

Advisory Opinion #186

Parties: Jay Harwood, Tooele County

Issued: May 24, 2017

**TOPIC CATEGORIES:
Nonconforming Uses**

The doctrine of diminishing assets permits legal nonconforming (grandfathered) gravel pits to expand beyond their physical boundaries in order to continue operations. However, expansion is limited to the boundaries of the parcel(s) upon which gravel operations existed at the time the use became nonconforming.

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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ADVISORY OPINION

Advisory Opinion Requested By: Jay Harwood
Local Government Entity: Tooele County
Applicant for Land Use Approval: Jay Harwood
Type of Property: Gravel Pit
Date of this Advisory Opinion: May 24, 2017
Opinion Authored By: Brent N. Bateman
Office of the Property Rights Ombudsman

ISSUE

May Mr. Harwood expand the boundaries of his legal nonconforming gravel pit?

SUMMARY OF ADVISORY OPINION

Utah law recognizes the doctrine of diminishing assets. This doctrine permits legal nonconforming gravel pits to expand beyond their physical boundaries in order to continue operations. Unlike other legal nonconforming uses, expansion of a gravel pit does not jeopardize the pit's legal status. However, expansion is limited to the boundaries of the parcel(s) upon which gravel operations existed at the time the use became nonconforming.

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 Mr. Jay Harwood on January 11, 2017. A copy of that request was sent via certified mail to Marilyn K. Gillette, County Clerk, Tooele County, 47 South Main, #318, Tooele, UT 84074.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for an Advisory Opinion submitted by Mr. Jay Harwood on January 11, 2017, with attachments.
2. Letter submitted by Mr. Gary K. Searle, Chief Deputy Tooele County Attorney, received February 13, 2017, with attachments.
3. Response submitted by Mr. Harwood, received on February 17, 2017, with attachments.
4. Letter submitted by Mr. Scott Hunter, received on March 20, 2017, with attachments.
5. Response submitted by Mr. Harwood, received on April 7, 2017, with attachments.
6. Response submitted by Mr. Hunter, received on April 12, 2017, with attachments.

BACKGROUND

Advisory Opinion #176, released by this Office on November 29, 2016, concerns a ten-acre gravel operation in Tooele County. This Advisory Opinion is the second concerning the same gravel pit. Jay Harwood, requestor of this opinion, owns the pit and approximately 160 acres of the surrounding land, and would like to extract gravel. Some residents near the pit would prefer the gravel operation cease. Tooele County, we believe, simply wants to follow the law.

Advisory Opinion #176 addressed whether a previous conditional use permit for the pit remained in effect or had expired. This Office found therein that the CUP was no longer in effect since the zoning on the property changed to prohibit gravel extraction. Nevertheless, we opined that the existing ten-acre gravel pit was a legal nonconforming use that could continue unless abandoned. We further expressed the opinion that "the Pit can continue to operate in the size and manner to which it has been continuously maintained as a legal nonconforming use." It appears that after the release of that Advisory Opinion, Tooele County determined that Mr. Harwood's pit could continue gravel extraction operations, but could not expand its boundaries. In other words, the County ordered that extraction could continue vertically, but not horizontally.

In the current Advisory Opinion request, Mr. Harwood raises for the first time the *doctrine of diminishing assets*. He argues that this doctrine allows the nonconforming use to expand horizontally, widening the boundaries of the extraction area in order to continue operations. Tooele County counter-argues that Mr. Harwood does not have the legal right to expand his gravel operations beyond the existing 10 acre pit to the adjacent 160 acres he owns, because the

zoning did not allow gravel operations in any location on the property at the time Mr. Harwood purchased the property. Scott Hunter, requestor of the previous Advisory Opinion, also submitted arguments for this opinion, and argues that despite Advisory Opinion #176, no legal nonconforming use exists because the mine had been abandoned, and therefore the doctrine of diminishing assets does not apply.

ANALYSIS

Normally, legal nonconforming uses cannot expand beyond the historical boundaries of the use. The Utah Code states that an owner may not expand a legal nonconforming use by structural alteration of its building. UTAH CODE § 17-27a-510. In other words, the use must normally remain within the confines existing when the use became nonconforming.

A 50 year-old Utah case, *Gibbons & Reed Co. v. North Salt Lake City*, 431 P.2d 559 (Utah 1967), provides Utah's solitary exception to this prohibition on expansion. This case concerns a gravel extraction pit in North Salt Lake City, to which, as here, the neighbors objected. After accepting as a given that the gravel operation was legally nonconforming, the Utah Supreme Court noted that a gravel operation differs from other uses in that the very use consumes the asset:

The case here is not the usual case of a business conducted within buildings, nor is the land held merely as a site or location whereon the enterprise can be conducted indefinitely with existing facilities. In a gravel operation the land itself is a material or resource. It constitutes a diminishing asset and is consumed in the very process of use.

Id. at 562-563. The court expressly adopted a rule that we now call the doctrine of diminishing assets, which allows an extraction business to expand its boundaries onto the entire parcel. The Utah Supreme Court held that

The very nature and use of an extractive business contemplates the continuance of such use of the entire parcel of land without limitation or restriction to the immediate area excavated at the time the ordinance was passed.

Id. at 564. *Gibbons & Reed* remains the sole Utah case we can discover on the subject, and thus remains the effective and unoverturned law in Utah. And because of the close similarity of *Gibbons & Reed* to the present case, there can be no question that this doctrine applies here. Thus, in accordance with *Gibbons & Reed*, the non-conforming gravel pit in this case may continue to extract its diminishing assets. The pit may expand beyond its boundaries as they existed at the time the use became nonconforming. In other words, the doctrine of diminishing assets represents the law in Utah and Mr. Harwood may extract gravel horizontally. The pit may increase in size.

Nevertheless, the expansion of the nonconforming gravel pit is not indefinite. There must be a limit to which the horizontal boundaries of the gravel pit can expand. Otherwise, the pit could expand forever, rendering the nonconforming use rule meaningless. In *Gibbons & Reed*, the

court limited the expansion of the gravel pit to the boundaries of Parcel D, specifically finding that Parcel D was in use as a gravel pit at the time the use became nonconforming. The *Gibbons & Reed* Court held that since a part of Parcel D was in use, then all of Parcel D could be used for extraction as a legal nonconforming use. *Gibbons & Reed*, 431 P.2d at 564. The Court stated that “plaintiffs’ use of parcel D was a valid nonconforming use and not an extension thereof.” *Id.* at 565.

The unmistakable conclusion from the Court’s analysis is that only a parcel actually in use at the time of nonconformity is eligible for expanded use under the doctrine of diminishing assets. Parcels *not in use* at the time are not eligible for gravel extraction under the diminishing assets doctrine. Expansion of the pit is limited by the boundary of the parcel upon which the owner conducted the use.

Accordingly, under *Gibbons & Reed*, the doctrine of diminishing assets allows the expansion of a gravel pit beyond the pit’s physical boundaries, but only within and not beyond the boundaries of the parcel upon which the pit existed at the time that the extraction became legally nonconforming. Subsequent purchases of adjoining property, and even subsequent adjustment of boundaries, cannot indefinitely expand the nonconforming use. *Gibbons & Reed* supports only expansion of the pit to the boundaries of the parcel as it existed at the time the pit became nonconforming.

This result comports with existing Tooele County ordinance, which currently accepts the diminishing assets doctrine but prohibits adding property and changing boundaries in order to expand a nonconforming use area. Tooele County Ordinances 5-12. Moreover, the diminishing assets doctrine as adopted in other states yields the same result. For example, the Washington Supreme Court specifically limits expansion under the doctrine of diminishing assets to the boundaries of the parcel:

The proper scope of a lawful nonconforming use in an exhaustible resource is the whole parcel of land owned and intended to be use by the owner at the time the zoning ordinance was promulgated.

City of Univ. Place v. McGuire, 30 P.3d 453 (Wash, 2001) (also citing “the overwhelming number of jurisdictions” that have also held that expansion under this doctrine is limited by the boundaries of the parcel that existed at the time). Also, note 83 *Am. Jur. 2d* ZONING AND PLANNING § 569:

Such diminishing asset enterprises ‘use’ all of the land contained in a particular asset, and as a practical matter, such use must begin at one spot and continue from there to the boundary of the land.

Accordingly, Mr. Harwood’s existing ten-acre legally nonconforming gravel pit can continue extraction and operation. In the process the extraction can expand beyond its current horizontal boundaries without losing its legal nonconforming status. However, Mr. Harwood cannot continue that extraction onto properties that were not used for extraction at the time the use became nonconforming, even if he now owns those properties.

Moreover, the fact that the properties did not allow gravel extraction at the time that Mr. Harwood purchased them does not terminate or alter the legally nonconforming use status of the property. A legal nonconforming use runs with the land: “[A] nonconforming use or noncomplying structure may be continued by the present or a future property owner.” UTAH CODE § 17-27a-510(1)(a). Also, “lawful existing nonconforming uses are not eradicated by a mere change in ownership.” *Gibbons & Reed*, 431 P.2d at 564.

Finally, a party wishing to prove abandonment must show actual abandonment and not just evidence of intent to abandon. No authority can be found to support Mr. Hunter’s argument that subsequent changes of intent alone effectuate abandonment. Abandonment arises from actual changes in actual physical use, *see generally* UTAH CODE § 17-27a-510(4), and not only intent to change use. No evidence of physical abandonment has been shown.

CONCLUSION

Gibbons & Reed established the doctrine of diminishing assets in Utah. This doctrine permits legal nonconforming gravel pits to expand beyond their physical boundaries and still retain their legal use status. Mr. Harwood can therefore continue to extract gravel at the site, and can expand his gravel pit horizontally. However, that horizontal expansion is limited to the boundaries of the parcel(s) upon which the pit existed at the time the ordinance changed and the use became legally nonconforming. Even if Mr. Harwood owns the adjacent land and/or boundaries have subsequently changed, the gravel pit cannot expand beyond the parcels as they existed at that time.

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 § 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:

Marilyn K. Gillette, County Clerk
Tooele County
47 South Main, #318
Tooele, Utah 84074

On this _____ Day of May, 2017, 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