

Advisory Opinion #140

Parties: Central Bank and Saratoga Springs

Issued: May 20, 2014

Reconsidered Opinion -- Original Opinion # 123, Issued on April 30, 2013

TOPIC CATEGORIES:

Compliance With Land Use Ordinances Nonconforming Uses and Structures

A property owner must establish that a land use was legal at the time it was commenced in order for it to qualify as a legal nonconforming use. A property owner may do so by showing that the use was legal under the terms of an annexation agreement that sets forth the relevant land use restrictions applicable to a property. A city may not defeat a property right by relying on a contrary ordinance it does not produce. Doing so violates the owner's constitutional rights.

In this case, Central Bank's predecessor in interest received a building permit from Utah County to build a horse barn on lots 8, 9 and 10 (collectively, the "Property") of the Sage Hill Subdivision. The Property was annexed into Saratoga Springs (the "City") during the barn's construction. An Annexation and Development Agreement (the "Annexation Agreement") between the City and the owners provided the zoning designation and land use restrictions applicable to the Property at the time of the annexation. Central Bank has shown that the Annexation Agreement did not restrict the commercial use of the barn. The City has alleged that a zoning ordinance in place at the time of the Annexation Agreement did not allow any commercial uses of the barn. The City has not provided any copy of this ordinance. The City must produce the ordinance in order to use it to deprive Central Bank of a property right to avoid violating Central Bank's constitutional rights.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

(RECONSIDERED)

Advisory Opinion Requested by: Central Bank
By: John Brems, Attorney for Central Bank

Local Government Entity: City of Saratoga Springs

Date of Original Advisory Opinion: April 30, 2013

Date of this Advisory Opinion: May 20, 2014

Reconsidered Opinion Authored By: James S. Wright
Office of the Property Rights Ombudsman

Issue

May a city use circumstantial evidence about an ordinance it does not produce to prevent a property owner from establishing a legal nonconforming use when a property owner can show other applicable regulations allowed the use at the time it commenced?

Summary of Advisory Opinion

A property owner must establish that a land use was legal at the time it was commenced in order for it to qualify as a legal nonconforming use. A property owner may do so by showing that the use was legal under the terms of an annexation agreement that sets forth the relevant land use restrictions applicable to a property. A city may not defeat a property right by relying on a contrary ordinance it does not produce. Doing so violates the owner's constitutional rights.

In this case, Central Bank's predecessor in interest received a building permit from Utah County to build a horse barn on lots 8, 9 and 10 (collectively, the "Property") of the Sage Hill Subdivision. The Property was annexed into Saratoga Springs (the "City") during the barn's construction. An Annexation and Development Agreement (the "Annexation Agreement") between the City and the owners provided the zoning designation and land use restrictions applicable to the Property at the time of the annexation. Central Bank has shown that the Annexation Agreement did not restrict the commercial use of the barn. The City has alleged that

a zoning ordinance in place at the time of the Annexation Agreement did not allow any commercial uses of the barn. The City has not provided any copy of this ordinance. The City must produce the ordinance in order to use it to deprive Central Bank of a property right to avoid violating Central Bank's constitutional rights.

Review

On April 30, 2013, the Office of the Property Rights Ombudsman (the "Office") issued an Advisory Opinion (the "Original Advisory Opinion") in the matter of Central Bank versus the City of Saratoga Springs. That Opinion addressed whether Central Bank had established a legal nonconforming use related to the commercial boarding and training of horses on the Property. On July 11, 2013 John Brems, attorney for Central Bank, requested that this Office reconsider Section C.3 of the Original Advisory Opinion. Specifically, Mr. Brems objected to the conclusion that the use on the property was not permitted when first established based on a conclusion that an ordinance the City could not produce could be inferred to prohibit the commercial use of the barn. It is this Office's policy to accept and consider such requests when received. This Reconsidered Advisory Opinion is issued in response to that request.

This Reconsidered Advisory Opinion does not supersede or replace the Original Advisory Opinion, except with regard to the specific questions addressed herein. The Original Advisory Opinion remains in full force and effect as the opinion of this Office, except as supplemented by this document. To the extent the Original Advisory Opinion conflicts with matters addressed in this document, this document controls.

Evidence

The Office reviewed the following relevant documents and information in preparing this Reconsidered Advisory Opinion:

1. Original Advisory Opinion and the evidence referenced therein.
2. Letter submitted by John N. Brems and received by the Office on July 15, 2013 requesting a reconsideration of the Original Advisory Opinion (the "Request for Reconsideration").
3. Letter by Brent Bateman dated October 9, 2013 and sent to John N. Brems and Kevin S. Thurman relating to the Request for Reconsideration.
4. Letter submitted by John N. Brems and received by the Office on October 30, 2013.
5. Letter submitted by Kevin S. Thurman and received by the Office on February 24, 2014.
6. Letter submitted by John N. Brems and received by the Office on March 14, 2014.
7. Letter submitted by Kevin S. Thurman and received by the Office on April 21, 2014.

Background

In 1999, Central Bank's predecessor received a building permit from Utah County to build an approximately 84,000 square foot barn on the Property. The barn included over 70 horse stalls, an area for horseshoeing, a horse wash station, restrooms and a large arena with spectator seating. The Property was then located in the RA-5 zone. Under this zone, "[t]he care and keeping of domestic livestock and fowl without restriction as to number; and barns, stables. . ." were permitted uses.

The City annexed the Property in May of 1999, as construction on the barn began. In conjunction with the annexation, the City entered into the Annexation Agreement with the owners of the property annexed into the City. This agreement set forth the zoning and other land use restrictions applicable to the Property.

Even though the City annexed the Property, Utah County officials continued to inspect and oversee the barn's construction until its completion in April of 2001. In 2002 the City realized it had not issued a certificate of occupancy and acted to complete this process. While proceeding to issue the certificate of occupancy, the City found out the Property's owners used the barn for commercial horse boarding and training purposes, in violation, the City believed, of applicable land use restrictions.

Central Bank acquired the Property pursuant to foreclosure proceedings in November of 2011. The City has indicated its position that applicable land use restrictions do not allow any commercial activity on the Property. Central Bank has countered that the applicable land use regulations allowed commercial activities when the prior owner completed the barn and established the commercial horse boarding and training at the barn and therefore they are legal nonconforming uses.

This Office issued the Original Advisory Opinion concluding that Central Bank had not established that the prior ordinances allowed the commercial uses of the Property at the time these activities commenced. The City could not produce its zoning ordinance in effect at the time it annexed the Property for analysis in the Original Advisory Opinion. After this Office issued that opinion, Central Bank asked for a reconsideration of the portion of that opinion addressing the effect of the City's failure to produce a copy of the applicable zoning ordinance. The City provided a copy of its zoning ordinance enacted a few months after the annexation, but did not provide a copy of any ordinance in effect at the time of the annexation. This Advisory Opinion will address the effect of the City's failure to provide this ordinance.

Analysis

The Commercial Boarding of Horses at the Barn Was Legal When Established.

Under Utah law, if a land use is a legal nonconforming use, then property owners generally have the right to continue using the property as they have historically done, even if it violates current land use ordinances. UTAH CODE ANN. § 10-9a-511(1)(a). In order to qualify as a legal

nonconforming use, the use must have, among other things, conformed to the land use regulations prior to the change in land use designation making it illegal. UTAH CODE ANN. § 10-9a-103(32). In this case, the commercial horse boarding and training at the barn were legal when they commenced because Central Bank has satisfactorily established that the Annexation Agreement allowed these uses and the City has not provided any copy of the concurrent ordinance it says prohibited these uses.

A. The Annexation Agreement Allows the Commercial Use of the Barn.

The Annexation Agreement sets forth the land use regulations applicable to the Property at the time of the Property's annexation into the City. The Annexation Agreement states: "Development of the Property shall be governed by the terms of this Agreement including the terms set forth in Exhibit C." Annexation Agreement, Section 4.0. The Agreement also says that "The parties agree that the zoning classifications and densities assigned to the Properties upon annexation by the Town Council . . . shall be those set forth in Exhibit D, 'Zoning Map.'" Annexation Agreement Section 5.0.

The Annexation Agreement's land use regulations applied at the time the prior property owner commenced using the barn when completed in 2001 because these rights vested pursuant to the express terms of the agreement. The Annexation Agreement states: "[T]he rights established by this Agreement shall vest immediately upon annexation, shall run with the land, and shall be irrevocable for a period of not less than five years following the annexation." Annexation Agreement, Section 9.0. No party has indicated, and we have no reason to believe, that the City attempted to change any rights vested by the Annexation Agreement as allowed by the specific provisions of its Section 9.0. This means that the land use regulations contained in the Annexation Agreement governed the Property at the time of the barn's completion in 2001, despite the new zoning ordinance the City enacted a few months after the Annexation Agreement.

The Annexation Agreement contains some land use regulations, but Central Bank has shown that nothing precludes a commercial use of the Property in the Annexation Agreement. Under common law principles, property owners have the right to unrestricted use of their property unless restricted by zoning or other regulations. *See Hugoe v. Woods Cross*, 988 P.2d 456, 458 (Utah Ct. App. 1999). This means that if the applicable land use regulations contained in the Annexation Agreement or other zoning ordinance, if any, in effect at the time of the Annexation Agreement did not prohibit commercial uses of the barn, then common law principles allowed them. Given that Central Bank has shown that the Annexation Agreement allowed commercial uses of the Property and the City has not produced any applicable ordinance showing that commercial uses violated the terms of the Annexation Agreement, commercial uses were legal at the time of the barn's completion in 2001.

B. The City Cannot Use an Ordinance It Does not Produce to Deprive a Party of Property Rights.

To date, the City has not provided any copy of a zoning ordinance in existence at the time of the Annexation Agreement. It has argued that circumstantial evidence suggests there was an ordinance and that the evidence further suggests this ordinance did not allow any commercial use of the Property. The City desires to use this evidence to determine that using the barn for commercial purposes violated the ordinances in effect at the time of the Annexation Agreement. Applicable law, however, prohibits the City from using an ordinance it does not produce from depriving Central Bank of a property right.

If an ordinance is too vague for an individual to understand what conduct it regulates, it violates the due process clause of the U.S. Constitution and is unenforceable. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined . . . we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”) Likewise, if an ordinance cannot be referenced at all, its attempted use to deprive a party of rights violates constitutional protections based on the same principle that people need notice of laws so they know what conduct is prohibited.

In this matter, the City is attempting to use an ordinance that it has not produced to prevent Central Bank from using the Property for commercial uses. Without a chance to examine this ordinance, Central Bank cannot know exactly which conduct was prohibited at the time of the establishment of the commercial uses of the barn. If the City can produce the ordinance, then Central Bank will need to show that its conduct conforms to the uses allowed by that law, but an absent ordinance cannot deprive it of rights allowed by the Annexation Agreement.

In addition, the Utah Supreme Court has declared that depriving property owners of the right to continue a nonconforming use by ordinance deprives the owners of a property right. *Gibbons & Reed Co. v. North Salt Lake*, 431 P.2d 559, 563 (Utah 1967) (“ . . . a zoning ordinance which required the discontinuance forthwith of a nonconforming use would be a deprivation of property without due process of law.”). In this case, the City has not passed a new zoning ordinance explicitly requiring the discontinuation of the nonconforming use; however, the City desires to arrive at the same result by arguing that an ordinance not available for examination precludes the commercial use of the Property as allowed by the Annexation Agreement.

Unless the City can produce a zoning ordinance in effect at the time of the Annexation Agreement, it cannot take action to deprive Central Bank of a nonconforming use by passing an ordinance or by arriving at that same result by failing to produce a relevant ordinance and then arguing that this absent ordinance disallows the commercial use of the Property. If the City can produce this ordinance, Central Bank will need to show that it allowed the commercial use of the

Property. Until the City can produce this ordinance, the City cannot deprive Central Bank of the right to use the Property for commercial purposes allowed by the Annexation Agreement based on an absent ordinance under due process considerations.

Conclusion

Central Bank has shown that the Annexation Agreement allowed the commercial use of the Property at the time of the barn's completion. The City cannot deprive Central Bank of a property right with an ordinance it does not produce for examination. If the City can produce a relevant ordinance, Central Bank will need to show that it allowed the commercial use of the Property in order to show the historic commercial uses of the Property are legal nonconforming uses.

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.

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached Advisory Opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63G-7-401.

These provisions of state code require the delivery of the Advisory Opinion to the agent at the address 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.

The person and address designated in the Governmental Immunity Act database is as follows:

Mark Christensen, City Manager
City of Saratoga Springs
1307 N. Commerce Drive
Saratoga Springs, Utah 84045

On this _____ day of May, 2014, I caused the attached Advisory Opinion to be delivered to the foregoing 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