Advisory Opinion # 159

Parties: Heidi and Roger Eggett, Morgan County

Issued: July 7, 2015

TOPIC CATEGORIES:

Compliance With Land Use Ordinances
Conditional Uses
Nonconforming Uses & Structures

Local governments are bound to comply with the terms of their zoning ordinances. To be eligible for nonconforming use status, a use must have been "legally established" under former zoning ordinances before those ordinances were changed. For a use to be "legally established" it must have obtained all necessary approvals and permits to conduct the use, including a conditional use permit. If the use did not obtain all necessary approvals, it cannot be eligible for nonconforming use status, regardless of how long it has existed.

The Office of the Property Rights Ombudsman
Utah Department of Commerce
PO Box 146702
160 E. 300 South, 2nd Floor
Salt Lake City, Utah 84114

(801) 530-6391
1-877-882-4662
Fax: (801) 530-6338
www.propertyrights.utah.gov
propertyrights@utah.gov

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

FRANCINE A. GIANI
Executive Director

BRENT N. BATEMAN
Lead Attorney, Office of the Property Rights Ombudsman

ADVISORY OPINION

Advisory Opinion Requested by:	Heidi & Roger Eggett
Local Government Entity:	Morgan County
Property Owner:	Wilkinson Construction, Inc.
Type of Property:	Residential Subdivision
Date of this Advisory Opinion:	July 7, 2015
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

Is a Landing Strip allowed under Morgan County's zoning ordinances, or is it eligible for nonconforming use status?

Summary of Advisory Opinion

Local governments are bound to comply with the terms of their zoning ordinances. The County's current zoning only allows airport facilities within an Airport Overlay Zone, and prohibits them in all other zones. The former ordinances allowed airport facilities as conditional uses in Agricultural zones, meaning that facilities established when those ordinances were in effect may be eligible for nonconforming status.

In order to be legally established, and thus eligible for nonconforming status, all required approvals to initiate the use must be obtained. A conditional use requires a conditional use permit before in order to be carried out. Without a permit, the use could not have been "legally established," and it is thus disqualified from nonconforming use protection.

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 § 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 Heidi and Roger Eggett, on April 15, 2015. A copy of that request was sent via certified mail to Morgan County, at 48 Young Street, Morgan, Utah. According to the return receipt, the County received the Request on April 20, 2015.

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, with attachments, submitted by Heidi and Roger Eggett, received by the Office of the Property Rights Ombudsman on April 15, 2015.
2. Brief Response from Morgan County, stating that all relevant materials had been included in the Request for Advisory Opinion.

Background

Heidi and Roger Eggett own a 20-acre parcel in Porterville, an area of Morgan County. The property is zoned Agricultural (A-20). They purchased the property in 2009, and have since built a home. They discovered that a neighboring parcel, owned by Wilkinson Construction, Inc. has a landing strip that is occasionally used by small aircraft ("Wilkinson Property"). The Eggetts state that the aircraft often fly directly over their home while taking off or landing. Their neighbors confirmed that the landing strip has operated for several years.[1] The Wilkinson Property also includes a building, large enough to hold an airplane, although there is no evidence that any aircraft are stored on the property.[2]

The Eggetts researched the history of the Wilkinson Property ownership and development. They discovered that Wilkinson purchased the property in 1995, and that roads to the parcel were constructed in 1997. From aerial photographs and recollections of other property owners in the area, they concluded that the landing strip was built sometime in 1998. From this, the Eggetts

[1] The Eggetts believe that the landing strip on the Wilkinson Property is known to the "flying community" and is used by several different aircraft, not just the property owners.

[2] When asked by Morgan County, representatives of Wilkinson Construction stated that the building is for agricultural purposes. The County indicates that it does not feel that it has need to investigate further. Evidently, no County employee or representative has seen the inside of the building for some time.

determined that the applicable zoning ordinances for the area were either the 1981 version or the 1998 code.[3]

Neither of the earlier zoning codes specifically allowed private airports or landing strips. Both codes indicate that an "airport" requires a conditional use permit in all zones. The term "landing strip" is not found in either zone. The sections of the two codes provided for this Opinion do not include any definitions, so it is not clear what type of airport facility was regulated by the former zoning ordinances. Both the 1981 and 1998 codes, as well the current Morgan County ordinances, include language that "[t]he uses of land allowed in each district are plenary and uses of land not specifically allowed as set forth therein shall be prohibited in the respective district."[4]

The County's current zoning ordinance only allows airport facilities in an "Airport Overlay Zone."[5] Noncommercial aeronautical activities are permitted uses in the Overlay Zone; commercial activities require approval from the County Council; and non-aeronautical activities, particularly those of a commercial nature, require conditional use permits. MORGAN COUNTY CODE, § 8-5H-7(A).[6]

Analysis

I. The Landing Strip is Not Eligible for Nonconforming Use Status

A. The County's Current and Former Zoning Codes Allow Airports

As was previously stated, the current zoning ordinance of Morgan County allows an airport in an "Airport Overlay Zone." Depending upon the nature of the activities, an airport may be permitted, or require specific approval. Airports are not allowed in any other zone, and the County may not approve them in any other zone.[7] The County is obligated to comply with its own ordinances.[8] However, because airports could have been built in most zones under the former code, the property owners could claim that the Landing Strip is entitled to nonconforming use status.

---

[3] A completely new zoning ordinance was adopted by Morgan County in December of 1998. The exact date of construction on the landing strip could not be determined, only that it was built in 1998. The Eggetts provided a copy of the "1981 Model Land Development Code for Utah Counties and Municipalities." It is not clear whether this was identical to the former Morgan County ordinance, but the County did not object to the Eggett's reference.

[4] *See* MORGAN COUNTY CODE, § 8-5-4 (current language); MORGAN COUNTY LAND USE MANAGEMENT CODE (1998), § 9.4; 1981 MODEL LAND DEVELOPMENT CODE, § 9-4. "Plenary" means full, complete, or entire; the County is stating that its zoning ordinance expresses the entire list of allowed uses.

[5] *See* MORGAN COUNTY CODE, § 8-5H-7. "AIRPORT: Any area of land which is used, or intended for use for the landing and taking off of aircraft, and any appurtenant areas which are used, or intended for use, for aircraft buildings or other airport facilities or rights of way, together with all airport buildings and facilities located on them." *Id.* § 8-5H-2. The Morgan County Airport is located near Mountain Green, about 10 miles northwest of Morgan City, while Porterville is located a few miles south of the city. The materials submitted for this Opinion do not specify where an "Airport Overlay Zone" is located within the County.

[6] Airports are not listed as permitted or conditional uses in any other zone, and are therefore prohibited under the current zoning ordinance. *Id*., § 8-5-4

[7] *Id*., § 8-5-4 (Uses not listed are prohibited). *See also supra,* Note 4.

[8] "A county is bound by the terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances." UTAH CODE ANN. § 17-27a-508(2)

Both of the County's former zoning ordinances allowed airports in Agricultural Zones as conditional uses. Although the term "landing strip" has not been used in any of the County's land use codes, the County's definition of "airport" includes "landing strip."[9] Thus, it must be concluded that a landing strip was potentially allowed on the Wilkinson Property in 1998, but as a conditional use. However, there is no evidence—not even a suggestion—that the County has ever approved a conditional use permit for an airport or landing strip on the Wilkinson Property.

B. The Landing Strip is Not Eligible for Nonconforming Use Status

Because there is no evidence that the County approved a conditional use permit for the Landing Strip, it cannot be eligible for nonconforming use status. To be eligible for nonconforming status, a use must have been legally established when it was allowed under a land use ordinance.

> "Nonconforming use" means a use of land that:
> (a) legally existed before its current land use designation;
> (b) has been maintained continuously since the time the land use ordinance regulation 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.

UTAH CODE ANN. § 17-27a-103(38).

To be considered "legally existing," a use must receive any required approvals from a local government, including a conditional use permit.[10] Without such approvals, a use cannot be considered "legal." Simply because a use is allowed does not mean it may be "legally established" without obtaining necessary approvals to carry out the use.

This conclusion is bolstered by the analysis found in *Hugoe v. Woods Cross City*, 1999 UT App 281, 988 P.2d 456. In *Hugoe*, the Utah Court of Appeals upheld a decision that a trucking company was entitled to nonconforming use status, because it had been established when such uses were permitted by the city's zoning ordinances. *Id.*, 1999 UT App 281, ¶ 8, 988 P.2d at 458-59. The city argued that because the company had not filed a required site plan for their business, the use could not have been "legally" established. The Court concluded that the site plan was not needed to make the use, operation of a trucking company, legal. *Id.*, 1999 UT App 281, ¶ 10, 988 P.2d at 459.

In contrast, a landing strip/airport was a conditional use under the County's former ordinances, not a permitted use like the trucking company in *Hugoe*. A conditional use permit was required before a landing strip/airport could be constructed or operated; thus, the permit *was* needed to

[9] MORGAN COUNTY CODE, § 8-5H-2.
[10] Uses listed as conditional require specific approval from the local jurisdiction before they may be established. "A conditional use permit shall be required for all uses listed as conditional uses . . .." MORGAN COUNTY CODE, § 8-8-3(A)

make both the construction and the use legal.[11]

It is presumed for the purposes of this Opinion that the "1981 Model Land Development Code" accurately depicts the zoning ordinances in place from 1981 through December of 1998 in Morgan County.[12] Although no copy of the County's actual ordinances from that time were submitted, the County did not object to the submission of the 1981 Model Code. According to that Code, an airport would have required a conditional use permit in an Agricultural zone.[13] There is no evidence that the owners of the Wilkinson Property obtained a conditional use permit to construct and operate the Landing Strip. Since no conditional use permit was granted, the landing strip on the Wilkinson Property could not have been legally established under the 1981 or the 1998 land use codes, and is thus not eligible for nonconforming use status.[14]

The current zoning ordinance for Morgan County allows an airport only in an "Airport Overlay Zone." They are not allowed in any other zone. Since the Wilkinson Property is located within an Agricultural zone, a landing strip (built or otherwise) cannot be approved.

II. An Exclusively Private Use of Property is Not Exempt from Zoning Regulation.

The current County Code limits airport facilities to Airport Overlay Zones only. Such facilities are not allowed in any other zone, even if the facilities are for the exclusive use of a private property owner. In the materials submitted for this Opinion, the County's staff implied that a private landing strip for an owner's personal use would somehow be exempt from regulation as a land use. The County indicated that such personal use was analogous to a property owner keeping horses or riding snowmobiles.

Personal enjoyment of a regulated land use does not exempt the use from regulation, nor does it exempt any structures associated with that use. Using the County's analogy as an example, it is true that horseback riding would most likely not be regulated through a zoning ordinance, but keeping horses on the property would be subject to regulation. In addition, construction of barns or stables for the horses would require approval. It does not matter whether the owner rides horses for personal recreation, or whether horseback riding is offered as a commercial activity. Keeping animals and construction of facilities for animals are regulated.

---

[11] *See also Vial v. Provo City*, 2009 UT App 122, 210 P.3d 947. In *Vial*, the city argued that a basement apartment had not been "legally established" because no building permit had been granted for the necessary remodeling for the apartment. The Court of Appeals rejected this argument, holding that a building permit was relevant to a question of whether the structure was legally nonconforming, but was not relevant to whether the use had been established. A building permit was not necessary to initiate a use that was permitted under the city's former zoning ordinances.

[12] The 1998 ordinances were adopted on December 15, 1998. The current land use ordinance was first adopted in February of 2010.

[13] "Airports" are listed as conditional uses in all zones (except the Forestry District) in the 1981 Land Use Code. *See* 1981 MODEL LAND DEVELOPMENT CODE, § 10-3. Airports were also listed as conditional uses in all zones in the 1998 ordinance. *See* MORGAN COUNTY LAND USE MANAGEMENT CODE (1998), § 10-3-15

[14] Under the County's current zoning ordinance, an airport is only allowed in the Airport Overlay Zone. The Wilkinson Property is located within the A-20 zone.

In like manner, building a private airport or landing strip is still subject to regulation by the County. It does not matter if the landing facility is for the owner's exclusive use by the owner's aircraft only. Morgan County has chosen to regulate airports, and restrict them to a particular overlay zone. The County's zoning ordinances do not attempt regulation of pilots, or any airport operations. The ordinance does, however, regulate where an airport facility may be constructed and operated. If a landing strip is desired on the Wilkinson Property, it must comply with the County's zoning ordinances. If the zoning code prohibits such facilities in the zone where the Wilkinson Property is located, then a landing strip may not be built and operated.

Conclusion

Under Morgan County's current zoning ordinance, an airport may only be located within an "Airport Overlay Zone;" they are prohibited in all other zones. However, the County's former ordinances allowed airports (as conditional uses) in several zones, including Agricultural. A use was legally established when it was allowed may be eligible for nonconforming use status if it becomes prohibited due to an ordinance change.

The Landing Strip does not qualify for nonconforming use status, because there is no evidence that the County issued a conditional use permit for an airport (or airport facility) at a time when airports were allowed by the County's zoning ordinance. Since a conditional use permit is necessary to initiate a use listed as conditional, failure to obtain a permit disqualifies a use from nonconforming status.

Uses intended and carried out for the exclusive enjoyment of property owner are not exempt from zoning regulation. Construction of buildings and facilities are also subject to zoning and building regulation, regardless of the intended users.

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.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in Utah Code § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.

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. § 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:

Jann L. Ferris
Morgan County Attorney
48 Young Street
PO Box 886
Morgan, Utah 84050

On this _____ Day of July, 2015, 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