

Advisory Opinion #52

Parties: Kent Dunkley, Cache-Rich Association of Realtors and the City of Logan

Issued: September 25, 2008

TOPIC CATEGORIES:

Q: Nonconforming Uses and Noncomplying Structures

R(v): Other Topics (Interpretation of Ordinances)

A local government does not forfeit the power to enforce an ordinance simply because it has not actively enforced it in the past. Even if a violation has been allowed for some time, the use is not validated. In order to qualify for nonconforming use status, a property use must be established when it was allowed in the zoning ordinance.

DISCLAIMER

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



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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by: Kent Dunkley
Cache-Rich Association of Realtors

Local Government Entity: Logan City

Project: Logan City Enforcement of Parking Strip Ordinance

Opinion Authored By: Su J. Chon, Attorney
Office of the Property Rights Ombudsman

Date of this Advisory Opinion: September 25, 2008

Issue

Can the City enforce the ordinance prohibiting parking in the parking strip when it has not enforced the ordinance for some time?

Is the use of the park strip for parking a legal nonconforming use?

Summary of Advisory Opinion

The City can enforce the long-standing ordinance prohibiting parking in the park strip. Failure to enforce the ordinance for a time does not cause the City to waive or forfeit its right to enforce the ordinance in the future.

The use of the park strip for parking by property owners is not a legal nonconforming use. A legal nonconforming use must be legal when the use was established. Absent a showing of legal use prior to the ordinance, the use cannot qualify as a legal nonconforming use.

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.

The request for this Advisory Opinion was received from Kent Dunkley on May 15, 2008. As provided in statute, a letter with the request attached was sent via certified mail, return receipt requested, to Lois Price, City Recorder, at 255 N. Main, Logan, Utah 84321. The return receipt was signed and received on May 16, 2008, indicating that it had been received by the City. Kymber D. Housley, City Attorney for Logan City, responded by mail on or about June 5, 2008.

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, submitted by Kent Dunkley, and received by the Office of the Property Rights Ombudsman, May 15, 2008.
2. Letter dated June 5, 2008 from Kymber D. Housley, City Attorney for Logan City, with attachments.

Statutes & Ordinances

1. Logan City Code, §10.52.010.
2. Logan City Land Development Code, §17.39.050.
3. Logan City Land Development Code, §17.39.140
4. Logan City Land Development Code, §17.59.040
5. Utah Code Ann. §10-9a-103(28).
6. Utah Code Ann. §10-9a-511.

Background

Since 1952, Logan City (the “City”) has had an ordinance in its code prohibiting the parking of vehicles on park strips within the City (the “Ordinance”).¹ The park strip is the area between the road and the sidewalk. It appears that, for many years, the City did not enforce the prohibition against parking on park strips. Individual park strips were often converted to parking spaces (allowing for perpendicular or front-in parking), in some instances with the help of the City.² Many property owners parked or allowed the perpendicular parking of vehicles in the park strip area.

¹Logan City Code, §10.52.010. The enactment date of the Ordinance was provided in a telephone conversation by Teresa Harris, City Recorder for Logan City. The City Recorder is “the keeper of the community archives and is responsible for the preservation and management of official records”. See the Logan City website, <http://www.loganutah.org>.

² Letter of Kent Dunkley, dated April 24, 2008.

The City states that the issue of parking in the park strip has been ongoing because of residents' concerns.³ The City reports that it began addressing these issues in 1998. In 2007, after receiving public comment, the City determined that it would make parking enforcement a priority, and no longer allow parking in park strips. The City also decided to give the property owners one year notice of the City's intent to enforce the park strip ordinance.⁴

Recently, the City announced that it had approved a Park Strip Renovation Plan ("Park Strip Plan") which was adopted by the City Council on or about May 13, 2008. The Park Strip Plan requires that perpendicular parking spaces be removed from park strips and no more than 30% of the front yard could be paved.⁵ This would also eliminate any additional parking areas that were not in front of the garage of a home. The Park Strip Plan provided that all property owners and residents in single family residential areas were to be notified when the City would come into their neighborhoods to remove gravel, pavement and/or bridges over gutters within the City right of way.⁶ The removal of the gravel, pavement and/or bridges would be at the City's expense paid by CDBG grant funds. The property owners would incur some expense to restore landscaping in the park strip.⁷

Initially, under the Park Strip Plan, vehicle owners would not be ticketed.⁸ Parking enforcement would begin after the City had removed bridges, paving and/or gravel from the park strip.⁹ Parallel parking would be allowed on the street. Property owners would be required to apply for permits to park on the street and compliant property owners would have the permit and application process streamlined for them.¹⁰ Following the removal of gutter bridges, gravel and/or paving, the City would begin to ticket offenders parking in the park strip.¹¹ The Park Strip Plan would begin in single family residential areas and would eventually be enforced in all areas of the City, including multi-family, commercial and industrial areas.¹²

Kent Dunkley, individually and on behalf of the Cache-Rich Association of Realtors (collectively, the "Applicant") filed this Request for Advisory Opinion questioning whether the City had waived its right to enforce the ordinance against parking in the park strip by its failure to enforce over the years. The Applicant also requested an opinion regarding whether the use of the park strip for parking may constitute a legal nonconforming use.

³ Letter of Kymber D. Housley dated June 4, 2008.

⁴ It is not clear when the notice was sent to the property owners regarding the Park Strip Plan or when the one year notice period commenced.

⁵ See Park Strip Plan, Paragraph 12. Paving of other areas of a particular lot would be restricted to 50% of the back yard and 100% of any side yards.

⁶ See Park Strip Plan, Paragraphs 4 and 15; and Letter to Logan City Resident or Property Owner.

⁷ See Park Strip Plan, Paragraph 8. Landscaping in the park strip is required under Logan City Land Development Code, §§17.39.040 and 17.39.140.

⁸ See Park Strip Plan, Paragraph 4.

⁹ See Park Strip Plan, Paragraph 6.

¹⁰ See Park Strip Plan, Paragraphs 3, 9, and 10.

¹¹ See Park Strip Plan, Paragraph 6. Parking enforcement thereafter will continue on a complaint basis.

¹² See Park Strip Plan, Paragraph 1.

Analysis

I. The City Has Not Waived or Forfeited Enforcement of its Ordinance Prohibiting Parking in the Park Strip.

The City has not waived or forfeited its ability to enforce its Ordinance¹³ prohibiting parking in the park strip due to lack of enforcement. The City has statutory authority to “regulate the use of streets, alleys, avenues, sidewalks, crosswalks, parks and public grounds, prevent and remove obstructions and encroachments thereon, and provide for the lighting, sprinkling and cleaning of the same.” UTAH CODE ANN. §10-8-11 (1953). Accordingly, the City may remove any improvements upon its right of way that do not comply with the Ordinance.

Although it appears that the City has not enforced its prohibition against parking in the park strip in the past,¹⁴ the City has determined that it will begin enforcement after a notification period to property owners. A lack of past enforcement of an ordinance by a City does not render that City unable to enforce that ordinance in the future: “[F]ailure to enforce zoning for a time does not forfeit the power to enforce.” *Town of Alta v. Ben Hame Corp.*, 836 P.2d 797 (Utah Ct. App. 1992) (citing *Salt Lake County v. Kartchner*, 552 P.2d 136 (Utah 1976)).¹⁵ This is because the failure of City employees charged with ordinance enforcement to enforce an ordinance does not abrogate or usurp the authority of the legislature body to enact the ordinance. *Kartchner*, 552 P.2d at 138 (“This governmental power usually may not be forfeited by the action of local officers in disregard of the ordinance.”). Therefore, although the ordinance has not been enforced in the past, the ordinance remains effective as an indication of the City’s legislative intent, and the City may enforce the ordinance in the future.¹⁶

Moreover, the Applicant raises an issue whether the City’s enforcement of the Ordinance is discriminatory because it focuses on certain areas of the City. If the City chose to selectively enforce the Ordinance against certain property owners, this action could be deemed discriminatory. However, the City has indicated in its Park Strip Plan that City will eventually enforce the Ordinance in all areas of the City, including commercial, multi-family, and industrial.

¹³ See Logan City Code, §10.52.010 regulating the use of the park strip by prohibiting parking thereon.

¹⁴ The actual extent of enforcement of the park strip ordinance has not been established. It is unknown whether the City has ever enforced the ordinance, whether the City enforced the ordinance for a time and then stopped enforcement, or whether the City enforced the ordinance sporadically over time. Although none of these scenarios are determinative to the outcome of this Advisory Opinion, it will be assumed that the Ordinance has never been enforced by the City.

¹⁵ These cases specifically refer to zoning provisions, and the ordinance in the present case is not a zoning ordinance. Nevertheless, no reason can be found to prohibit extending the reasoning in these cases to the park strip ordinance. See also *Chapman v. Lincoln*, 84 Neb. 534 (Neb 1909) (“[T]he city [is not] stopped by reason of its failure to enforce the ordinances in the past, or by reason of its permission of such violation, from now insisting upon a strict observance of its ordinances.”); *Tucson v. Landry*, 108 Ariz. 106 (Ariz. 1972) (holding that the City was not estopped from enforcing its ordinance against an adult business in the future because it had failed to enforce it for a few months).

¹⁶ In addition, under Utah law, reliance on the City’s lack of enforcement does not estop future enforcement of the Ordinance: “Mere silence or inaction will not operate to work an estoppel.” *Town of Alta*. at p.15. That is not to say that a government entity will be held completely harmless for the failure to enforce an ordinance – only that failure to enforce an ordinance does not render that ordinance unenforceable in the future. Reliance on the failure to enforce an ordinance must be exceptional and seems to mitigate penalties for past violations rather than prohibit future enforcement. See generally *Kartchner*, 552 P.2d at 138.

Assuming that the City actually does so, enforcement of the Ordinance will not be discriminatory. The City's failure to enforce the ordinance in the past does not waive, forfeit, or estop the City's ability to enforce its ordinance in the future.

II. The Use of the Park Strip for Parking is Not a Legal Nonconforming Use of Such Property.

In order for a land use to be a legal nonconforming use, it must meet three criteria: first, the use must have legally existed before its current land use designation; second, the use has been maintained continuously since the time the land use ordinance changed; and third, because of subsequent land use ordinance changes, the use does not conform to the regulations that now govern the use of the land. *See* UTAH CODE ANN. §10-9a-103(28). The property owner has the burden of establishing the existence of a legal nonconforming use. UTAH CODE ANN. §10-9a-511. Accordingly, establishment of a legal nonconforming use must be done on a case-by-case basis. According to the City, the Parking Strip Ordinance was enacted in 1952. In order to establish a legal nonconforming use to park in the park strip, a resident would have to establish that prior to 1952, that resident's park strip was used for parking, and has been used for parking continuously since that time. Although such a showing may be possible, it will be patently difficult to do. Nothing has been provided to establish such facts in any property. Absent evidence satisfying the elements of UTAH CODE ANN. §10-9a-103(28), parking in the park strip does not qualify as a legal non-conforming use.¹⁷

Conclusion

The City may enforce its Ordinance prohibiting parking in the park strip. The failure of the City to enforce the Ordinance previously does not waive nor estop the City from enforcing the Ordinance.

Because of the difficulty in establishing use of park strips for parking prior to 1952, and continuous use of the park strip for parking since, it is unlikely that many property owners will be able to establish that their use of the park strip for parking is a legal nonconforming use. Absent such a showing, parking in the park strip cannot be a legal nonconforming use.

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

¹⁷ Parking in the park strip may not qualify as legal nonconforming use even if such a showing can be made. Parking in the park strip may not be considered a "land use" that would qualify as a nonconforming use. Parking may be an incidental use of land that is regulated under other aspects of the City's police power. This Advisory Opinion expresses no opinion regarding whether the parking in the park strip is a land use that would qualify for legal nonconforming use status.

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 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/her understanding of the relevant law, he/she 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/her interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

MAILING CERTIFICATE

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

Lois Price
City Recorder
255 N. Main
Logan, Utah 84321

On this ____th day of September, 2008, 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