Advisory Opinion #93

Parties: David & Ruth Fuller and City of Springville
Issued: November 15, 2010

TOPIC CATEGORIES

Nonconforming Uses and Noncomplying Structures
Interpretation of Ordinances

A local ordinance is voided for failure to comply with statutory requirements, including those requiring notice and public hearings, and property owners may rely on prior regulations to establish vested rights. A settlement agreement did not alter a city's zoning ordinances, but merely allowed certain uses. Local governments have broad discretion over enforcement. The existence of similar ordinance violations does not excuse any other violations.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	David and Ruth Fuller
Local Government Entity:	Springville City
Applicant for the Land Use Approval:	David and Ruth Fuller
Type of Property:	Nonconforming Accessory Apartment
Date of this Advisory Opinion:	November 15, 2010
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

I. May a city change a zoning ordinance when there has been a legal challenge to that ordinance?

II. Does a stipulated settlement of a lawsuit change a zoning ordinance?

III. May a local government "selectively enforce" its ordinances?

IV. Is the property owner entitled to maintain an accessory apartment as a nonconforming use?

Summary of Advisory Opinion

Local governments may enact zoning ordinances at any time, including when those ordinances are challenged in court. Failure to comply with statutory requirements, including those requiring notice and public hearings, voids ordinances, and property owners may rely on prior regulations to establish vested rights to land uses.

An agreement settling a lawsuit between the property owners and the city did not alter the city's zoning ordinances, but merely allowed the property owners to conduct certain activities on their property.

Local governments have broad discretion to determine how and when to enforce ordinances. The existence of similar ordinance violations or negligent enforcement in the past does not excuse any violations, but the remedy or penalties for a violation may be mitigated.

There has not been enough information provided for this Opinion to determine if the property owners are entitled to nonconforming use status. The property owners have the burden of proving that the use was established when allowed under zoning regulations, and that it has been continuously maintained since the use was prohibited.

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 David and Ruth Fuller on August 5, 2010. A copy of that request was sent via certified mail to Venla Gubler, City Recorder for Springville City. The City received the request on August 11, 2010. The City submitted a response to the Office of the Property Rights Ombudsman, which was received on September 2, 2010. The Fullers submitted a reply, which was received on October 19, 2010.

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 August 5, 2010 with the Office of the Property Rights Ombudsman by David and Ruth Fuller.
2. Response from Springville City, submitted by John Penrod, City Attorney, received on September 2, 2010, with attachments.
3. Reply from the Fullers, received October 19, 2010.

Background

David and Ruth Fuller own a home located at 2025 Canyon Road in Springville, Utah. The home has a basement apartment, with separate kitchen and bathroom facilities. The Fullers state that the

home was constructed in 1960, and they believe the apartment was included in the original design.[1] The apartment is accessed from a stairwell near the main entrance. The home's electrical connection has a "base" which could accommodate two separate electrical meters, but evidently, the entire structure is served via one meter.

The Fullers property was located in unincorporated Utah County when the home was built. In January of 1975, the Fuller's home, along with the surrounding neighborhood, was annexed into Springville City. At that time, according to the City, the zoning for the property was designated "R-A-1," a residential-agricultural zone which allowed single family residences only (no accessory apartments). The zoning has changed since 1975, and is now purportedly "R-1-10,000," which also does not allow accessory apartments. The Fullers challenge the City's contention that the zoning was changed to R-1-10,000, claiming that the City did not follow the proper procedure to change the zoning.

The Fullers maintain that the apartment was first occupied before 1975 (possibly as early as 1960), and was a permitted use under Utah County's former zoning regulations. Since the unit has been continuously occupied, the Fullers claim nonconforming use status, even though Springville City's current zoning regulations prohibit the apartment.

In the mid-1990s, a dispute arose concerning whether or not the Fullers were entitled to keep animals on their property. Animals were not permitted under the R-1-10,000 zoning regulation, but the Fullers claimed the right to keep animals as a nonconforming use. The Fullers sued the City in 1996, arguing that they were entitled to keep animals. They also claimed that the City failed to follow correct procedures when it changed the zoning designation to R-1-10,000, and so the property was subject to the previous zoning regulations.[2] The lawsuit was settled in 1997, when the parties entered into a "Settlement Agreement and Release of Claims" (1997 Settlement). In that agreement, the City conceded that the Fullers could keep an animal on their property, subject to nuisance laws.[3] The agreement, however, did not address or resolve the Fuller's claims that the zoning for their property was improperly enacted.

In August of 2000, the City sent a letter to the Fullers, informing them that their property was located in a single-family zone, and they could not lease the basement apartment. The letter stated that the Fullers had 30 days to comply, or they could possibly face fines and even incarceration. Despite this warning, it appears that the City took no further action to prevent the Fullers from leasing the basement apartment.

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[1] The Fullers purchased the home in 1985, but they maintain the former owners had leased the basement apartment continuously up to that date. The Fullers also maintain that the apartment was continuously occupied from the time they purchased the property.

[2] The previous zoning was apparently R-1-20,000. In 1979, the City revised its zoning ordinances, and adopted the R-1-20,000 zone, with animal rights. The City claims that it adopted the R-1-10,000 zone in 1981, but the Fullers dispute the legality of that action. According to the City, the R-1-20,000 zone did not allow accessory apartments.

[3] The 1997 Settlement provided that the Fullers could maintain no more than one "animal unit" on the property, a term defined in the Springville City Ordinances. The right could be transferred to new owners, but was otherwise subject to the same provisions as other nonconforming uses. The Fullers were also allowed to reconstruct a barn on the property.

According to the Fullers, a fire damaged the home in 2007. The Fullers obtained a building permit to repair the damage, and were required to comply with current building standards. Evidently, this included upgrades to the basement apartment.[4] The City notes that the building permit application submitted by the Fullers "indicates that the existing and proposed use of the home on the Property was a 'Single Family Structure,' with one dwelling unit." Response from Springville City, submitted on September 2, 2010, at 3 (¶10). The City also submitted a building permit application from 1989, where the Fullers sought permission to construct a garage. The Fullers also marked the "Single Family Structure" box for both the existing and intended use of the building. The Fullers counter that they simply checked the box which most closely matched their structure, and that there was no option for accessory apartment.[5] The applications, however, include options for "Duplex" and "Multiple Units" under both existing and intended uses.

The City has not provided information related to the Fuller's claim for nonconforming use status. Instead, the City explains that it has not researched whether accessory apartments were allowed, because the Fullers have never applied for a "Certificate of Non-Conformity" from the City.[6] It appears, however, that the City does not believe that the Fullers qualify for nonconforming use status. The City also declined to discuss any previous zoning regulation of the property, including any zoning adopted by Utah County prior to 1975.

The Fullers requested this Advisory Opinion to help determine if the City may prohibit use of the accessory apartment. Specifically, the Fullers ask the following:

a. Can an improperly noticed zoning ordinance be corrected after a court case has been filed by issuing a new ordinance adopting a zoning map to correct errors?

b. What is the effect of a stipulated compromise of zoning rights via a final judgment in a state court (is the zoning "special," "modified," "unzoned," or other)?

c. Can a municipality selectively enforce zoning restrictions upon one property owner where many similarly situated properties face no enforcement?

d. Is determination of a nonconforming use discretionary with a municipality?

[4] The extent of the fire damage was not explained in the materials submitted for this Opinion. The Fullers indicate that the building was damaged, and needed repairs, while the City implies that the home was completely rebuilt.
[5] The Fullers also state that they informed the City's staff that they had a home with an accessory apartment, and that the staff told them there was no "accessory apartment" classification, and that it did not matter if they did not identify the apartment on the application.
[6] Evidently, a Certificate of Non-Conformity is a formal finding that a particular use qualifies for nonconforming use status.

Analysis

I. The City Retains Authority to Adopt Zoning Ordinances Which Promote Public Welfare, but it Must Recognize Vested Property Rights.

A. Local Governments May Change Zoning Ordinances, but Property Owners may Claim Vested Rights in Prior Ordinances.

Because a local government has broad authority to adopt zoning ordinances after complying with notice and public hearing requirements, the City could amend its zoning ordinance to address alleged errors even after a suit challenging the ordinance has been filed. However, the City would be obligated to honor any vested rights which arose under the prior ordinance. If a property owner has not established valid land use rights under a prior ordinance, a change in zoning regulations would have no effect upon the owner's vested rights to use the property.

"It is established that an owner of property holds it subject to zoning ordinances enacted pursuant to a state's police power." *Western Land Equities v. City of Logan*, 617 P.2d 388, 390 (Utah 1980). Cities may enact and amend zoning ordinances which are "necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort and convenience of the city and the inhabitants thereof, and for the protection of property therein." *Smith Investment Co. v. Sandy City*, 958 P.2d 245, 252 (Utah Ct. App. 1998); *see also* UTAH CODE ANN. §§ 10-8-84 and 10-9a-102. Property owners are subject to those ordinances, and are expected to comply with reasonable regulation of land use. Absent a specific injunction ordered by a court of competent jurisdiction, there is no reason why a local government could not change its zoning ordinances, even in the face of a challenge to that ordinance.[7] Furthermore, "[a] person who purchases land in reliance upon its current zoning restrictions acquires no right that the restrictions remain the same." *Id.*, 958 P.2d at 259, n. 19 (internal quotation and alterations omitted).

A property owner may claim a vested right to continue a use that would otherwise be prohibited by a newly-enacted zoning ordinance. *See Western Land Equities*, 617 P.2d at 391. Nonconforming uses are a type of these vested rights. If a property owner establishes or undertakes a property use when that use is permitted by local zoning regulations, the owner may continue that use even if a new zoning ordinance prohibits it. *See* UTAH CODE ANN. § 10-9a-511. The use, however, must be actually established when it is permitted by a zoning ordinance. If the use is not actually established, the property owner has no claim for nonconforming use status.

B. The Fullers Cannot Successfully Pursue a Challenge to the 1979 Zoning Ordinance, Because too Much Time has Passed.

Because so much time has passed since the Fullers first became aware of potential irregularities in the 1979 and 1981 zoning ordinances, the Fullers may no longer challenge the validity of those ordinances. The Fullers claim that the City's prior zoning ordinances were made without proper

[7] Whether it is advisable for a local government to amend its zoning ordinance in the face of a challenge is a decision within the local government's discretion. The point of this Opinion is that other than a specific order from a court, there is nothing prohibiting a local government from enacting a new ordinance at any time.

notice, in violation of the Utah Code.[8] Because of this violation, the Fullers essentially argue that the prior zoning ordinances are void.

Courts have held that non-compliance with statutory requirements may invalidate zoning ordinances.

> Ordinances which fail to comply with the state enabling statutes requiring notice and hearing are *void*. . . . Non-compliance with statutory requirements relating to notices and hearings are procedural defects jurisdictional in nature. Such procedural infirmities cannot be overlooked and the fact that such an ordinance has been "on the books" and in effect for a long period of time does not instill life into an ordinance which was void at its inception. Such an ordinance is of no effect.

Carter v. City of Salina, 773 F.2d 251, 254 (10th Cir. 1985) (citations omitted, emphasis in original).[9] In *Carter*, a city purportedly enacted a zoning ordinance in 1973, but failed to comply with notice and hearing requirements. The Carters owned property in the city, but lived out of state. They were unaware of the zoning ordinance until they attempted to sell the property in 1981. They marketed the property as suitable for a restaurant, and found a potential buyer. That sale, however, fell through when the buyer discovered that the property was not zoned for commercial businesses. The Carters asked for a zoning change, but the city denied their request, and maintained that the 1973 zoning ordinance was valid. In 1984, the city adopted a new zoning ordinance, which retained the residential zoning for the Carter's property.

The Carters sued, arguing that the 1973 ordinance was illegally adopted and therefore void, and that the property was not subject to zoning regulation at all.[10] On appeal, the Tenth Circuit Court of Appeals agreed, and held that the Carters were entitled to use their property for commercial purposes. The fact that the 1973 ordinance was not challenged for eight years was not relevant. The 1984 ordinance, while compliant with statutory requirements, did not affect the Carter's right to the commercial use under the City's prior zoning scheme. *Id.*, 773 F.2d at 256.[11]

Notwithstanding the clear ruling of *Carter*, the Fullers have probably waited too long to mount a successful challenge of the City's 1981 zoning ordinance.

> Whether the reason is called laches, estoppel, waiver, or public policy, challenges to the procedural invalidity of a zoning ordinance and constitutional challenges based thereon must be brought within a reasonable time from enactment of the

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[8] Utah's statutes have long required notice and public hearings prior to the adoption of zoning ordinances. *See* UTAH CODE ANN. § 10-9a-502. This Opinion does not attempt to track previous statutory incarnations of this requirement.

[9] *See also Melville v. Salt Lake County*, 536 P.2d 133, 134 (Utah 1975) (zoning ordinance enacted using inapplicable procedures invalidated); *Hatch v. Boulder Town*, 2001 UT App 55, ¶ 8, 21 P.3d 245, 248 (failure to comply with mandatory requirements voids a zoning ordinance).

[10] Salina had no zoning regulation prior to 1973. The Carters argued that the absence of zoning regulation meant that they could undertake any lawful use on the property.

[11] The Tenth Circuit reasoned that since the sale would have been completed, the commercial use would have been established, and would thus be a nonconforming use even if the 1984 zoning ordinance was adopted. Therefore, the court held that the most appropriate remedy was to allow commercial use, although the Carters had not actually used the property for some time.

ordinance. If not brought in a timely manner, the plaintiff will be barred from challenging the zoning ordinance.

Thatcher v. Cache County, 902 F.2d 1472, 1476 (10th Cir. 1990). In *Thatcher*, a property owner objected to zoning regulations first adopted in 1970. For several years, the property owners were aware of procedural "defects" in the 1970 ordinance, but did not pursue legal action until 1987. The property owner relied on *Carter*, and "alleged some thirty-two procedural defects in the adoption of the 1970 Cache County zoning ordinance." *Id.*, 902 F.2d at 1474-75.

The Tenth Circuit, however, held that the property owner waited too long, and so could no longer bring a challenge to the ordinance. The property owners in *Carter* sought relief from the city government as soon as they discovered the issue, by requesting a zoning change. When that request was denied, the Carters immediately filed suit.[12] The Thatchers, in contrast, waited several years before they pursued legal action, even though they were aware of the procedural problems.[13]

Like the property owners in *Thatcher*, the Fullers have known about the alleged procedural defects in Springville's 1981 zoning ordinance for several years. They pursued legal actions in 1996 and 2009, alleging impropriety in the enactment of the 1979 and 1981 ordinances.[14] In fact, the Fullers have been actually aware of the alleged defects for at least 14 years, far longer than the Thatchers were aware of the purported problems with Cache County's ordinance. Because such a long time has passed, it appears that the Fullers are barred from mounting a challenge to the 1979 or 1981 zoning ordinances now.[15]

To conclude, the Fullers' question concerning whether or not the City could adopt a new or amended zoning ordinance after initiation of a court case challenging the prior ordinance is misplaced. There is no question that a local government may adopt zoning ordinances at any time, provided they comply with notice and hearing requirements. Unless a judge specifically enjoins such action on an ordinance, there is nothing preventing a local government from adopting a new ordinance.[16] It does not matter how, when, or even why the City changed the zoning classification

[12] In addition, the Carters lived out of state, and never received constructive notice of the original zone change. The Thatchers lived in the area, and the court noted that they received proper notice. (They alleged other procedural defects).

[13] "There is no dispute that [the] plaintiffs should have known of the zoning ordinance for approximately seventeen years and that they actually knew of the zoning ordinance for nine years before filing suit." *Thatcher*, 902 F.2d at 1476 (The Thatchers were granted a type of variance in 1978, which allowed them to conduct their desired use, subject to several conditions).

[14] The Fullers filed an action in the U.S. District Court for Utah in 2009. That matter was dismissed on jurisdictional grounds. *See Fuller v. Springville City*, Case No. 2:09-CV-781-TS.

[15] It must be noted, however, that the *Thatcher* decision was from the Tenth Circuit Court of Appeals, not a Utah appellate court. The court did not cite a Utah case or statute to support its conclusion. Instead, the court stated, "[w]e are aware of no Utah authority to the contrary." *Thatcher*, 902 F.2d at 1476.

[16] A challenge may raise legitimate issues about an ordinance which ought to be addressed. Local governments should be encouraged to resolve and settle conflicts—including adopting corrections to ordinances—instead of engaging in costly litigation.

for the Fullers' property. The crucial question is whether or not the Fullers are entitled to nonconforming use status for their basement apartment.[17]

II. The 1997 Settlement Did Not Change the Zoning Classification or Regulation of the Fullers' Property, and Did Not Address or Resolve the Status of the Apartment.

The 1997 Settlement was merely an agreement to settle a lawsuit filed by the Fullers related to the construction of a barn and the right to keep animals on their property. The Settlement does not modify, amend, terminate, or alter any part of the City's zoning ordinances, and it does not create a "special" zoning status. It simply allows the Fullers to construct a barn on their property, and recognizes that they have the right to keep animals as a nonconforming use. The Settlement is not a "final judgment," but a stipulated agreement. The court accepted the agreement, and dismissed the Fullers' suit.

The 1997 Settlement does not address the basement apartment at all, and does not resolve the issue of whether that apartment is a nonconforming use. It also does not address the validity of any past or present provision of the City's zoning ordinance, or the 1975 annexation ordinance. The Settlement is nothing more than what it says it is: An agreement between the Fullers and Springville City on the limited issues of nonconforming animal rights and construction of a barn.

III. The City has Discretion to Determine How and When to Enforce its Ordinances.

The Fullers cannot claim an entitlement to maintain their basement apartment simply because other properties may also have similar apartments. All local governments have fairly broad discretion to decide which potential ordinance violations to prosecute. The existence of other similar violations or problems does not excuse any particular violation.

> Ordinarily, a municipality is not precluded from enforcing its zoning regulations, when its officers have remained inactive in the face of such violations. The promulgation of zoning ordinances constitutes a governmental function. This governmental power usually may not be forfeited by the action of local officers in disregard of the ordinance.

Salt Lake County v. Kartchner, 552 P.2d 136, 138 (Utah 1976). Governmental agencies have finite resources, and must decide which of numerous competing interests gets attention. A property owner cannot take advantage of governmental limitations and claim the right to flaunt governmental authority.

Specific circumstances may mitigate the remedies or penalties for violating an ordinance, but do not excuse the violation:

[17] It is also noteworthy that a challenge to the 1981 ordinance is moot, because according to the City, the prior ordinance also did not allow accessory apartments. In other words, even if the 1981 zone change was overturned, the Fullers still could not claim nonconforming use status from the prior regulations. In addition, the City has amended its ordinance since 1981, and the current language would govern, unless the Fullers establish entitlement to nonconforming use status.

> Estoppel, waiver or laches [*i.e.*, failure to enforce] ordinarily do not constitute a defense to a suit for injunctive relief against alleged violations of the zoning laws, unless the circumstances are exceptional. Zoning ordinances are governmental acts which rest upon the police power, and as to violations thereof any inducements, reliances, negligence of enforcement, or like factors are merely aggravations of the violation rather than excuses or justifications therefor.

Id.[18] The Fullers have identified other properties that may also have accessory apartments. The conditions on these other properties, even if they are violating City ordinances, do not grant them the right to maintain their accessory apartment.[19] The allegations also do not appear to constitute "negligence of enforcement" or "laches" of a sufficient nature to mitigate any remedies or penalties the City may seek.[20]

IV. There is not Enough Information to Determine if the Fullers' Apartment is Entitled to Nonconforming Use Status

Although the Fullers have provided some proof that their basement apartment has been continuously rented for several years, they have not established that the apartment is a valid nonconforming use. There is has simply not been enough information provided to make a determination in this Opinion. The Fullers have the burden of proving that their apartment is entitled to nonconforming use status. *See* UTAH CODE ANN. § 10-9a-511(4)(a). That includes showing that the apartment was first rented out at a time when the zoning regulations allowed accessory apartments, as well as showing that the apartment has been continuously rented.

A property owner may continue a valid nonconforming use, even if the use is no longer permitted by local zoning ordinances. *See id.*, § 10-9a-511(1). In order to be considered validly nonconforming, the use must satisfy the definition from the Utah Code:

> "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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[18] A decision to prosecute or enforce ordinance violations motivated by improper discrimination against a protected class may preclude enforcement, or at least be punished under anti-discrimination laws. *See e.g., Provo City v. Hansen*, 585 P.2d 461, 463 (Utah 1978). However, the Fullers have not alleged discrimination by the City.

[19] The Fullers may continue renting the apartment, if they can prove entitlement to it as a nonconforming use. This section simply explains that the existence of similar violations on other properties does not constitute a "right" to continue a violation.

[20] In *Kartchner*, the property owner constructed a carport without applying for a building permit. The new structure also violated the setback requirements for the zone. The County discovered the unauthorized carport, and demanded that the portion which violated the setback be torn down, and that the property owner pay a fine as well as the cost for a building permit. The owner testified that he consulted with a County zoning inspector, who indicated that the new structure was within the required setback. The Owner also noted that his structure was similar to several others in the neighborhood. The Utah Supreme Court held that the County's failure to properly measure the setback, and its failure to take action as the owner proceeded with construction constituted laches. However, the court held that the County could not require demolition of the carport, but could impose penalties and require the owner to comply with building permit requirements. *See Kartchner*, 552 P.2d at 137-38.

(b) has been maintained continuously since the time the land use ordinance governing the land changed; and

(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.

Id., § 10-9a-103(28).[21]

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 existed" if it was allowed under previous zoning ordinances, and was established when the use was allowed.

There has been no information submitted indicating if the Fullers' apartment legally existed before the City's ordinances prohibited accessory apartments. The Fullers indicate that the apartment was part of the original design of the home, which was apparently constructed in the early 1960s. At that time, the property was not part of the City, but was governed by Utah County. Therefore, the Fullers should first find out what zoning regulations, if any, governed the property when the apartment was established.[22] Then, the Fullers must prove that the apartment was established when allowed by the zoning regulations. Finally, the Fullers must show that the apartment has been continuously rented from that time. They have the burden of proving that the apartment was legally established and that it has been maintained continuously since the City's zoning ordinances prohibited it.[23] Unfortunately, there has not been sufficient information provided for this Opinion to determine if the apartment is a valid nonconforming use.

Conclusion

The City may enact new zoning ordinances at any time, provided it complies with statutory requirements and recognizes and vested rights that may have arisen under prior ordinances. Although an ordinance enacted which fails to comply with statutory mandates is void, there is nothing preventing a local government from enacting a new zoning ordinance that has been challenged in a lawsuit. The pertinent question is whether the Fullers are entitled to a vested right to continue a nonconforming use, not whether the City has authority to change its ordinances.

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

[22] Counties were not required to have zoning ordinances until the mid-1970s. However, some counties adopted zoning ordinances before that time. It is not known if Utah County had a zoning ordinance in place during the 1960s. That information should be available from the county.

[23] "Unless the municipality establishes, by ordinance, a uniform presumption of legal existence for nonconforming uses, the property owner shall have the burden of establishing the legal existence of a . . . nonconforming use." UTAH CODE ANN. § 10-9a-511(4)(a). The person claiming that a nonconforming use has been abandoned has the burden of establishing abandonment. *Id.*, 10-9a-511(4)(b).

The agreement between the City and the Fullers settling the 1997 lawsuit does not alter any zoning regulation. The 1997 Settlement only provided that the Fullers could construct a barn and keep animals on their property. The agreement is nothing more than that, and does not affect any aspect of the City's zoning regulations.

The City, like all local governments, has fairly broad discretion to determine when and how to enforce its zoning ordinances. The existence of similar violations does not excuse a property owner's violation, but the City's actions may mitigate the remedy or penalties imposed. Negligent or non-existent enforcement does not grant a right to violate local ordinances.

Finally, there is not enough information to determine if the Fullers' apartment is a valid nonconforming use. The Fullers have the burden of proving that the apartment was established when zoning regulations allowed such a use; they also have the burden of proving that the apartment has been continuously rented since the City's ordinances first prohibited it. Since there has only been limited information provided related to when the apartment was first opened, and if it has been continuously rented, this Opinion cannot determine if the Fullers have established a valid nonconforming use.

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.