

Advisory Opinion #135

Parties: Bruce W. Church and City of LaVerkin

Issued: November 29, 2013

TOPIC CATEGORIES:

Q: Nonconforming Uses and Noncomplying Structures

A noncomplying structure may remain in place, but uses undertaken within the structure must comply with local use regulations, unless the use separately qualifies for nonconforming use status. Noncomplying structure status does not automatically convey legal nonconforming use status to all uses within the structure. If a proposed use within a noncomplying structure violates a local ordinance, it cannot be approved.

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.



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: Bruce W. Church,
by J. Gregory Hardman attorney for Mr. Church.

Local Government Entity: City of LaVerkin

Applicant for the Land Use Approval: Bruce W. Church

Type of Property: Residential

Date of this Advisory Opinion: November 29, 2013

Opinion Authored By: Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

Issues

May a noncomplying structure be used as a single-family residence?

Summary of Advisory Opinion

Noncomplying structures are allowed to remain in place, even if they no longer conform to local zoning standards such as setbacks, height, etc. Uses allowed under the property's current zoning may be carried out in a noncomplying structure, provided other city ordinances are met. Noncomplying status does not exempt a use or structure from regulation. If a proposed use violates a local ordinance, it cannot be approved, regardless of whether the structure is complying or noncomplying.

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 J. Gregory Hardman, attorney for Bruce W. Church, on July 16, 2013. A copy of that request was sent via certified mail to Karl Wilson, Mayor of LaVerkin, at 435 North Main, LaVerkin, Utah 84745. The return information indicates that the City received the Request on July 22, 2013.

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 J. Gregory Hardman, attorney for Bruce W. Church, received by the Office of the Property Rights Ombudsman, July 16, 2013.
2. Response submitted on behalf of the City of LaVerkin by Kevin R. Bennett, attorney for the City, received August 14, 2013.
3. Reply submitted by Mr. Hardman, received September 9, 2013.
4. Response from the City, received October 16, 2013.
5. Reply submitted by Mr. Hardman, received October 23, 2013
6. Response from the City, received October 25, 2013.

Background

Bruce W. Church owns property located at approximately 100 South 100 West in LaVerkin. The property consists of four lots. The four lots were originally a single parcel, but were divided several years ago. When the parcel was divided, the lots apparently complied with the City's zoning ordinances. Since the lots were created, however, the City's zoning for the property has been changed to "R-1-14," with a minimum lot size 14,000 square feet. The lots are smaller than 14,000 square feet, but are considered "legally authorized" and buildable.¹ Single-family homes are permitted uses in the R-1-14 zone, but not multiple family dwellings.

One of the lots, located on the corner of 100 South and 100 West, has a home, which appears to face 100 South. The adjoining lot includes a large structure, originally built in the mid-1940s as a dairy barn.² According to Mr. Church, this building was used as a dairy until the late 1950s. In

¹ In October of 2006, the City informed Mr. Church's aunt (who owned the property) that the lots were "legally authorized pre-existing non-conforming uses." Letter, City of LaVerkin to Ilene Church, dated October 19, 2006. (Included with materials submitted for this Opinion).

² The dairy was operated by Mr. Church's grandparents. Mr. Church purchased the property in 2007.

the 1980s, the building was renovated and used for several years for retail businesses and commercial offices.³ It is currently not being used, except as storage space for Mr. Church.

Most of this former dairy structure sits on the adjoining lot, but a significant portion extends cross the lot line, and is located on the corner lot, along with the home.⁴ The structure is also very close to the front boundary of the two lots. According to the City, the structure is about 10 feet from the pavement of 100 West.⁵ The required setbacks for the R-1-14 zone are 25 feet for a front yard, and 10 feet from the side property lines. In addition, the City Code requires a 10-foot utility easement along public streets.⁶ The structure thus is non-complying, because it does not meet the City's required setbacks, and because the building straddles the lot line.

Beginning in 2007, Mr. Church sought approval to rent the dairy structure as a residence. He originally proposed converting the structure into apartments, but multi-family dwellings are not allowed in the zone. He then asked for approval to lease the structure as a single-family home. The City informed him that the structure must be brought into compliance with the City's ordinances before it can be used as a residence.⁷ The City also explained that in addition to the setback and lot line non-compliance, its zoning ordinances allow only one dwelling on each lot.⁸

The City agrees that the building is entitled to non-complying structure status, but that there is no protection for any non-conforming use in the building. The City argues, however, that if any new use is undertaken in the structure, all ordinances must be followed. Mr. Church maintains that noncomplying status entitles the structure to remain standing, and so any permitted use may be undertaken.

Analysis

I. Noncomplying Structures Are Not Exempt From Regulation

A. *Nonconforming Uses, Noncomplying Structures, and Nonconforming Lots.*

A nonconforming use is a land use that

³ It appears that the previous owners of the property lived in the home located on the corner lot, and operated the businesses in the former dairy structure. The owners state that the structure has a kitchen, bathroom, plumbing, electrical service, and other improvement consistent with its use as a commercial building. The City states that there is no evidence of a building permit for these improvements, and it has not been established that the structure meets residential standards.

⁴ Based on an aerial photograph submitted by the City, roughly 25% of the structure is located on the corner lot. The other two lots are not affected by the former dairy structure.

⁵ There is no sidewalk along 100 West. The external wall of the dairy structure sits on the property's boundary with the right-of-way. The City suggests that a small portion of the building may extend across the front property line, and into the City's right-of-way. However, the City acknowledges that the measurements for the property lines may not be accurate.

⁶ Since the dairy structure sits on the property line, there is no room for a utility easement.

⁷ A single family residence is a permitted use in the R-1-14 zone.

⁸ LAVERKIN CITY CODE, § 10-7-3: "Every dwelling structure shall be located and maintained on a separate lot having no less than the minimum areas, width, depth, and frontage required by this title for the zoning district in which the dwelling structure is located . . ." According to the City, a residence in the dairy structure would violate this ordinance, since there is already a dwelling on the corner lot.

- (a) legally existed before its current land use designation;
- (b) has been maintained continuously since the time the land use ordinance governing the land change; 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. § 10-9a-103(32). This definition relates to *uses* of land, i.e. the activities undertaken upon the property. For example, a parcel of land may be put to use as a farm. If that use is initially legal, but later the local jurisdiction prohibits that use within the zone, then the use (farming) would receive legal nonconforming use status on that land. Thus, farming activities could continue, even though no longer conforming.

A noncomplying structure differs in that it relates to the physical *structures* existing on the land. A noncomplying structure “legally existed before its current land use designation; and . . . because of one or more subsequent land use ordinance changes, does not conform to the setback, height restrictions, or other regulations, excluding those regulations which govern the use of land.” *Id.*, § 10-9a-103(31). For example, if a lot contains a large barn, legally built but now in violation of the height restriction, the barn may remain as a legally noncomplying structure. The local jurisdiction cannot require removal of the barn because of the height restriction. A legal noncomplying structure may remain in place and may be used, unless the structure is voluntarily demolished, or deteriorates to the point that it is no longer usable. *See id.*, § 10-9a-511.⁹

A nonconforming lot differs from the first two in that it relates to the configuration of the *lot* itself. Utah state law is silent on nonconforming lots. However, many local governments, including LaVerkin,¹⁰ have enacted ordinances or policies which recognize legally nonconforming lots. A lot can have legal nonconforming lots status if established lawfully, but no longer conforms to minimum size or dimension requirements. Such a lot is granted non-conforming status, which typically means it is a buildable lot.¹¹

B. Nonconforming Status Does Not Exempt Property From Use Regulations.

Each of these – nonconforming uses, noncomplying structures, and nonconforming lots – gives legal status to a condition that was initially legal, but has become illegal due to a change in the law. Nevertheless, the three are not interchangeable. Each relates to a distinct issue: uses, structures, and lots. In other words, a lot may have nonconforming lot status, which allows building upon the lot, but that status does not mean that any imaginable structure can be built upon the lot. The structure that is placed upon the lot must still comply with local and state regulations regarding structures.

⁹ A non-complying structure may be restored or rebuilt, if it is involuntarily destroyed. If the building deteriorates, and the owner does not repair the building within six months after being notified of the deteriorated condition, then non-complying status is lost.

¹⁰ *See* LAVERKIN CITY CODE, § 10-1-6.

¹¹ Nonconforming lot status “runs with the land,” meaning that new owners would also be able to build on the lots.

Likewise, the existence of a legal nonconforming structure upon a lot does not permit any use whatsoever to be undertaken within that structure. Because all property is subject to regulation by local authorities, any uses established in a noncomplying structure must comply with local zoning and building ordinances. “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).¹²

Thus, noncomplying structures are not exempt from use regulations. Noncomplying structure status means that the structure may remain standing and be used. However, the structure and any uses carried out within the structure remain subject to regulations to promote the health, safety, and welfare of the public.¹³ The use undertaken within a legal noncomplying structure must conform to local regulations regarding uses of land.

II. The Structure May Not Be Used as a Residence Under Local Use Regulations.

A. The Dairy Barn is a Legal Noncomplying Structure, but Subject to Local Zoning and Building Ordinances

In October of 2006, the City determined that the four lots comprising Mr. Church’s property are legally authorized pre-existing non-conforming lots, and so may be used as building lots. Moreover, there is no dispute that the dairy building is entitled to non-complying structure status. Both the City and Mr. Church agree that the structure complied with local ordinances when it was built, but now does not conform to the City’s land use ordinances. The City may not require that the building be removed or altered, as long as it is maintained in a reasonable condition.¹⁴

The building may also be used. However, the building is still subject to the City’s ordinances, and any uses carried out in the building are subject to regulation. For example, the City may require the owner to repair the building, should it become damaged to the point that it is a safety hazard.¹⁵

B. Using the Barn as a Single-Family Residence Violates the Local Use Restrictions.

Single-family residences are permitted uses in the R-1-14 zone, so there is no question that a home could be established on any of the lots comprising Mr. Church’s property.¹⁶ The dairy building is a noncomplying structure and may remain on the property and be used for any

¹² Local zoning is authorized as an exercise of the state’s police power. *Marshall v. Salt Lake City*, 105 Utah 111, 121, 141 P.2d 704, 708 (1943); *see also Hatch v. Boulder Town Council*, 2001 UT App 55, ¶ 7, 21 P.3d 245, 247.

¹³ *See Patterson v. Utah County Board of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995).

¹⁴ The City notes that it is not asking Mr. Church to remove the building. The question is whether it may be used as a residence.

¹⁵ This in no way implies that the dairy structure is unsafe or is in a decrepit condition. This example is given to demonstrate that the City retains its regulatory authority over all buildings within its jurisdiction, including those entitled to noncomplying status.

¹⁶ Since all four lots have been granted “legal” status, each lot could potentially be used for any use allowed in the R-1-14 zone.

permitted use, including a single-family residence, as long as the use complies with the City's ordinances.

Unfortunately, the City Code as a use regulation that prohibits the use of the structure as a residence. The City Code prohibits two dwelling structures on the same lot. "Every dwelling structure shall be located and maintained on a separate lot having no less than the minimum area, width, depth, and frontage required by this title for the zoning district in which the dwelling structure is located." LAVERKIN CITY CODE, § 10-7-3(B). Because a portion of the dairy structure is located on the corner lot—which also has a home—converting the dairy structure to a dwelling would violate this ordinance.¹⁷ Although this Ordinance relates closely to the structure, it does not regulate the structure itself. This ordinance is a *use* regulation. It prohibits the property being used for more than one residence.¹⁸ It does not dictate what can or cannot be done to a structure. Rather, it dictates how a particular structure may be used. Even though the structure may remain, any use carried out on the property must comply with the City's ordinances. One of those ordinances prohibits more than one dwelling structure on a lot. Since a residence in the dairy structure would result in two dwelling structures on one lot, it cannot be allowed.

As a noncomplying structure, the building may remain even though it straddles two lots. Presumably the structure may also be put to uses that are permitted to straddle two lots, or at least are not prohibited as a residence is here.

Conclusion

Noncomplying structure status does not exempt uses in a building from regulation. Nonconforming structure status simply means that a use or structure that was established when lawful, but which would now be prohibited, may continue. The use within the structure would still be subject to local ordinances and other laws. Even a permitted use in a noncomplying structure must comply with ordinances governing the use. Allowing a residence in the dairy structure would violate a city ordinance prohibiting more than one dwelling on a lot. Therefore, the structure may not be used as a residence, even if it is entitled to noncomplying structure status.

Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

¹⁷ The corner lot does not meet the minimum area for the R-1-14 zone. But, as has already been discussed, the corner lot has been granted nonconforming status, and so a home could be located there.

¹⁸ Note that the result would be the same even if the dairy structure completely complied with all of the City's requirements. The structure could not be used as a residence if there were two dwelling structures on the same lot, regardless of whether one of the structures was noncomplying.

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.

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 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. Thus, the attorney fees provisions, like the entire Advisory Opinion process, should be viewed as a tool to avoid litigation.

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:

Kyle Gubler
City Administrator/City Recorder
City of LaVerkin
435 North Main
LaVerkin, UT 84745

On this 29th Day of November, 2013, 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