Advisory Opinion #84

Parties: Keith Warner and City of Clearfield
Issued: March 2, 2010

TOPIC CATEGORIES

Nonconforming Uses and Noncomplying Structures
Interpretation of Ordinances

The shed in question satisfies the City's definition of an "attached building," because it shares a common wall with the main building on the lot. The shed does not qualify for non-complying structure status, because it violated the City's setback ordinances when it was built. A building must conform to existing zoning standards in order to qualify for non-complying status once those standards change.

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

GREG BELL
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Keith Warner
Local Government Entity:	Clearfield City
Applicant for the Land Use Approval:	Keith Warner
Project:	Reconstruction of Storage Building
Date of this Advisory Opinion:	March 2, 2010
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

Did the City correctly determine that a shed was an "attached building," within the meaning of the City's ordinances?

Does the shed qualify as a non-complying structure, allowing the property owner to reconstruct the shed in the same location?

Summary of Advisory Opinion

The shed in question satisfies the City's definition of an "attached building," because it shares a common wall with the main building on the lot. The City's interpretation of its ordinance is therefore correct. The shed, however, does not qualify for non-complying structure status, because it violated the City's setback ordinances in place when it was built. A building must conform to existing zoning standards in order to qualify for non-complying status once those standards change. The property owner cannot rely on non-complying status to rebuild the shed in the same location. However, the property owner may apply for a variance of the setback requirement, which, if granted, would allow the shed to remain.

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. 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 Keith Warner on August 20, 2009. A copy of that request was sent via certified mail to Nancy R. Dean Clearfield City Recorder. The return certificate, indicating that the City received the copy of the Request, was received by the Office of the Property Rights Ombudsman on August 24, 2009. The City submitted a response on September 16, 2009. Both Mr. Warner and the City submitted additional materials.

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 August 20, 2009 with the Office of the Property Rights Ombudsman by Keith Warner
2. Response from Clearfield City, submitted on September 16, 2009, resubmitted on October 26, 2009, by Brian E. Brower, Attorney for Clearfield City.
3. Reply from Keith Warner, received September 22, 2009.
4. Reply from Clearfield City, received October 5, 2009.

Background

Keith and Marlene Warner own a home in Clearfield. The home was built before 1970, and a small storage shed or addition was constructed in 1972. This shed was attached to the side of the home, but was not otherwise connected to the house. The shed was about three feet from the property line, although the home itself complies with all setback requirements. The Warners used the shed for storage continuously until about 2006, when it was torn down. In 1997 or 1998, the weight from an unusually heavy deposit of snow damaged the roof of the shed. In spite of this damage, the Warners continued to use the shed until they decided to replace it.

The Warners state that they contacted the City and inquired about reconstruction of the shed in 2006.[1] According to the Warners, the City informed them a building permit was not required, because the structure was less than 200 square feet in floor area, and not higher than the home.

[1] The Warners state that the contact was made by Morgan Roberts on their behalf. The City has no record of this contact, and denies that it occurred.

Based on this representation, the Warners reconstructed the shed in the same place as the original, and used the original shed's concrete pad for the floor.

The Warners feel that the new shed is simply a continuation of a legal, non-complying structure. Since the old shed was damaged due to heavy snow, a replacement shed could be built on the same spot and still qualify for non-complying status. The new shed is nearly identical to the old one, although the Warners added electricity.[2]

In the early part of 2009, the City became aware that the Warners had reconstructed their shed. The City informed the Warners that they were required to obtain a building permit; and that the new shed could not be placed at that location, because under the current City Code, a main building cannot be closer than eight feet from a side property line. A detached accessory building may be located as close as one foot to a side yard, but must be at least six feet from the main building. In addition, the City states that since the shed has electricity, and was built on a foundation with footings, a building permit is required.

The City does not consider the shed to be an accessory building, but an addition to the home. However, the City claims that the original shed or addition did not qualify for non-complying structure status, because it did not meet the City's setback requirements that were in place when it was constructed in 1972.[3] That earlier code allowed that "[a]ny portion of a main building or appendage thereof which is designed, constructed, or used for accessory purposes shall be located as required for any other part of a main building . . .." CLEARFIELD CITY CODE, § 11-4-5(D) (in effect in 1972).[4] That section also provides that "[a]ll accessory buildings shall be located not less than fifteen feet from dwellings on adjacent property and one foot or more from the side or rear lot lines . . .." *Id.*[5]

The Warners dispute the City's position that the shed is an attached building, and not an accessory building. They also claim that, as an accessory building, the shed is entitled to non-complying status, as provided in § 10-9a-511 of the Utah Code.

Analysis

I. The City's Determination that the Shed is an Attachment to the Warner's Home is Correct.

Since the City followed the plain language of the definition found in its ordinance, its determination that the shed is an attachment to the Warner's home is correct. Statutory interpretation begins with the language of an ordinance. The "primary goal . . . is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." *Foutz v. City of South Jordan*, 2004 UT 75, ¶ 11, 100 P.3d 1171, 1174.

[2] There was a slight difference between the original shed and the new one. The Warners state that the old shed was approximately 180 square feet, and the new shed's floor area is 192 square feet.
[3] The language in effect in 1972 required a ten foot setback.
[4] It appears that the language was first enacted in 1958.
[5] A different rule applied to corner lots, which is not applicable here.

Section 11-3-3 of the Clearfield City Code defines an attached building as a "building connected by any one or more of the following: a common wall, a continuous wall, a continuous foundation or a continuous roofline." CLEARFIELD CITY CODE, § 11-3-3(A).[6] The Warner's shed is attached to the north side of their home. Even though the shed cannot be accessed from the interior of the home, and was built after the home was completed, it shares a common wall with the home. This clearly falls within the definition of an attached building, and the City's interpretation is correct.

The shed also was an attached building when it was built in the early 1970s. Although there was no definition of "attached building" in the materials submitted for this Opinion, the plain language of the City's ordinances supports the City's interpretation. The ordinance quoted above refers to "[a]ny portion of a main building or appendage thereof which is designed, constructed, or used for accessory purposes . . .." CLEARFIELD CITY CODE, § 11-4-5(D) (in effect in 1972). When the Warner's shed was originally built, then, it would have been governed by that provision, because it was an appendage to their home, and was constructed and used for accessory purposes. The City's interpretation that the shed is and was an attached building is therefore correct.

II. The Warner's Shed Does Not Qualify for Non-complying Status, and Must Therefore Conform to the City's Ordinance.

Because it violated sideyard setbacks when it was constructed, the Warner's shed does not qualify as a non-complying structure, and the City may require conformity with its ordinances. Nonconforming uses and buildings are afforded protection by the Utah Code. "[A] nonconforming use or noncomplying structure may be continued by the present or a future property owner." UTAH CODE ANN. § 10-9a-511(1)(a). However, a non-complying structure is a building that:

> (a) legally existed before its current land use designation;
>
> (b) 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(30).[7] Thus, even a structure which has been continuously maintained for several years but did not comply with local ordinances when it was first erected (*i.e.*, did not "legally" exist), cannot qualify for non-complying status. *See e.g.*, *Town of Alta v. Ben Hame Corp.*, 863 P.2d 797(Utah 1992).[8]

The Warner's shed cannot qualify for non-complying status, since it violated the City's setback requirements when it was built. In the early 1970s, when the shed was first built, the City's

[6] "Nonroofed accessory uses," such as patios, fences, and parking slabs are not considered attached buildings. CLEARFIELD CITY CODE, § 11-3-3(B).

[7] The comma after the phase "excluding those regulations" is found in § 10-9a-103(30), but is not in the corresponding section applicable to counties. *See* UTAH CODE ANN. 17-27a-103(34). The comma may possibly be an error that was overlooked when the subsection was enacted.

[8] "A nonconforming use may not be established through a use which from its inception violated a zoning ordinance. Such use has no lawful right to continue." *Ben Hame*, 863 P.2d at 802. The same analysis applies to a structure that violated a zoning ordinance from its inception.

ordinance required a minimum side-yard setback of ten feet for attached buildings.[9] The shed, however, was located about three feet from the side yard. It therefore did not comply with the City's setback requirements, and cannot be considered a non-complying structure.[10]

The City's current ordinance imposes an eight-foot sideyard setback, which is two feet less than the requirement from the early 1970s, when the shed was constructed. The shed, unfortunately, is approximately three feet from the side property line, which is still not acceptable. It is within the City's authority to require compliance, even though the violation has been long-standing.[11]

One possible alternative is for the City to grant the Warners a variance reducing the sideyard requirement. Variances are allowed in the Utah Code. *See* UTAH CODE ANN. § 10-9a-702. In order to receive one, a property owner must satisfy the five criteria established in § 10-9a-702(2)(a).[12]

Conclusion

The determination that the Warner's shed is an attached building correctly interprets the City's ordinance. The shed clearly falls under the definition of "attached building" in the current code, and the language of the former code also supports the conclusion. The shed is therefore governed by the provisions addressing attached buildings.

The shed does not qualify for non-complying structure. When it was built in the early 1970s, the shed violated setback ordinances. In order to by a "non-complying structure," a building must comply with local zoning ordinances, including setbacks, when it was built. The structure becomes non-complying when an ordinance change means that an existing building no longer conforms to the new requirements. That has not happened here. The Warner's shed was non-complying when it was built, and it remains out of compliance. The shed therefore cannot be considered a non-complying structure.

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

---

[9] The City correctly concluded that the shed was an attached building. *See* Section I, *supra*.
[10] Even if the shed were considered an "accessory building" (which is argued by the Warners) it still would have been out of compliance. An accessory building must be in a rear yard, at least six feet from a main building, and must be smaller than 150 square feet. Thus, the shed would not qualify for non-complying status, even if it were considered an accessory building.
[11] "Ordinarily a municipality is not precluded from enforcing its zoning regulations, when its officers have remained inactive in the face of such violations. The promulgation of zoning ordinances constitutes a governmental function. This governmental power usually may not be forfeited by the action of local officers in disregard of the ordinance." *Salt Lake County v. Kartchner*, 522 P.2d 136, 138 (Utah 1976)*; see also Ben Hame*, 836 P.2d at 802.
[12] This Opinion does not attempt an analysis of whether a variance should be granted, and should not be construed as requiring that the City grant a variance. The suggestion is offered as a possible way to reach a resolution.

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.