Advisory Opinion #68

Parties: Scott Davidson and City of Provo
Issued: May 5, 2009

TOPIC CATEGORIES

Nonconforming Uses and Noncomplying Structures
Interpretation of Ordinances

A use is eligible for nonconforming status if it was legally established prior to being prohibited by a change in a land use ordinance. Compliance with building codes and other ordinances unrelated to land use regulation is not a factor in determining whether the use was legally established. Local ordinances adding a condition that a use be fully compliant with local ordinances are invalid. Local ordinances also cannot increase the burden of proof on a property owner, or add other conditions for eligibility.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Determination of Nonconforming Use

Advisory Opinion Requested by:	Scott Davidson
Local Government Entity:	Provo City
Applicant for the Land Use Approval:	Scott Davidson
Property:	Nonconforming Determination for Duplex
Date of this Advisory Opinion:	May 5, 2009
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

Did the City apply the proper standards to determine that a building was not entitled to nonconforming use status?

Summary of Advisory Opinion

Under Utah Law, a property owner claiming nonconforming use status is only obligated to establish that the use legally existed. No other proof is required. A local ordinance imposing a greater burden of proof is therefore invalid, because it conflicts with the state law. In addition, a local ordinance may not make compliance with ordinances unrelated to land use regulation a condition of legal existence.

The property owners submitted sufficient proof that the property in question was used as a duplex when multi-family uses were permitted. The City has offered nothing to refute that evidence. The City may not deny the legal existence of the use on the grounds that it did not comply with an unspecified ordinance unrelated to land use regulation.

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 ANN. § 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 Scott Davidson on March 12, 2009. A copy of that request was sent via certified mail to LaNice Groesbeck, City Recorder for Provo City. The City received the request on March 19, 2009. The City submitted a response to the Office of the Property Rights Ombudsman, which was received on April 6, 2009. Mr. Davidson emailed a copy of the "Property Information" sheet for the property in question from the Utah County Assessor's Office.

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, including attachments, filed March 12, 2009 with the Office of the Property Rights Ombudsman by Scott Davidson.
2. Response from Provo City, submitted by Camille S. Williams, received on April 6, 2009, with attachments.
3. "Property Information" summary sheet from the Utah County Assessor's Office, submitted by Scott Davidson, via email dated April 8, 2009.
4. Sections from Title 14 of the Provo City Code, including Chapter 14.36, Nonconforming Uses, Structures, and Lots.

Background

In 2006, Scott and Tabitha Davidson purchased a home located at 175 West 200 South in Provo. The property is located near Freedom Boulevard and Provo's historic business district. The property is within the "Central Business District Commerical" zone, which restricts residential uses to those which are "attached to commercial or other non-residential use." PROVO CITY CODE, § 14.21.020(4).[1] The home was constructed in 1915, and is similar in size and style to other homes of the same age in the neighborhood. For some time, the building has consisted of two units, the

[1] Both single-family and multi-family residential uses are allowed, if attached to a commercial use.

upstairs level, and a basement apartment, which had a separate entrance, kitchen, and bathroom.[2] The Davidsons purchased the home intending to rent the two units. They own other rental properties, including one also located on 200 South. A large apartment complex, with approximately 60 units, is located across the street from the property.

The Davidsons undertook repairs and renovation of the units, including installation of separate utility meters for the basement unit. The work required an inspection by the City. The inspection revealed no serious problems, but when the Davidsons applied for a Rental Dwelling Business License, the City informed them that only one unit was approved for rental. The Davidsons requested a determination of nonconforming use. The City maintained that the Davidsons had not proven that the second unit had been established prior to 1974.[3] The Davidsons appealed that decision to the City's Board of Adjustment.[4]

Duplexes were permitted under the zoning regulation for the area prior to 1974, when the Central Business District zone was enacted. The Davidsons contend that two units were established and leased for several years prior to 1974, and that the use continued to the present day. The City states that the second unit had not been *legally* established prior to 1974, and so the property is not eligible for nonconforming use status, even if it had been rented as two units continuously.

The Davidsons presented affidavits from the previous owner and a former tenant, who stated that the basement apartment had been rented prior to 1974, and that it had been continuously rented since then. The tenant had lived in the apartment prior to 1974. The Davidsons also presented directories from 1941 and 1956, which showed "roomers," or tenants living at the property. They also noted that the City's building inspector determined that the kitchen in the basement apartment had been installed around 1950.[5]

The City contends that the use was not legally established, and notes that there have never been separate utility meters for an apartment on the property. The City did not cite any ordinance or code imposing such a requirement.[6] The City also notes the lack of any building permits associated with the building.[7] Apparently, the City reasons that a building permit would have been required because the home was remodeled when the apartment was created. Since there is no permit, the apartment could not have been legally created. Since the Davidsons cannot prove that the

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[2] The person who sold the property to the Davidsons stated that she and her husband used the home as a two family dwelling, and that the previous owner had lived in the upstairs of the home, and rented the basement apartment for many years. The basement apartment did not have separate meters for natural gas, water, or electricity.

[3] Prior to 1974, multi-family residential dwellings would have been allowed under the zoning regulations for the property. The City submitted copies of zoning regulations dating back to 1937.

[4] The Davidsons requested this Opinion after they submitted their appeal to the Board of Adjustment, but prior to a final decision by the Board.

[5] This conclusion is apparently based on the type of fixtures in the kitchen. For example, the stove is a late 1940's model.

[6] The City specifically mentioned that the home has one heating system, and that "each unit in a legal two-family dwelling must have its own independent heat source." City Response at 4. However, the City did not identify the source of that requirement.

[7] The City's records show only one permit associated with the property, a 1968 permit for the construction a garage. There was no record of a building permit approving the original construction of the home.

apartment complied with building codes prior to 1974, the City maintains that the apartment should not be recognized as a nonconforming use.

Analysis

I. The Duplex was Lawfully Established Prior to 1974.

The duplex was lawfully established prior to 1974, because duplexes were permitted under the City's zoning regulations, and the building's use as a duplex was established prior to the change in the City's zoning regulations. An established use of land becomes "nonconforming" when it no longer complies with the zoning or land use regulations that govern the property.

> "Nonconforming use" means a use of land that
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> (a) legally existed before its current *land use* designation;
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> (b) has been maintained continuously since the time the *land use ordinance* governing the land changed; and
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> (c) because of one or more subsequent *land use ordinance* changes, does not conform to the *regulations* that now govern the *use of the land*.

Utah Code Ann. § 10-9a-103(28) (emphasis added).[8] The City's zoning ordinance uses nearly identical language:

> "Nonconforming use" means a use of land that
>
> (a) legally existed before its current *zoning* designation;
>
> (b) has been maintained continuously since the time the *zoning regulation* governing the land changed; and
>
> (c) because of subsequent *zoning* changes does not conform with applicable requirements of *this Title* (*i.e. Title 14*) that govern *use of the land*.

PROVO CITY CODE § 14.06.02 (emphasis added).

A use that "legally existed" before a zoning ordinance prohibited the activity may continue as a nonconforming use. However, a use that was never permitted under prior zoning regulations cannot be eligible for nonconforming use status, even if it has continued for some time. "A nonconforming use may not be established through a use which from its inception violated a *zoning ordinance*. Such use has no lawful right to continue." *Town of Alta v. Ben Hame Corp.*, 863 P.2d 797, 802 (Utah 1992) (emphasis added). Within the meaning of § 10-9a-103(28), a use "legally

[8] There is a parallel provision, applicable to counties, found at § 17-27a-103(32).

existed" if it was allowed under previous zoning ordinances. Noncompliance with ordinances not directly associated with land use regulation does not bar the legal establishment of a use.

The Utah Court of Appeals addressed the question of whether a use "legally existed" in *Hugoe v. Woods Cross City*.[9] In that case a city sought to bar business owners from operating a "transfer company," and using a parcel for "parking, staging, and storing the large trucks and trailers used in their trucking business." *Hugoe*, 1999 UT App 281, ¶ 2, 988 P.2d at 457. There was no question that when the property owners established the use, the city's zoning ordinance permitted property owners from parking and storing large trucks and trailers.[10] "Hence, because transfer company is a permitted use under [the city's former zoning] ordinance, [the owner's] use of the property 'legally existed before its current zoning designation.'" *Id*., 1999 UT App 281, ¶ 8, 988 P.2d at 459 (quoting language from former UTAH CODE ANN. § 10-9-103(1)(l)(i) (Supp. 1999) (amended 2006)).[11]

The *Hugoe* decision also rejected the city's argument that the property use was not legally established because the property owners failed to comply with a requirement that the owners needed to file a site plan. The court held that "a site plan was not needed to be legal . . .. The city has failed to demonstrate—by way of statute, ordinance, case law, or other authority—how failure to file a site plan can defeat or invalidate an otherwise legal nonconforming use." *Hugoe*, 1999 UT App 281, ¶10, 988 P.2d at 459. In other words, because the use was permitted, it could "legally exist" until the zoning ordinance was amended. Failure to comply with requirements unrelated to the regulation of the land did not invalidate the use.

This position is consistent with the statutory language defining nonconforming uses. Under that definition, a use that "legally existed before [the] current land use designation" may continue.[12] The statute refers to the "land use designation," the "land use ordinance governing the land," and the "regulations that now govern the use of the land."[13] No reference is made to regulation of the use itself, only to how the use of the *land* is governed and designated. There is no justification for including "non-zoning" regulation as part of the nonconforming use analysis. Furthermore, "because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed in favor of the property owner." *Hugoe*, 1999 UT App 281, ¶ 8, 988 P.2d at 458 (alteration and citation omitted).[14] This rule mandates the interpretation of the statute that a use is legally established if it is allowed under a land use designation, regardless compliance with other health and safety regulations.

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[9] 1999 UT App 281, 988 P.2d 456.

[10] *Id*. 1999 UT App 281, ¶ 8, 988 P.2d at 458-59. The city's zoning ordinance included "transfer company" as a permitted use in the relevant zone. The Court of Appeals agreed that the business was a "transfer company" because it was engaged in "the business of transporting freight or other products for hire." *Id*. (quotations omitted).

[11] The definition of "nonconforming use" from the 1999 Utah Code is virtually the same as it reads in the current statute. *See* UTAH CODE ANN. § 10-9a-103(28).

[12] *Id*., § 10-9a-103(28)(a).

[13] *Id*., § 10-9a-103(28).

[14] *See also Rock Manor Trust v. State Road Comm'n*, 550 P.2d 205, 206 (Utah 1976) ("[T]here is a trend increasingly looking with disfavor upon nonconforming uses. Such trend, however, at least theoretically, or constitutionally, cannot, or at least, should not destroy property rights, or continued lawful use of one's property . . ..")

This approach is further confirmed by decisions from other states. "Courts have repeatedly found that licensing and other regulations *unrelated* to land use approval, whether business licensing, business and occupation tax regulations, or building permits, are not per se determinative of the continuance of a nonconforming use." *Van Sant v. City of Everett*¸ 849 P.2d 1276, 1282 (Wash Ct. App. 1993) (emphasis in original).[15] Of particular relevance is the Minnesota Supreme Court's decision in *Hooper v. St. Paul*, 353 N.W.2d 138 (Minn. 1984). In that case, a property owner's application for nonconforming use status of a duplex was denied. A home had originally been moved onto the property in 1918.[16] Later, a carriage house was constructed without a building permit. For many years, the carriage house served as an artist's studio, although individuals occasionally resided there as well. A fire damaged the carriage house in 1969, and restoration work was completed without a building permit. A few years later, some additional work on the carriage house was undertaken with proper building permit approval. From 1971 on, a new owner leased the carriage house to a succession of tenants. In 1976, the city changed the zoning classification for the property from multi-family to single family. The new owner then sought certification that leasing the carriage house was a valid nonconforming use.[17]

The city originally approved the application, but neighbors requested review. The city's board of zoning appeals denied the application, on the grounds that the carriage house had not been "lawfully established because the [owners] did not obtain building permits for either the original construction or the post-fire reconstruction. Hence, . . . its use as a residence was unlawful both before and after the zoning change." *Hooper*, 353 N.W.2d at 141. The Minnesota Supreme Court rejected that argument, holding that multi-family residential use was legally established because the prior zoning classification permitted such uses.

> Violations of ordinances unrelated to land use planning do not render the type of use unlawful. . . . If the reconstructed carriage house fails in some respect to meet the requirements of the building code, the City must seek its remedy in the enforcement provision of the building code. The City's remedy does not lie in denying the owners the right to continue the existing two-family residential use of the property, a use permitted under the zoning code in effect when the use was established.

Id., 353 N.W.2d at 141. (*See also Lam v. St. Paul*, 714 N.W.2d 740 (Minn. Ct. App. 2006)).[18]

In essence, the logic followed by *Hugoe, Hooper*, and other decisions is grounded in the preservation and continuation of vested rights. A nonconforming use should be treated in the same manner as any permitted use. A property owner's right to conduct a particular property use arises due to the land use designation, not from strict compliance with every regulation that might apply to carrying out the use. Once a permitted use is established, the owner maintains a vested property

[15] *See generally Van Sant*, 849 P.2d at 1282 (listing appellate court opinions from several states that follow the same rule.)
[16] A permit was issued for the foundations where the home was placed, but apparently not for the home itself. *Hooper*, 353 N.W.2d at 140.
[17] *Id*., 353 N.W2d at 140.
[18] *Cf. Derby Ref. Co. v. Chelsea*, 555 N.E.2d 534 (Mass. 1990) (rejecting argument that absence of a requisite governmental approval invalidated a nonconforming use).

right to continue it, subject to reasonable regulation. A local government may enforce compliance with a health and safety regulation; but failure to comply does not mean that the use is forfeited and forever lost. Nonconforming use status is a type of vested right, and it should be respected as such.[19]

II. Local Governments are not Authorized to Increase the Burden of Establishing the Existence of Nonconforming Uses.

The City's ordinance requiring a property owner to prove, by a preponderance of evidence, that a nonconforming use complied with applicable ordinances then in effect impermissibly exceeds the requirements established in the Utah Code. While local governments may determine whether nonconforming uses exist, they may not exceed the burden placed upon property owners by the Utah Code. "[W]here the legislature imposes the requirement of doing some affirmative action . . . upon a citizen, it may be implied that the legislature intended that the cities and counties shall not require him to do more." *Hansen v. Salt Lake City*, 21 Utah 2d 318, 323, 445 P.2d 691, 694 (1968).[20] The state statute establishes the total burden required of property owners. The City may not require more.

Under the City's ordinance, a property owner claiming nonconforming use status has "the burden of proving by a preponderance of evidence that a lot, structure, use, or other circumstance which does not conform to the provisions of this Title [*i.e.*, Title 14 of the Provo City Code] complied with applicable ordinance requirements in effect when the nonconforming circumstance was established." PROVO CITY CODE, § 14.36.100(2).[21] The ordinance explains that such evidence as the date the use was first created, ordinances in effect when the use was first created, documentation of local approval or inspections, and affidavits from persons with knowledge of the use are among the types of evidence that may prove that a use was legally established. *Id.,* § 14.36.100(2)(b). If the use was not allowed under prior ordinances, the ordinance provides that the use cannot have been legally established. *Id.*, § 14.36.100(2)(c).

Finally, the ordinance provides that if any use "did not conform to the provisions of applicable zoning or other code provisions, the fact that it has been occupied, used, or existed for a considerable period of time shall not be a factor in determining whether the circumstances should be deemed legally established." *Id.,* § 14.36.100(2)(d). In other words, even if it is shown that the use has continuously existed, if there any violation of a zoning or other applicable ordinance, the long-standing practice cannot be evidence that the use was legally established.

In contrast, the Utah Code establishes minimal requirements to establish the legal existence of a nonconforming use. "[T]he property owner shall have the burden of establishing the legal

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[19] A nonconforming use may, of course, be eliminated through abandonment, or phased out through amortization. However, a permitted or conditional use may also be abandoned and discontinued, and, if the zoning ordinance changes, the use may not be revived. Both of these outcomes are rooted in vested rights analysis.

[20] *See also Hansen v. Eyre*, 2005 UT 29, ¶ 15, 116 P.2d 290, 293 ("It is well established that, where a city ordinance is in conflict with a state statute, the ordinance is invalid at its inception.").

[21] The ordinance defines "preponderance of evidence" as "evidence which is more credible and convincing than evidence offered in opposition to it." PROVO CITY CODE, § 14.36.100(2)(a).

existence of a . . . nonconforming use." UTAH CODE ANN. § 10-9a-511(4)(a).[22] Nothing more is required by the state statute. The terms of that statute "makes void all ordinances . . . which conflict with and constitute a barrier to the enforcement of the uniform state law. *Hansen v. Eyre*, 2005 UT 29, ¶ 15, 116 P.3d 290, 293. Because it increases the burden of proof required of property owners, and adds the additional burden of total compliance with "applicable ordinances," the City's ordinance conflicts with the state statute.

An ordinance conflicts with a state law when the ordinance permits something that is prohibited by state law, or prohibits something that would be allowed.[23] In *Harding v. Alpine*, 656 P.2d 985 (Utah 1982), the Utah Supreme Court invalidated a city ordinance that required property owners to connect to the municipality's sewer system if the property was located within 500 feet of a sewer line. State law, however, provided that cities could require mandatory connection to a sewer system, but only for properties located within 300 feet of a sewer line. *Id.*, 656 P.2d at 985-86.

In *Harding*¸ the city argued that its ordinance was reasonable exercise of its authority, and that the state statute was not a strict limit.[24] The court disagreed, explaining that "if the City were permitted to reach beyond 300 feet the words '300 feet' in the statute would have no meaning." *Id.*, 656 P.2d at 986. Requiring sewer hookups within 500 feet of a line exceeded the limits of the state statute, and was therefore invalid. *Id.*

Like the ordinance in *Harding*, the City's ordinance exceeds the limits of the state statute, by imposing greater requirements on property owners claiming nonconforming use status. Local governments "have independent authority . . . to pass ordinances reasonably related to the objectives of . . . granted authority." *Dairy Product Services, Inc. v. Wellsville*¸ 2000 UT 81, ¶ 31, 13 P.3d 581, 589. However, local governments may not enact an ordinance that "is arbitrary, or is directly prohibited by, or is inconsistent with the policy of, the state or federal laws or the constitutions of this State or of the United States." *Id.* (*quoting State v. Hutchinson*, 624 P.2d 1116, 1126 (Utah 1980).

Under state law, property owners have the burden of "establishing" that a purported nonconforming use legally existed before the zoning ordinances were changed. The City, on the other hand, requires that legal existence be "proven" by a preponderance of evidence. The City also requires that nonconforming uses comply not only with zoning regulations, but all "applicable ordinances." Establishing the legal existence of a use is very different from "proving" legal existence by a preponderance of the evidence.[25] The City's ordinance thus renders the language in

[22] That subsection excuses the burden on property owners if the local government enacts and ordinance that establishes "a uniform presumption of legal existence for nonconforming uses . . .." UTAH CODE ANN. § 10-9a-511(4)(a) (*see also* § 17-27a-510 (applicable to counties)). Provo City has not enacted such an ordinance.
[23] *See Hansen v. Eyre*, 2005 UT 29, ¶ 15, 116 P.3d 290, 293.
[24] The city relied upon *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980), which held that local governments have a "reasonable latitude of judgment and discretion . . . to exercise its express and implied powers." *Id.*, 624 P.2d at 1124.
[25] It must be presumed that the terms of § 10-9a-511(4) were "used advisedly." *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 1208, 1216.

the state statute meaningless.[26] Because the City's ordinance requires more from property owners than the state statute, the ordinance conflicts with the statute.[27]

In addition, the City's ordinance conflicts with the policy of the state. "[B]ecause zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed in favor of the property owner." *Hugoe*, 1999 UT App 281, ¶ 8, 988 P.2d at 458. Statutes should be interpreted "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. Since the policy of the state is to strictly construe laws which purport to restrict property uses in favor of the property owner, § 10-9a-511(4) must be interpreted as defining all that is required of property owners claiming nonconforming uses.

Even if the City may validly impose a "preponderance of the evidence" standard in order to prove the existence of a nonconforming use, it may not condition the existence of the use on compliance with all "applicable ordinances."[28] Thus, the only thing that needs to be proven is whether the use existed at a time when zoning regulations allowed it. Either the use existed or it didn't. That may easily be shown by a "preponderance of the evidence," by proving that the use had been undertaken when it was allowed under prior zoning regulations. Compliance with unrelated ordinances is not necessary to prove that the use had been undertaken.

The Davidsons have submitted sufficient evidence establishing that the property was legally established prior to the change the current land use designation. This was attested to by the previous owner and at least one tenant. It is remarkable that the Davidsons were able to locate any former tenants who lived there over 35 years ago. There was also evidence that the basement apartment was used as a separate residence dating back to the 1940s. Prior to 1974, duplexes were permitted uses on that property.

The City has not offered any evidence which refutes the Davidsons. The City seems to rely on the fact that there are not separate utility meters, and only one heating source for the entire building. That does not negate the existence of the duplex prior to 1974. The existence of a use is not dependent upon building permit approval or code compliance, as provided in the *Hugoe* decision.[29]

In short, the Davidsons have met the threshold requirement provided in the Utah Code, by establishing that the duplex "legally existed before the current land use designation."[30] The City's

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[26] Such a result is prohibited. *See Harding*, 656 P.2d at 986.
[27] *Hansen v. Salt Lake County*, 21 Utah 2d at 323, 445 P.2d at 694.
[28] As has already been discussed, a local government may not impose the additional requirement that a proposed nonconforming use must conform to all zoning or other code provisions. Such a requirement is not valid. *See Hugoe*, 1999 UT App 281, ¶ 10, 988 P.2d at 459.
[29] The City simply states that the duplex was never legally established, and that evidence of occupancy prior to 1974 is irrelevant because such evidence does not prove that the duplex legally existed. However, the City "has failed to demonstrate—by way of statute, ordinance, case law, or other authority—how failure to [obtain building permit approval] can defeat or invalidate an otherwise legal nonconforming use." *Hugoe*, 1999 UT App 281, ¶ 10, 988 P.2d at 459.
[30] UTAH CODE ANN. § 10-9a-103(28).

ordinance cannot raise that threshold requirement, and it cannot impose conditions unrelated to determining whether the use was permitted under the previous zoning designation.

Conclusion

The Davidsons have established that their property was used as a duplex prior to 1974, when the City's zoning regulations permitted multi-family uses. That is all they are required to do under § 10-9a-511(4) of the Utah Code. The City may not exceed the minimum requirements of the state statute. Moreover, strict compliance with ordinances unrelated to determining the use of the property may not be required.

The proof submitted by the Davidsons for this Opinion also meets the preponderance of the evidence standard. They have shown that the zoning regulations in place prior to 1974 allowed duplexes on their property. They have also submitted affidavits from former owners and tenants stating that the property was used as a duplex prior to 1974. That is all that needs to be shown. Compliance with other ordinances and regulations is not a condition of existence, as provided by *Hugoe v. Woods Cross*, 1999 UT App 281, 988 P.2d 456.

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.