Special Issues and Topics

CHAPTER 12

1. Grandfathered (Nonconforming) Uses and Structures

Utah law recognizes that sometimes the law changes after a use is initiated and that to require an immediate compliance with the newly revised ordinance would be unfair.

A nonconforming use or structure is one that:

1. was legal when established (before the current land use ordinance);
2. has been maintained continuously since the time the land use ordinances changed; and
3. because of subsequent zoning changes, does not conform with the land use ordinances that now govern the land.[1]

If a use or structure is legally nonconforming, then it may continue.[2] A nonconforming use might be a house in a commercial zone or a business in a residential zone. It might be animals in a housing area or involve a lot that was originally created legally but is now smaller than allowed in the zone. If a vacant residential lot was legally created in the first place, building permits should be allowed even if the lot could not be created under the current ordinances, as long as the use of the lot does not create a significant threat to health and safety.

Difficulties arise when a grandfathered use that has been in place for some years is challenged. Sometimes it is difficult to prove whether the use was ever legal. For example, in college communities, some houses were divided into apartments, but often the required building permits were not issued to make the changes.

Are they legally grandfathered uses? Probably not. If you have a nonconforming use, be sure to document it, with signed and notarized affidavits, by those who remember its origins while they are still around to make a statement. Some cities have adopted "legalization" processes where those who own nonconforming uses must prove the

legality of their use and, for doing so, get a certificate that puts their minds at ease about future enforcement.

An undocumented nonconforming use or an originally illegal use that continues, is a problem waiting to happen. Don't buy one, sell one, or rest thinking one is safe and secure unless it is well documented and/or legalized.

If a nonconforming use or non-complying structure is destroyed by fire or casualty, it may be rebuilt, even if there is an ordinance providing that it cannot.[3] In 1976 the Utah Supreme Court stated:

> We are of the opinion that even had this barn been prostrate in ashes in complete destruction, its soul, or Phoenix, if you will—a continuing nonconforming use—can rise and live on —unless the barn owner does not rebuild within a reasonable time—as required under the statute.[4]

This power plant in Logan Utah was deemed a nonconforming use even though it was city-owned. In order to expand the use, the city was required to obtain the permission of its own planning commission, just as would any other owner of a nonconforming use who seeks to enlarge the use.

There also is a provision in state law allowing a community to adopt an "amortization" process whereby nonconforming uses may be phased out over sufficient time to allow owners to recoup their investment in the use. These are allowed by statute and have been upheld by the Utah Court of Appeals in a case that allowed the City of Provo to amortize nonconforming student housing uses and restore single-family uses near Brigham Young University.[5]

The planning commission or other land use authority or appeal authority is often assigned the regulation of nonconforming uses by the legislative body, and can manage their establishment, restoration, extension, alteration, or substitution.[6]

Remember that the owner of a nonconforming use does not have the right to maintain a nuisance or significant threat to health or safety, even if it was once legal.[7] If the use is abandoned for a year, it lapses and thereafter becomes an illegal use which may be removed or abated as if the use were never legal. The same would apply to a non-complying structure that was destroyed or demolished and not rebuilt before it was considered abandoned under the law.[8]

2. Permits Issued by Mistake

The $50 word for the dilemma a property owner finds when a permit has been issued to him by mistake is "zoning estoppel." That term applies when a property owner who, in good faith and with "clean hands", gets a permit that legally should not have been granted and embarks on construction. The property owner can later claim relief under this legal doctrine if someone later tries to force him to tear down the building or stop the use he has unwittingly commenced.

In order for a property owner to be saved from the consequences of embarking on construction based on a permit or approval that should not have been legally issued, he must establish several key facts:

1. the city or county must have done something or omitted doing something that the property owner could rely on before making a substantial change in position and/or incurring an extensive expense; *and*
2. the government action relied on must be of a clear, definitive and affirmative nature; *and*

3. if the action was an omission, it must have been a negligent or "culpable" omission where the government entity was under a duty to do something and did not (silence or inaction is not sufficient); *and*
4. the landowner had a duty to inquire and confer with the local land use authority on what uses of the property would be permitted and did so.[9]

Thus, the property owner claiming that it is too late to enforce a given land use rule or other ordinance against him must have clean hands and have innocently assumed that his project was permitted and legal because government officials looked at his plans and said it was permitted and legal. Even if the property owner and the governmental unit say the development is legal, with proper notice, formal appeal, and diligence, third parties such as neighbors can enforce the rules that were ignored.[10]

When Can a Permit Issued by Mistake be Revoked?

Case Law — Dayley v. Summit County

A recent case in Summit County illustrates the point.[8] A property owner bought a 10-acre building lot and, over a few years, prepared to build a large home on the summit of the knoll where the property is located. Before commencing construction, he purchased an additional 10 acres.

Prior to buying the lots, he inquired as to whether or not he could build on the ridgeline as he intended to do. He was told by local authorities that there weren't any rules against that. Before he actually pulled the permits, however, the county passed a ridgeline ordinance that prohibited his locating the home where he had planned it to be. The owner claimed he was unaware of this. Then he took his building plans and site plan to the building department.

They reviewed it and gave him a building permit. Although the plan showed the actual lot dimensions and setbacks, there weren't any contour lines indicating lot slopes. He began construction, and by the time the county stopped work due to neighbors' complaints, he had invested about $250,000 in the framework and foundations.

Bruce Dayley's house sat unfinished for more than a year while the Summit County Board of Adjustment and the Third District Court weighed whether or not the County could revoke his building permit. The court rules to would be unfair to require demolition and allowed the house to be finished.

The Summit County Board of Adjustment heard the matter and decided that the property owner's hands were not clean. They concluded that the property owner must have known about the ridgeline ordinances and told him to tear down the house.

This case, like many land use cases, came down to the substantial evidence standard we discussed in Chapter 3. There was plenty of evidence the house was under construction, the expenses were significant, and a building permit had been issued. There was no evidence, according to the judge, proving that the property owner was not innocent or the county officials who issued the permits knew they were proceeding in error.

Although difficult to establish, sometimes the legal doctrine of zoning estoppel can be of assistance to property owners who have innocently relied on specific, affirmative acts of government officials. Note that this doctrine is not of any help to those who openly and knowingly violate the rules only to claim later that they should not have to bear the burden of their decision to proceed at their own risk.[11]

3. Covenants, Conditions and Restrictions: Homeowner Associations

The private covenants that attach to the land when subdivision lots are sold would seem to be beyond the scope of land use regulation. In fact, however, they are a significant part of the land use process.

Local ordinances usually require covenants, conditions and restrictions (CC&Rs) whenever there is open space to be owned or maintained in a subdivision or among common owners. Additionally, most new home buyers want some assurance that the amenities of the community will be maintained and enforced. In a condominium or townhome development where all the area outside the actual dwelling is common area, the CC&Rs and the homeowners association (HOA) created by the CC&Rs are even more important.

Sometimes local government is accused of getting a little too involved in the developer's drafting of the CC&Rs for a subdivision. Unsubstantiated rumors abound that some rules that could not be legally placed into local ordinance, such as the prohibition of manufactured houses in a neighborhood, are imposed by the city by

Quiet, peaceful streets with grace and charm are everyone's ideal. Homeowners associations, and their related covenants, conditions, and restrictions on suburban lots represent an attempt to reach this ideal.

proxy. Sometimes, it is alleged, subdivisions will not be approved if certain minimum house sizes, aesthetic standards, and other limits on lower value housing are not imposed by the subdivider. No one has taken the issue to court and challenged whether local governments have overstepped their authority in managing such private covenants.

Homeowners are often naive about the role of the HOA in their daily lives. For some, HOAs appear to be a great solution for maintaining common spaces and regulating appearance. On the other hand, they certainly have their detractors.

HOAs are not like local government. They do not have the same standards for public notice for open meetings as municipalities do. The statutes related to open governmental records do not apply. However, they can assess fees that are equivalent to taxes.[12] When someone does not pay, they can place a lien on the offender's dwelling and sell it to recover the fees. Usually, the HOA can collect attorneys' fees in successful actions against homeowners. The standards to be met can be revised and made harsher without unanimous consent. Homeowners must comply, if the HOA insists, even if disability or age makes it difficult.[13]

As one who has long had some skepticism of whether local government needs to regulate or intrude everywhere it does, I can sometimes be critical of what a city or county does to regulate its citizens. But the worst abuses I have seen in local government pale when compared to the astounding grief that occurs when a small cadre of homeowners with too much time on their hands decide to go after some miscreant who does not conform to the community ideal envisioned by the majority of the board of directors of an HOA.

I am certain that, in most cases, the HOA concept operates well. In many neighborhoods the quality of life suffers because no one will step up to the plate and provide leadership to solve immediate problems. To serve on a HOA board must be a thankless task in most cases.

If a property owner has a permanent and unavoidable problem with an HOA, however, my recommendation is to move—sooner rather than later. If everyone digs in on a protracted fight, there is no way for an individual homeowner to ever win the battle that results. It is better to seek out a place where the restrictions are less severe or the community more sympathetic to your frame of mind.

These issues do not involve government-related land use law. They are contract issues, or they mimic the kind of relationship that a minority stockholder has in a private corporation. This is not the place you want to be when you need to assert individual rights against a strong-willed majority.

One thing is certain. You need to know what you are getting into. When you buy a home in a subdivision, planned unit development, or condominium that has an HOA, talk to people who are already there about the tone and history of enforcement. Read the CC&Rs. What kind of a majority is needed to change the rules? Are there any limits on what the HOA board can impose in terms of new rules and regulations? How does one participate?

Whether you want to be sure the board actively enforces community manners or you wish they would all go away, it is better to know before you purchase a home. If you are not sure what the CC&Rs for your HOA say, it is easy to find out. They were probably included in all that paperwork you got when you closed the purchase of your home and have been recorded at the local county recorder's office as a burden on the title to your land. Your HOA is also required to provide such to you by state statute.[14]

If you are not sure where all that went, or your HOA cannot provide you a copy, you can easily stop by the county recorder's office and get a copy. A few minutes with your reading glasses—they are always in very fine print—will reveal what the rules are where you live. Once you understand what CC&Rs say, you can figure out what to do about it. If you need good legal advice, seek it early. The issues arising from an HOA can be very expensive and significant, both socially and financially.

You would also be well advised to review the Utah Community Association Act[15] and the Condominium Ownership Act[16]. They are long and tedious reading, but for that reason often are not well-understood by the local HOA. Sometimes an answer can be found there which will resolve a local dispute.

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1 §10-9a-103(43), (44) (municipalities) and Utah Code Ann. §17-27a-103(46), (47) (counties).

2 §10-9a-511(1)(a) (municipalities) and Utah Code Ann. §17-27a-510(1)(a) (counties).

3 §10-9a-511(3)(a) (municipalities) and Utah Code Ann. §17-27a-510(3)(a) (counties).

4 *Rock Manor Trust v. State Road Comm'n*, 550 P.2d 205 (Utah 1976).

5 Utah Code Ann. §10-9a-511(2)(b) (municipalities); Utah Code Ann. §17-27a-510(2)(b) (counties); see *M&S Cox Investments v. Provo City*, 2007 UT App 315.

6 §10-9a-511(2) (municipalities) and Utah Code Ann. §17-27a-510(2) (counties).

7 *Xanthos v. Bd. of Adjustment of Salt Lake City*, 685 P.2d 1032 (Utah 1984).

8 §10-9a-511(4)(c) (municipalities) and Utah Code Ann. §17-27a-510(4)(c) (counties).

9 *Utah County v. Young*, 615 P.2d 1265 (Utah 1980).

10 See, for example, the case of *Culbertson v. Bd. of Cty. Comm'rs of Salt Lake Cty.*, 2001 UT 108, overruled by *Madsen v. JPMorgan Chase Bank, N.A.*, 2012 UT 51, overruled on other grounds. , where the Utah Supreme Court indicated to the trial court judge that if warranted he could order the developer involved to remove a building that was built on what was once a county street, since the remaining half of the street was left in violation of the county's own street standards.

11 *Dayley v. Summit County*, Case No. 010500292, (2002) (Hilder, J.).

12 See Utah Code Ann. §57-8a-226

13 See the Utah Community Associations Act, §57-8a-101 et seq.

14 See Utah Code Ann. §57-8a-227.

15 Utah Code Ann. §57-8a-101 et seq.

16 Utah Code Ann. §57-8-1 et seq.