Advisory Opinion #57

Parties: Ronald Perry and City of Ogden

Issued: November 24, 2008

TOPIC CATEGORIES:
Q: Nonconforming Uses and Noncomplying Structures
R(viii): Other Topics (Interpretation of Ordinances)

Phasing out, or amortizing, nonconforming uses is authorized by the Utah Code. A property owner is given a reasonable amount of time to recover an investment in a nonconforming use. An amortization period may be required by a local government, but property owners must be given a reasonable amount of time to recover their investments. While a local government may require amortization of nonconforming uses and may impose a reasonable phase-out period, it may not cut off the availability of an amortization period.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Required Amortization of Nonconforming Use

Advisory Opinion Requested by:	Ronald Perry
Local Government Entity:	Ogden City
Applicant:	Ronald Perry
Project:	Duplex (Nonconforming Use)
Date of this Advisory Opinion:	November 24, 2008
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

May a local government require a property owner to amortize a nonconforming use, but limit the opportunity to apply for the amortization period?

Summary of Advisory Opinion

A local government may impose occupancy limits which distinguish between family units and unrelated individuals living together. Such limits promote legitimate government interests such as reducing density and areas with high numbers of transient residents. A local government may require the amortization, or phasing out, of nonconforming uses over a reasonable period of time in which the property owner is entitled to recover any investment in the nonconforming use. If amortization is required, it must be made available to all affected property owners, and that availability may not be arbitrarily cut off by the local government.

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 ANN. § 13-43-205. The 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 Ronald Perry on September 23, 2008. A copy of that request was sent via certified mail to Cindi Mansell, Ogden City Recorder. The City submitted a response to the Office of the Property Rights Ombudsman, which was received on October 8, 2008. A copy of the City's response was mailed to Mr. Perry.

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, filed September 23, 2008 with the Office of the Property Rights Ombudsman by Ronald Perry, with Attachments.
2. Response from Ogden City, submitted by Mark H. Stratford, Assistant City Attorney, received on October 8, 2008.
3. Materials submitted by Mr. Perry related to amendment of the City's definition of "family," including examples of similar ordinances from other local governments.

Background

In 1992, Ronald Perry acquired a duplex near Weber State University in Ogden. The structure had been built around 1960, and had been used as a duplex since that time. A few years after he purchased the building, Mr. Perry renovated it, expanding the number of bedrooms to five in each unit. He also completed some renovations and repairs in 2005. Since the units are near the university, Mr. Parry usually has not had any problem finding tenants.

In 2004, Ogden City amended its ordinances, changing the definition of "family" to the following:

> 1. Two (2) or more individuals related by blood, marriage, adoption, guardianship, or other duly authorized custodial relationship;
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> 2. Two (2) unrelated individuals and any children of either such individuals, if any; or
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> 3. A group of not more than three (3) unrelated individuals including in such number any domestic staff residing on the premises.

OGDEN CITY CODE, § 15-2-1. According to the City, this ordinance would apply to Mr. Perry's units, restricting the number of tenants to three. Another provision of the City Code, which was apparently enacted at the same time, allowed existing units renting to more than three tenants to

continue leases to the existing tenants. As those "original" tenants moved out, however, the units had to comply with the new occupancy limit.[1] Since Mr. Perry's tenants are primarily college students, there is a fairly rapid turnover in his units; so, after very short time, he was required to adhere to the reduced occupancy level.

In February, 2006 Mr. Perry petitioned for amendments to the City Code which would allow him five tenants.[2] As a result of his petition, the City amended its ordinance, providing an amortization period for landlords to recoup their investment:

> Conditions: The director [of the City's Community Development Division] shall grant an owner of property affected by subsection A [*i.e.*, the Transition Provision] of this section an extension of time for complying with the requirements of such subsection if:
>
> a. The Owner:
>
> (1) By September 20, 2006, files a notice of intent to apply for a time extension as provided in this subsection B, and
>
> (2) By June 20, 2007, files a complete application for an extension of time as provided in this subsection B; and
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> b. The owner's application for an extension of time demonstrates by a preponderance of evidence that:
>
> (1) The nonconforming use which is the subject of the application was legally established as of July 27, 2004, and
>
> (2) The owner is unable to recover prior to January 27, 2006, the amount of the owner's investment using the formula provided in subsection B2 of this section.

Id. § 15-13-31(B).[3] According to the City, Mr. Perry was aware of this provision, but did not submit a complete application requesting an amortization calculation before June 20, 2007, as

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[1] *See* OGDEN CITY CODE, § 15-13-31, "Transition Provision for Application of Definition of Family". This "Transition Provision" amortized or eliminated the pre-existing higher occupancies through tenant turnover. For example, if a unit had 5 tenants on the effective date of the new family definition, those 5 tenants could continue to live in the unit. If one of them moved out, however, the landlord could not find a new tenant, but had to rent to the four. If another of the "original" tenants moved out, the landlord would not be able to replace the tenant, but would have to comply with the 3-person limit from that time forward.

[2] Mr. Perry proposed creating "Single College Student Housing" or "Multifamily Single Student Housing" zones near the Weber State Campus, which would allow higher occupancy. As an alternative, he proposed repealing the Transition Provision enacted in 2004, allowing existing units to be "grandfathered" as nonconforming uses.

[3] The Ordinance authorizes an amortization period, based on the present value of the owner's investment, minus the "compliance value" (the appraised value of the property, based on compliance with the new occupancy requirements). The difference is identified as the "residual value." The amortization period is based on a reasonable

provided in the ordinance. Thus, the City states that Mr. Perry has forfeited his right to the amortization period, and must comply with the three-person occupancy limit.

Analysis

I. The City May Restrict the Number of Unrelated Tenants.

The City may choose to define "family" with any reasonable definition, including distinguishing between related and unrelated individuals. Local governments may enact ordinances which are intended to promote the health, safety, and welfare of residents. The action chosen merely needs to be reasonable. "Though a municipality may have a myriad of competing choices before it, the selection of one method of solving the problem in preference to another is entirely within the discretion of the [city]; and does not, in and of itself evidence an abuse of discretion." *Bradley v. Payson City*, 2003 UT 16, ¶ 24, 70 P.3d 47, 54.

A local government may promote the health, safety, and welfare of its community by choosing to reduce density and encourage longer-term residency within its jurisdiction. The government may decide to impose occupancy limits on unrelated individuals which reduces population density, and discourages a transient, changeable population (such as college students). In *Stegman v. City of Ann Arbor*,[4] a city ordinance somewhat similar to Ogden's defined "family" as any number of related individuals, four persons plus their children, a "functional family" living as single housekeeping unit, or six unrelated individuals. The Michigan Court of Appeals rejected an argument that the ordinance unfairly placed a restriction on unrelated individuals that was not imposed upon family units. The court held that the city could encourage "traditional" family units, as well as a more stable population, by limiting the number of unrelated individuals who could live together.[5] The Utah Supreme Court has also rejected an argument that a local ordinance prohibiting "accessory" apartments unless the owner also resided on the property violated equal protection by distinguishing between occupying and non-occupying owners. The Court agreed that the ordinance was a legitimate means to improve the quality of residential neighborhoods.[6] Reasonable occupancy limits promote the interests of a community, and therefore are within a local government's zoning authority. Such limits, by themselves, do not violate constitutional provisions or fair housing laws, because there is no prohibition against distinguishing between traditional family units and unrelated individuals.[7]

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estimate of how long it would take the owner to recover the residual value, based on the expected income stream from the rentals.

[4] 540 N.W.2d 724 (Mich. Ct .App. 1995).

[5] It is noteworthy that the City of Ann Arbor is the home of the University of Michigan, and, obviously, a large population of college students.

[6] *Anderson v. Provo City*, 2005 UT 5; 108 P.3d 701

[7] Discrimination against "familial status" is prohibited by the Fair Housing Act, but the term only refers to families with children, not family composition. Occupancy limits may violate the Fair Housing Act if it is found that they impose an unfair burden on disabled persons. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995).

II. Local Government May Require Amortization of Nonconforming Uses.

The City may validly require property owners to amortize, or phase out nonconforming uses. The Utah Code provides that local governments may require "the termination of all nonconforming uses . . . by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of his investment in the nonconforming use, if any . . . ." UTAH CODE ANN. § 10-9a-511(2)(b).[8] This authority allows local governments to eliminate nonconforming uses, while protecting the investments made by property owners. "The goal of planning and zoning officials to eliminate nonconforming uses . . . without compensation has been achieved in many states through the concept of 'amortization' . . . ." EDWARD H. ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING (2005) § 78.18.[9]

The possible elimination of a property right without payment raises the obvious issue that requiring amortization may violate constitutional prohibitions against taking private property without compensation.[10] The Utah Court of Appeals has sanctioned an amortization program, and seemed to acknowledge that the concept of amortization was constitutionally valid. In *M&S Cox Investments, LLC v. Provo City*,[11] the Utah Court of Appeals validated a proposed amortization scheme, and held that there were no issues concerning an unconstitutional taking in that particular matter. *See id.*, 2007 UT App. 315, ¶ 26, 169 P.3d at 795.[12] Based on this language, and because the amortization ordinance at issue in *M&S Investments* is nearly identical to Ogden's, this Opinion concludes that the use of amortization to phase out nonconforming uses is constitutionally acceptable.[13] However, a specific amortization program or ordinance may still be prohibited by constitutional protections.

Moreover, local governments also possess the authority to require termination of nonconforming uses through an amortization process. The Utah Code authorizes local governments to "enact all ordinances, resolutions, and rules and . . . [the use of] other forms of land use controls and development agreements that they consider necessary or appropriate for the use and development of land." UTAH CODE ANN. § 10-9a-102(2).[14] This broad grant of authority includes the power to require property owners to amortize nonconforming uses, not just participate voluntarily.

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[8] *See also* UTAH CODE ANN. § 17-27a-510 (applicable to counties).

[9] "Amortization" in this sense is slightly different from the term used in accounting, and refers to a planned phase-out of a nonconforming use over a period in which the owner may reasonably expect to recover any investment in that use. It has been suggested that this process is more closely analogous to depreciation rather than "traditional" amortization. *See* THE LAW OF ZONING AND PLANNING § 74.18, n. 3

[10] *See* U.S. CONST., amend. V. ("nor shall private property be taken for public use, without just compensation"); *see also* UTAH CONST. art. I, § 22 ("Private property shall not be taken or damaged for public use without just compensation").

[11] 2007 UT App. 315, 169 P.3d 789

[12] It appears that the procedural history of the appeal precluded a full analysis of the takings question. "[W]e agree with the trial court that because the parties jointly asserted that the consolidated cases share common questions of law and because the amortization determination is reasonable and lawful, there are no remaining issues concerning an as applied unconstitutional taking." *M&S Investments*, 2007 UT App. 315, ¶ 26, 169 P.3d at 795. Although the amortization scheme was upheld, the overall question of whether amortization is a taking may still be unsettled.

[13] Other state and federal courts have concluded that the concept of amortizing nonconforming uses is constitutionally valid. *See* THE LAW OF ZONING AND PLANNING, §§ 74.19-20.

[14] *See also* UTAH CODE ANN. § 17-27a-102 (applicable to counties).

Otherwise, the purposes of an amortization scheme would be thwarted.[15] Thus, Ogden may require property owners to terminate nonconforming uses after a reasonable amortization period.

III. A Local Government May Require Amortization, but May Not Impose a Strict Time Frame for Property Owners to Either Obtain Approval or Forfeit the Nonconforming Use.

When amortization is required, a local government must give property owners full opportunity to participate in the phase-out period. A local government may not, therefore, impose a limited "time window" for property owners to either apply for approval or else lose the right to continue the nonconforming use. Allowing amortization only within a limited time frame is not consistent with the statute authorizing amortization, and may constitute a regulatory taking. The amortization period may start on the date the nonconformity began, even if the phase out period is determined after the nonconformity started.[16]

As has been discussed, the Utah Code authorizes amortization of nonconforming uses. The same statute also grants property owners the right to recover their investment in a nonconforming use within a reasonable time period. In order to fulfill the meaning and purpose of that statute, the right to a reasonable amortization period must be respected when the power to require amortization is invoked by a local government.[17] Many factors may go into the calculation of a reasonable time period for a particular use and a particular property, including the value of the individual investment that must be amortized. If the opportunity to apply for a reasonable amortization period is cut off on an arbitrary date, and the property owner is then required to comply with new zoning regulations without regard to the amortization period to which that owner was entitled, a taking may occur.[18] A nonconforming use is a type of vested property right, and denying that right without providing some form of compensation—either through direct payment or through a reasonable amortization period—is a taking, which is prohibited by the federal and state constitutions.

A local government may require a property owner to phase out a nonconforming use through an amortization period, which provides compensation to the property owner. It is also within a local government's police power to enforce compliance with an amortization program, possibly through fines or by implementing an amortization period applicable to that property, even though the property owner did not apply for one.[19] However, in order to preserve the right to

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[15] *See M&S Investments*, 2007 UT App. 315, ¶ 35, 169 P.3d at 797 (upholding a city's interpretation of its ordinances as "congruous with the meaning and purpose and amortization period.").

[16] If a great deal of time has passed since the nonconformity actually began, fairness may require that an amortization period be extended.

[17] *See id*, 2007 UT App. 315, ¶¶ 34-35 (Utah Court of Appeals upheld city amortization scheme, in part because it was consistent with the language and purpose of § 10-9a-511(2)).

[18] "A regulatory taking transpires when some significant restriction is placed upon an owner's use of his property for which justice and fairness require that compensation be given." *The View Condominium Owners Assoc. v. MSICO, L.L.C.*, 2005 UT 91, ¶ 31, 127 P.3d 697, 705 (citations omitted); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

[19] In other words, the City could determine the amortization period itself, using reasonably reliable investment and income values, and inform property owners that the period will be enforced. Property owners could be given a

recover investment costs granted by the Utah Code, as well as the respect the prohibition against taking of private property, a local government may not cut off any possibility of participation in an amortization scheme with an arbitrary date.

Ogden established an amortization scheme for landlords who were renting to more than three tenants. Property owners were given the opportunity to propose an amortization period based on investment costs and the expected income from the tenants.[20] However, the City's ordinance eliminates the opportunity to participate after June, 2007. After that date, a property owner with a qualifying nonconforming use must comply with the new tenant limitation. This is an impermissible restriction on a vested property right. The City must therefore allow all property owners an opportunity to propose a reasonable amortization period, or it must compensate any affected landlords.

Conclusion

The occupancy limits adopted by Ogden City allowing any number of persons in "family units" but limiting the number of unrelated individuals living together, are valid. Such limits promote the health, safety, and welfare of the community by reducing density and by encouraging residents who choose to dwell in the City for longer periods of time. Such limits are permissible, provided they do not impose unfair burdens on the disabled or other protected classes.

A local government may require that property owners amortize nonconforming uses by allowing them a reasonable time to recover any investment in the nonconforming use. Participation in an amortization scheme may be mandatory, and may be enforced through such means as fines or may be implemented by the local government itself.

If amortization is required, all property owners must be given full opportunity to propose a reasonable time to recover their investments. Arbitrarily cutting off the opportunity to apply for an amortization time frame, and requiring compliance with new zoning standards constitutes a taking of a vested property right, in violation of the federal and state constitutions.

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

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reasonable opportunity to challenge the calculation, and possibly revise the chosen amortization period. If the property owner persists in not participating with amortization, the City can enforce its own, and require compliance with the ordinance after the amortization period expires.

[20] There appears to be no problem with the formula adopted by Ogden's ordinance. It is easily understood, and can be applied to any affected properties. There may be other means to determine a reasonable amortization period, but the City has the discretion to choose any reasonable method. "Though a municipality may have a myriad of competing choices before it, the selection of one method of solving the problem in preference to another is entirely within the discretion of the [city]; and does not, in and of itself evidence an abuse of discretion." *Bradley v. Payson City*, 2003 UT 16, ¶ 24, 70 P.3d 47, 54.

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.

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:

Cindi Mansell, City Recorder
Ogden City
2549 Washington Blvd., Suite #210
Ogden, Utah 84401

On this _____ Day of November, 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.

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Office of the Property Rights Ombudsman