Advisory Opinion #9

Parties: James Bean and Salt Lake City

Issued: December 16, 2006

TOPIC CATEGORIES:
E: Entitlement to Application Approval (Vesting)
R(v): Other Topics (Interpretation of Ordinances)

The City's required setbacks were defined precisely, and the City had no discretion to approve a structure that did not comply with the setbacks. The Property Owner could rely upon the representations made by the City's inspector that the foundations were properly located and complied with the required setbacks. Zoning estoppel should therefore prohibit the City from claiming that the foundation violated the required setback. Certain types of architectural features could encroach into a setback, but a building's entire story did not qualify under the City's ordinances

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

Advisory Opinion

Advisory Opinion Requested by:	James Bean
Local Government Entity:	Salt Lake City
Applicant for the Land Use Approval:	James Bean
Project:	Single Family Home 518 Koneta Court
Date of this Advisory Opinion:	December 16, 2006

Issue: Can Salt Lake City require Bean to alter a residence under construction to comply with minimum side and rear yard setback requirements provided for in the land use ordinances?

Review:

The request for an advisory opinion in this matter was received by the Office of the Property Rights Ombudsman on September 6, 2006. A letter with the request attached was sent by certified mail, return receipt requested, to Salt Lake City on September 6, 2006. The letter was addressed to Kendrick Cowley, City Recorder, at the address shown on the Governmental Immunity Act Database at the Utah State Department of Commerce, Division of Corporations and Commercial Code as required by statute.

After the City officials received the letter I discussed with Lynn Pace, Deputy City Attorney for Salt Lake City the issue about who would prepare this advisory opinion and was advised that the City did not object to the opinion being prepared by the Office of the Property Rights Ombudsman. As lead attorney in that office I have proceeded to prepare the opinion with that understanding.

During the preparation of this opinion, I discussed the matter with Jim Bean, the applicant, on a number of occasions. I also exchanged a number of email communications and had a series of phone calls with Lynn Pace; Doug Wheelright, Deputy Planning Director for Salt Lake City; and Orion Goff, Building Services and Business Licensing Director for Salt Lake City. I attended the administrative hearing held on Thursday, October 4, 2006 and the planning commission meeting where the Bean subdivision proposal was heard on November 29, 2006. I listened to and made note of all public comments received on those occasions.

Many documents were reviewed prior to completing this advisory opinion, including the following which are relevant to the issue raised here:

1. Building permit drawings stamped by Salt Lake City Corporation Building Services on 7/26/02 and shown as related to permit number 175125.
2. Salt Lake City Corporation Building Permit Inspection Listing dated 8/13/2003 for permit ID 175125. Shows a series of inspections with notes by the inspector for each inspection beginning 7/29/02 and ending 3/28/2003.
3. Inspection report dated July 30, 2002 by Richard Nielson, Salt Lake City Inspector.
4. Inspection report dated August 6, 2002 by Richard Nielson, Salt Lake City Inspector.
5. Letter dated October 21, 2002 from Harvey Boyd, Deputy Director, Building Services and Licensing, Salt Lake City, to Jim Bean. By this letter Jim Bean was ordered to stop work until utility and design issues were resolved.
6. Letter dated November 22, 2005 from Douglas Wheelwright, Deputy Planning Director for Salt Lake City, to Jim Bean.
7. Survey of Bean property dated 7-26-06 by Bush and Gudgell, Inc.
8. Email memo from Alexander Ikefuna, Director of Planning, Salt Lake City, to Doug Wheelwright, Deputy Director, dated August 7, 2006.
9. Email memo from Orion Goff to Alexander Ikefuna dated August 29, 2006.
10. Memo dated September 13, 2006, from Orion Goff to Louis Zunguze, Director of Community Development, Salt Lake City, and Brent Wilde, Deputy Director.
11. Letter dated October 4, 2006 from Orion Goff, Building Services and Business Licensing Director, Salt Lake City, to James Bean.
12. Letter dated October 4, 2006 from A. Louis Zunguze, Director of Community Development, Salt Lake City, to James Bean.
13. Survey of Bean property dated 11-1-06 by Bush and Gudgell, Inc.
14. Letter dated December 1, 2006 from Larry Butcher, Development Review Administrator, Salt Lake City Building Services, to Jim Bean.
15. Board of Adjustment Staff Report, undated, prepared for the December 18, 2006 hearing of the Salt Lake City Board of Adjustment and delivered to me via email transmittal on the afternoon of December 14, 2006. No exhibits were attached to this electronic transmittal.
16. Salt Lake City Ordinances Section 21A.24.100(E) SR-3 Special Development Pattern Residential District: Minimum Yard Requirements.
17. Salt Lake City Ordinances Section 21A.36.020 Conformance with Lot and Bulk Controls and Table 21A.36.020B Obstructions in Required Yards.

Assumed facts:

1. James Bean is the owner of the properties located at 518 and 524 South Koneta Court, Salt Lake City. There is a residence at number 524, but prior to Bean's obtaining ownership the lot at 518 was vacant.

2. In the summer of 2002, Bean submitted plans for a building permit to build a residence at 518 South Koneta Court, which was approved as permit ID number 175125 on July 26, 2002 by Salt Lake City Building Services.

3. On July 30, 2002, Richard Nielson, acting as a Salt Lake City inspector, signed an inspection report on permit no. 175125 and noted: "24" x 10" continuous footings North, South and West wall elevations. Okay to pour."

4. On August 5, 2002, Nielson issued a stop work order with the note: "Stop work order issued. Violations. Need Engineering given to Larry Lincoln. I want survey done prior to pouring foundation. Prior violations were not corrected. Will need to install an enclosed concrete electrode No. 4 copper wire 24' in foundation for grounding. Do not pour foundation."

5. On August 6, 2002 at 9:30 a.m. Nielson again noted in an inspection report "It is necessary to have a survey done prior to pouring foundation."

6. On August 6, 2002, Nielson again signed an inspection report and noted: "Setbacks were checked from new survey hubs. North South and West foundation walls are ok to pour. Installing no. 4 grounding wire in bottom of wall 20' long."

7. During August of 2002 and part of 2003 work on the residence continued. As shown on the approved plans, part of the construction was to prepare a concrete structure at approximately ground level. A manufactured home was then placed above that structure as part of a second storey.

8. After the residence was enclosed and roofed, a stop work order was issued by the City. One of the issues involved in the stop work order was whether Bean had the legal right to install water lines in the street to service the residence then under construction.

9. For the next several years litigation was commenced involving Bean, the City, and third parties, which culminated in a resolution of the dispute that would allow utilities to be provided to the Bean residence.

10. After the litigation was finished, Bean again sought to commence work on the residence. He was told that a previous illegal subdivision of the properties had to be cured by submitting a subdivision application to the City for approval.

11. On November 22, 2005, Doug Wheelwright sent a letter to Bean outlining several requirements which would need to be complied with to approve the subdivision.

12. One of the requirements in the letter was that Bean produce "a surveyed site plan of the two structures, accurately located upon the two lots in your subdivision request."

13. A survey dated July 26, 2006 prepared by Bush and Gudgell Engineers was reviewed by the City to determine if Bean had met the requirement. The survey indicated that the new residence under construction was located 3.6 feet from the North property line and 14.3 feet from the West property line.

14. The Bean properties are located in the SR-3 Residential District under the Salt Lake City land use ordinances. In this zone, the setback requirements provide that a side yard must be a minimum of 4 feet wide and a rear yard must be at least 15 feet wide.

15. On October 4, 2006, Orion Goff, Building Services and Business Licensing Director, Salt Lake City, sent a letter to Bean indicating that the stop work order on his residence would not be lifted until the setback issues were resolved. The letter indicated that Bean must either alter the residence, appeal the decision to the Salt Lake Board of Adjustment, or seek a variance.

16. On October 4, 2006, A. Louis Zunguze, Director of Community Development and Zoning Administrator, Salt Lake City, also sent a letter to Bean stating the same requirements for lifting the stop work order as the Goff letter. This letter was deemed to be a land use decision subject to appeal under the relevant city ordinances.

17. Within 30 days of the date of these letters, Bean submitted an appeal from the decision of the zoning administrator to the Salt Lake City Board of Adjustments, seeking to avoid a strict imposition of the setback standards in this instance.

18. On November 1, 2006, Bean submitted another survey by Bush and Gudgell, which indicated that the sideyard to the North of the new residence was 3.9 inches wide and to the West the sideyard was 14.94 feet.

19. In a staff report prepared for the December 18, 2006 meeting of the Salt Lake City Board of Adjustments, the staff notes that the second storey of the Bean residence extends beyond the first level wall and into the required minimum rear yard an additional six inches. (The staff report erroneously states that the November 1 survey shows the rear yard as 14.3 inches. The survey instead shows a 14.94 inch rear yard.)

20. Bean, in revised construction drawings submitted to the Salt Lake City Building Department, indicates that the second level extends seven inches beyond the first level and into the rear yard.

Analysis:

In this matter, the Salt Lake City Zoning Administrator has interpreted the ordinances to require that Bean alter the residence under construction to comply with the required minimum setbacks. The only evidence of the extent of the encroachment that the zoning administrator mentions in his October 4 decision is the July 26 survey by Bush and Gudgell,

which showed a .4 foot (4.8 inches) shortfall in the sideyard setback. A November 1 survey shows that shortfall to be .1 foot (slightly more than 1 1/4 inch).

The rear yard setback shown on the July 26 survey was .7 feet short (just under 8 ½ inches) which was revised in the November 1 survey as .06 feet short, or ¾ inch. There are some differing opinions about the exact measurement as the surveyor evidently measured from the face of the concrete foundation and not from the face of the siding placed on the walls of the residence. In any event, it would appear that the ground level encroachment referred to in the October 4 letter is a few inches in either direction at the most.

Since the letter was delivered, the Planning Staff at the City has identified another encroachment created by a cantilevered second floor that extends beyond the rear wall of the first level of the Bean residence. That extension projects further into the rear yard area than the wall measured in the surveys and creates an encroachment issue that is not addressed in either the 7/26/06 or the 11/01/06 survey.

The issues addressed by this advisory opinion is 1) whether either the encroachment of an inch or a few inches of the first level foundation was properly interpreted by the zoning administrator to constitute a violation of the land use ordinances and thus justifies enforcement action to require that the building should be modified to cure the encroachment; and 2) if he second storey projection constitutes a violation of the land use ordinances and justifies the same enforcement action.

Standard of Review

Under relevant case law, the interpretation of a zoning ordinance is to be made first on the clear and unambiguous language of the ordinance; second, on the basis that ambiguities are to be resolved in favor of the use of land; and third, if necessary, on equitable grounds when harsh application of the ordinance works undue hardship.

In reviewing the decision by a land use official, there is no duty of deference to the person who first made the decision. According to relevant case law, when a challenge is made to the interpretation of an ordinance, the body or person acting to review the original decision is to determine what the correct interpretation of the ordinance would be. There is no requirement that the Board give any deference to the administrator or executive official making the determination. *Brown v. Sandy City Board of Adj*. 957 P.2d 207 (UT App 1998)

Clear and unambiguous language

The Salt Lake City land use ordinances are crystal clear with regard to set back issues. A person can search the ordinances and find no room for adjustments or accommodations on this issue, nor on many others, where specific standards are set. There do not appear to be any ambiguities. The zoning administrator's decision is therefore valid if the ordinance alone is the standard by which it is reviewed and there is no evidence of a tradition and practice of avoiding the harsh terms of the ordinance by routinely interpreting its provisions loosely and generously. Read strictly, however, that decision by the zoning administrator cannot be

overturned based on some discretion provided in the ordinance because there is none provided. Neither the first or second rules outlined in the preceding paragraph for reviewing land use decisions appear to be relevant in this case.

Unless the present situation justifies a decision by the Court to find some equitable remedy to resolve the matter, the decision by the zoning administrator must therefore be upheld. If an equitable remedy is available, it would most likely involve what the case law refers to as "zoning estoppel".

Zoning Estoppel

The basic elements of "zoning estoppel" are:

> "Estoppel is an equitable defense that requires proof of three elements: (i) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (ii) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act, or failure to act; and (iii) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act."

CECO Corp. v. Concrete Specialists, Inc., 772 P.2d 967, 969-70 (Utah 1989). The Utah courts have also added a fourth element:

> "While common law generally requires a balancing of the parties' equitable interests before awarding permanent injunctive relief, an exception is made when a defendant's encroachment is willful and intentional. . . . We have already determined that the same exception applies to willful and intentional zoning violations. . . This precedent is based on the doctrine that balancing the equities "'is reserved for the innocent defendant, who proceeds without knowledge or warning that he is encroaching upon another's property rights.'"

Johnson v. Hermes Associates 2005 UT 82 P31. (citations omitted) Clearly the courts have held that an individual should not be allowed to knowingly and intentionally ignore the law and then claim an estoppel defense to strict enforcement:

> "This court has set forth the circumstances in which a court may, at its discretion, apply a balancing of equities test instead of issuing a mandatory injunction. Under this test, the district court may in its discretion elect not to grant an injunction only "where an encroachment does not irreparably injure the plaintiff; was innocently made; the cost of removal would be disproportionate and oppressive compared to the benefits derived from it, and plaintiff can be compensated by damages." . . . Furthermore, "the benefit of the doctrine of balancing the equities . . . is reserved for the innocent defendant, who proceeds without knowledge or warning that he is encroaching upon another's property rights." If the defendant is not innocent, however, "equity may require [the property's] restoration, without regard for the relative inconveniences or hardships which may result from its removal."

Carrier v. Lundquist 2001 UT 105 P31. (Citation omitted). Based on these precedents, I must determine if there are equities that should be weighed in resolving the interpretation and nonconforming use issues involved in this matter and also come to some conclusions about the facts of the case.

Courts may use the doctrine of estoppel in rare cases to counter overly strict application of zoning laws:

> "Estoppel, waiver or laches 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.
>
> " . . . the court, in the exercise of its equitable powers, may deny injunctive relief against the violation of a zoning ordinance. An injunction will be denied where the granting of it would be inconsistent with basic principles of justice and equity, even though it is within the scope of relief available in equity courts to enjoin violations of zoning laws. . . .
>
> "When a municipal corporation seeks vindication of public rights by injunction, in a court of equity, it is on the same footing as any private person or corporation. An application for injunctive relief is addressed to the conscience of the chancellor, who may in the exercise of sound discretion either grant or deny the prayer as the circumstances require. The court will consider the equities between the parties and under some circumstances deny equitable relief, because a great injury will be suffered by defendant because of a mandatory injunction, with little or no benefit to complainant. . ."

Salt Lake County v. Kartchner 552 P.2d 136 (Utah 1976). In the current matter, it could be argued that the principles of zoning estoppel should be applied to both the foundation encroachment issues and the second level extension issues. I will discuss the foundation issues first.

Foundation encroachment issues:

1. Did Salt Lake City act to approve the structure as it was constructed?

The documents appear to clearly prove that the Richard Nielson, a Salt Lake City Building Inspector with years of experience, checked and approved the side and rear yard setbacks of the Bean residence before the foundations were poured. The inspection reports indicate:

On July 30, 2002, Richard Nielson, acting as a Salt Lake City inspector, signed an inspection report on permit no. 175125 and noted: "24" x 10" continuous footings North, South and West wall elevations. Okay to pour."

On August 5, 2002, Nielson issued a stop work order with the note: "Stop work order issued. Violations. Need Engineering given to Larry Lincoln. I want survey done prior to pouring foundation. Prior violations were not corrected. Will need to install an enclosed concrete electrode No. 4 copper wire 24' in foundation for grounding. Do not pour foundation.

On August 6, 2002 at 9:30 a.m. Nielson again noted in an inspection report "It is necessary to have a survey done prior to pouring foundation."

On August 6, 2002, Nielson, again signed an inspection report and noted: "Setbacks were checked from new survey hubs. North South and West foundation walls are ok to pour. . ."

2. Did the City later assert a claim that would be contrary to that affirmative act?

Clearly the October 4 letters from Goff and Zunguze reverse the position taken by the building inspector that the construction complied with the setback requirements of the zoning ordinance and impose a strict and severe remedy.

3. Did Bean rely on the City official's representation that the building was properly situated on the site?

Bean has asserted without contradiction that he relied on the building inspector's conclusion that the foundations were properly placed before instructing the contractor to place the concrete for the foundation walls.

4. Was Bean's reliance reasonable?

Based on the qualifications of the inspector, the use of a certified engineer to identify the lot lines, Bean's status as a layman in such matters, and the normal reliance placed on professionals in such contexts, it would seem unreasonable for Bean to <u>not rely</u> on the joint actions of the surveyor and building inspector. Indeed it is hard to imagine what else a property owner would do to establish the accuracy of the contractor's measurements once a surveyor and building official had certified the forms before authorizing the placement of concrete.

5. Does the violation of the ordinance work great injury to the City?

In his memo of August 29, 2006 to Alexander Ikefuna, Orion Goff states that "Building Services is willing to accept the minor encroachments into the setbacks and release the hold on the permit . . . if the Planning Division is willing to approve the application for the subdivision . . ."

In an email dated August 7, 2006, Ikefuna, who is the Director of Planning for the City says "The structure is already built; my question is what has been the practice in the past in addressing this type of issue? Six inches difference is not a lot to warrant having Mr. Bean go through all these processes . . ."

These City department heads did not deem five or six inch encroachments to be significant in August of 2006. By November, the newly fine-tuned surveys show that the actual encroachments may be two inches or less. Since the actual encroachments of the foundation walls have been found to be perhaps half as significant as was assumed in August, it would be no surprise that these department heads would find even less reason for the City to enforce the setbacks strictly.

If there were some compelling reason for the City to impose the setback standards strictly, surely these department heads would not have seemed so willing to forget this issue in August.

If the ordinances are strictly enforced against Bean, he would have to partially demolish his almost completed home. If he did so, he could rebuild it again a few inches from its present location, much as the approved building permit shows it. What significant benefit would be provided to the City from having the same structure reconstructed two or three inches from its present location?

6. Does the enforcement of the ordinance strictly work a great hardship on the property owner?

If the strict setback standards are enforced against Bean, he must remove his almost-completed residence and will incur significant cost to do so. The cost of demolition and reconstruction might approach all of the cost invested so far in the project, which has now taken more than four years.

This would seem to be a profound and obvious hardship that may justify some equitable relief. It may be claimed that he could recover the cost of his alterations from his surveying firm. This may be, but the time, hassle, and cost required to force his engineer to solve the problem would work a significant hardship even if he were to succeed. There is also no evidence that this matter arose out of anything other than a modest error by the surveyor or the building official. Surely such an innocent mistake of such slight proportion would justify no such severe sanction imposed on anyone.

7. Did the property owner act innocently?

Bean has provided credible commentary that he acted without any knowledge of the errors made in setting the foundation for his residence. He argues convincingly that he would not have had any motivation to knowingly move the residence a few inches off its proposed location as there would be no advantage in doing so. I have heard no evidence that Bean attempted to ignorantly set the foundations in a cavalier or negligent manner, but rather the documents provided by the City show that he followed the instructions of the building

official, hired a surveyor to string lines along the property lines, and did not pour foundation walls until Nielson had inspected and approved the setbacks specifically.

In the process of preparing this opinion, I specifically asked for any information that City officials have that would impugn Bean's claims that he acted innocently in the placing of the foundation walls. None has been provided or alleged to exist.

Conclusion – Foundation Encroachments

While the slight errors made here may have been those of the building official or the surveyor, it would seem counterproductive to continue to grind on these issues further no matter who was at fault. To uphold the decision of the zoning administrator would be inconsistent with basic principles of justice and equity.

The facts and equities of this matter entitle Bean to equitable relief. Although the ground level of the residence he is building encroaches an inch or three into the minimum side yard and rear yard setback, basic principles of justice and equity bar the City from enforcing these strict standards when Bean worked in good faith to do all the building official required him to do to verify the legal setbacks. The Bean residence is therefore legally placed on the lot as far as the foundation walls are concerned.

Since the structure as erected is not in strict conformance with the zoning regulations, it is a non-conforming structure under the common law. The right to continue the use of a non-conforming structure is a protected property right that cannot be unreasonably interfered with without the payment of just compensation. See *Rock Manor Trust v. State Road Commn.* 550 P.2d 205 (Utah 1976).

Second Level Encroachments Issue:

There was no specific certification by the building department with regard to the overhang of the second storey into the rear yard setback area. This condition is not protected by the principles of zoning estoppel. There was no specific approval granted to this violation of the setback requirements by the City before the encroachment was made and thus it was not created in reliance on some affirmative act by an agent of the City. It does not enjoy the same protected status that the location of the foundation walls enjoys.

In the Salt Lake City Land Use ordinances, at table 21A.36.020B, obstructions in required yards are spelled out specifically. There are several architectural features of buildings described there which are permitted to extend into minimum yard distances. Several would appear to be more intrusive than the 6 or 7 inch projection of Beam's second storey. But that is not the issue in this matter. The ordinance is to be enforced as written unless the elements of zoning estoppel are present.

There have been building inspections made and approvals given after the second level encroachment existed, but not with the specificity and prior affirmations that were present in the case of the foundation encroachment.

Conclusion: Second Level Encroachments Issue:

Where this condition exists prior to the issuance of a certificate of occupancy, the City would not be acting illegally to require its removal. On the other hand, if the Board of Adjustment or Zoning Administrator found that allowing the present configuration of the building would be consistent with prior interpretations of the ordinances and otherwise not be adverse to the City's interest, then it might be allowed it to remain.

Craig M. Call, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, 13-42-205. 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

Utah Code Annotated Section 13-43-206(10)(b) requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with U.C.A. Section 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:

Kendrick Cowley, City Recorder
Salt Lake City Corporation
451 South State Street, Room 415
Salt Lake City, UT 84111

On this eighteenth day of December, 2006, 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.

_____

Craig M. Call, Office of the Property Rights Ombudsman