at least 50 feet wide, and must have an area of at least 5,000 square feet. The lot in question, located at 149 South 900 East (the "Lot"), is 6,969 sq. ft., but is 41.25 feet wide. The Lot legally existed prior to enactment of the width requirement, so the staff considers it to be a "legal complying lot" within the terms of § 21A.38.100.

A. Standards of Statutory Interpretation

Statutory interpretation begins with the language of the ordinance. *See Biddle v. Washington Terrace City*, 1999 UT 110, ¶ 14, 993 P.2d 875, 879. The "primary goal . . . is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." *Foutz v. City of South Jordan*, 2004 UT 75 ¶ 11, 100 P.3d 1171, 1174. Statutes should be construed so that "all parts thereof [are] relevant and meaningful." *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996). Furthermore, it must be presumed "that each term

included in the ordinance was used advisedly." *Carrier v. Salt Lake County*, 2004 UT 98, ¶30, 104 P.3d 1208, 1216.

Two more paradigms of statutory interpretation are important to this analysis: First, "the expression of one should be interpreted as the exclusion of another." *Biddle*, 1999 UT 110, ¶ 30, 993 P.2d at 879. In other words, an omission in an ordinance should be given effect by a presumption that the omission was purposeful. *See Carrier*, 2004 UT 98, ¶ 30, 104 P.3d at 1216. Secondly, "since zoning ordinances are in derogation of a property owner's use of land . . . any ordinance prohibiting a proposed use should be strictly construed in favor of allowing the use." *Id.* 2004 UT 98, ¶31, 104 P.3d at 1217.

B. Interpreting and Applying § 21A.38.100 of the Salt Lake City Code

According to § 21A.38.100, a single-family dwelling could be constructed on a legal complying lot regardless of whether it met the minimum area or width, as long as the building complied with yard area requirements. The third sentence in § 21A.38.100 allows permitted and conditional uses other than single family dwellings on a legal complying lot, if the use complies with all *lot area and minimum yard requirements*. Neither the second nor the third sentence refers to a minimum allowable width.

The third sentence of § 21A.38.100 allows *permitted and conditional uses* on legal complying lots, as long as the minimum lot area and side yard requirements can be met. This is different from the preceding sentence, which allows for the construction (or development) of a *single-family residence* if side yard requirements are met, even if the lot area is too small. The ordinance must be read, therefore, as placing a greater burden on uses other than a single-family residence. Permitted and conditional uses (other than single-family dwellings) are allowable only on lots that meet the minimum area, and only when side yard requirements are met. There is no "minimum width" or minimum frontage requirement. It must be presumed that a width requirement was purposefully left out of the ordinance.

Furthermore, the plain language of the ordinance can only be interpreted as applying the greater burden on all uses other than single-family dwellings, regardless of whether the use requires new construction or not. The second sentence provides that a new single-family dwelling may be built on a lot that does not meet minimum area requirements. However, the third sentence refers only to uses, not new construction. Again, it must be presumed that reference to new construction was purposefully omitted from the third sentence (especially since it was included in the second), and that the term "uses" was adopted advisedly. This interpretation gives meaning and relevance to all clauses of the ordinance.

C. Analysis of the Competing Interpretations

In the factual situation that led to this Opinion, the Lot is noncomplying as to width, but exceeds the minimum area for the zoning district. It is presumed that the lot was created prior to the width requirement, and that it is a "legal complying lot," as provided in § 21A.38.100. The Staff findings

explain that the home does not comply with current yard area and setback requirements, making it a nonconforming structure. Both parties in this dispute concur on these basic facts.

i. Minimum Width Requirement

Ms. Cromer, who requested this Opinion, suggests that the minimum width requirement should be read into the third sentence of § 21A.38.100, restricting the allowable use on the Lot to a single family dwelling only. In other words, uses other than a single family dwelling would be allowed only if the lot met the minimum width requirement. She feels that the width requirement was erroneously left out of the section, and that it should be presumed that it was meant to be included. Ms. Cromer contends that area and width are linked throughout the entire ordinance. Based on her interpretation, any use other than a single family dwelling could not be allowed, because the Lot does not meet the minimum width requirement.

The City, on the other hand, argues that the language stands as approved by the Salt Lake City Council. The City notes the presumption that the language for the ordinance was chosen advisedly, and that it must be presumed that the width requirement was purposefully left out. The City also points out that imposing a width requirement without specific language in the ordinance exceeds the authority of City staff.

This Opinion concludes that the City's approach is correct. As has been discussed, it must be presumed that the Salt Lake City Council used each term in § 21A.38.100 advisedly and deliberately. It must also be presumed that the City Council purposefully chose not to impose a width requirement in the third sentence of the ordinance.[1] Finally, the City correctly notes that including the width requirement is a radical departure from the ordinance's language that City staff is not authorized to take. The City Council may act to amend § 21A.38.100 and include a width requirement, but until it does, no such requirement can be interpolated into the section.

ii. Are Conditional Uses Allowed?

The City contends that § 21A.38.100 only applies to new construction activity, and the proposed rooming house may therefore be allowed as a conditional use regardless of side yard requirements. Ms. Cromer argues that uses other than single family residences must comply with side yard requirements.

This Opinion concludes that § 21A.38.100 requires that uses other than single family dwellings must comply with side yard and yard area requirements. This conclusion is supported by the plain language of the ordinance. Two types of lots are identified in § 21A.38.100. Lots that do not meet minimum area requirements are distinguished from those that do, but are otherwise noncomplying. The ordinance allows more land use possibilities on noncomplying lots meeting the area requirements than on those that do not. The language chosen for the ordinance makes clear that nonconformity due to lot *width* will not prevent a use that is allowable, but that nonconformity due

[1] Interposing a minimum lot width requirement into this provision basically means that the third sentence of the ordinance is simply surplus language. Such an interpretation should be avoided. Furthermore, if a lot meets both width and area requirements, it is likely conforming, and § 21A.38.100 would not apply.

to *area* will limit development to single family homes only. There would be no need to distinguish between the two types of lots if width was also a limiting factor on development. Moreover, if a lot meets both area and width requirements, it is a complying lot, and the ordinance would not apply. Thus, while the Lot is noncomplying due to width, any use that is permitted or conditional may be allowed.[2]

The analysis, however, does not end there. City staff concluded that "the issues of noncomplying lots or noncomplying structures should have no bearing on the decision" to approve or deny the conditional use application. This statement seems to derive from the erroneous conclusion that since no new construction is proposed for the Lot, there is no need to consider the limitations of § 21A.38.100. This conclusion is unsupportable, because the provisions of the ordinance are not contingent on construction activity. The plain language of the ordinance anticipates permitted and conditional *uses*, without reference to any new construction activity. Uses allowed in the zoning district may be approved if the lot meets minimum area and side yard requirements. Even if there is no change to an existing structure, a new *use* may not be approved if yard requirements cannot be met.

This interpretation is supported by the plain language of § 21A.38.100, and it gives meaning and relevance to all of the terms in that ordinance. The Salt Lake City Council did not include a reference to new construction or development activity in the provision that allowed permitted and conditional uses, so it must be presumed that the ordinance is not limited to new construction only. In addition, this interpretation carries out the purposes of the ordinance, by imposing a greater restriction on uses which are more intensive than single family dwellings. The language of § 21A.38.100 implies that the Salt Lake City Council intended to control uses on noncomplying lots.

To conclude, the City's determination that a conditional use could be allowed on the Lot was incorrect, because its position that § 21A.38.100 only applies to new construction was misplaced. Under the plain language of the ordinance, the Lot is a "legal complying lot." Because it meets minimum area requirements, any permitted or conditional use allowed in the zone may be approved, but the plain language of § 21A.38.100 permits these uses only when all minimum yard requirements are met. The City's position that the Lot's nonconformity is not an issue because there is no new construction proposed is misplaced, and is not supported by the language of the ordinance.

It is axiomatic that a zoning ordinance should be construed in favor of allowing uses, but the plain language of an ordinance cannot be ignored simply to assuage an owner's desire to develop property. While the interpretation espoused in this Opinion does limit the uses available to the property owner, in the opinion of the Office of the Property Rights Ombudsman, the limitation is not excessive. As has been discussed, the existing single family home may continue in the same manner. The home presumably may be rented as a single family home, or a new building could

[2] This conclusion also complies with the general principle that land use regulations should be liberally construed to allow owners the right to use and develop property.

be constructed (complying with zoning and building requirements) that may possibly be used for a permitted or conditional use other than a single family residence.

II. This Opinion Expresses no Conclusions on the Conditions Approved by the Salt Lake City Planning Commission.

This Opinion has already concluded that the proposed rooming house is not allowable on the Lot as a conditional use. Therefore, the Ombudsman office does not take a position on whether the conditions adopted by the Salt Lake City Planning Commission were reasonable or allowable.

Conclusion

Salt Lake City did not correctly interpret or apply § 21A.38.100 to the lot located at 149 S. 900 East. Uses other than single family dwellings may not be allowed unless side yard requirements are met. That restriction is not contingent on new construction activity, because no such contingency was included in the ordinance. Section 21A.38.100 must be interpreted as a restriction on uses other than single family dwellings. If side yard requirements cannot be met, a permitted or conditional use (other than a single family dwelling) cannot be approved.

There is no basis to interpose a "minimum width requirement" into § 21A.38.100. The Salt Lake City Council did not include such a requirement in the ordinance, and there is no authority to include one without an amendment to the ordinance.

Because this Opinion concludes that the proposed conditional use is prohibited, there has been no analysis of the conditions adopted by the Salt Lake City Planning Commission

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

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.

MAILING CERTIFICATE

U.C.A. §13-43-206(10)(b) requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with U.C.A. §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:

Kendrick Cowley
Salt Lake City Recorder
451 S. State, Room 415
Salt Lake City, UT 84111

On this _____ Day of June, 2007, 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