Enforcing Local Land Use Ordinances

CHAPTER 14

Zoning Enforcement—When You are in Violation

What if you are accused of violating a zoning ordinance? The municipality can either enforce the statute by criminal or civil means under the corresponding criminal or civil statutes.

Criminal statute: You are charged with an infraction or misdemeanor and the city or county takes you to court to prove that you are guilty of a crime. If found guilty, you will be fined or, in an extreme case, imprisoned.

Civil statute: You are charged with a civil violation. The remedy is not imprisonment, but a fine will be levied against you.

These approaches are quite different. Many jurisdictions now use the civil statute method.

1. Criminal Procedure

If you are charged with a crime, you get a trial before the local court (usually the justice court). No fines will be assessed until you are found guilty or plead guilty to the infraction or misdemeanor. You will have a chance to explain your situation to the judge, present witnesses, cross examine those who testify against you and otherwise fully participate in a criminal trial. The judge is usually one who hears a lot of other types of cases, such as traffic citations and other types of criminal charges.

If a fine is assessed, you will pay the fine and that will end the matter. If you are charged with a zoning offense again, the process starts over. In criminal matters you are innocent until proven guilty.

It is worth noting that the Utah Legislature has enacted laws that limit criminal sanctions to infractions for violations of rules that involve the use of a person's residence.[1]

2. Civil Procedure

If you are charged civilly, you will usually get a warning notice indicating that you are in violation of the local ordinance. You will typically be given a time frame in which to bring your land into conformance and a warning of the amount of the fine that will be assessed against you.

If you comply, you will usually be left alone. The inspector will come to confirm that the violation was fixed. Sometimes your property will be monitored to be sure that it stays in compliance. If you do not challenge the notice, this warning may still constitute a "first offense" even if you were not technically in violation of the ordinance.

A second notice will often bring higher fines. Sometimes a different infraction on the same property will bring more fines even though the problem is not the same as the original violation. It is essential that you read the zoning or nuisance ordinance to understand the nature of the violation, but also that you read the enforcement section to find out how the fines are levied and collected. The procedure used to charge you with second and subsequent offenses is usually explained there as well.

There is always a method for appealing a determination that you are responsible for a civil violation of the zoning or nuisance ordinance. This should be explained in any written notice you receive about the alleged violation.

While there is always an appeal, it is not always convenient or flexible. If you wish to contest an allegation that you have violated an ordinance, you must comply with the appeals procedure, including the sometimes-short appeal deadline.

If the notice says you must appeal within 10 days, even if it took three days for the mail to get to you, you must file the appeal before the 10-day deadline to be safe. Often the municipality will afford you some accommodation on an informal basis if your appeal is late for good cause, but do not risk missing the chance to appeal if you wish to contest the matter. Most of the time no one, not even the local government officials or a district court judge, will be able to waive the deadline once it has passed.

File the appeal even if you are planning to work out some remedy for the situation. If you miss the appeal period, you may have to comply with the enforcement officer and/or pay fines. The local government entity can proceed as if you have admitted a violation if you miss the appeal deadline.

If you do appeal, you will likely be given a hearing before an administrative law judge or other hearing officer appointed by the county or city to hear such appeals. The judge is paid by the municipality, trained by the municipality, and the municipal officials appear before him or her regularly. They know each other and they don't know you, so you may feel that the deck is not exactly stacked in your favor. Nevertheless, this process is legal and has been upheld in decisions by the Utah Court of Appeals.[2]

If you do not agree with the decision of the appeal authority, you may appeal to the district court, but the decision of the first hearing will be upheld if there is any substantial evidence to support it (see Chapter 3). To win at district court, you must prove that the zoning hearing officer at the city made a decision that was completely unsupported by credible evidence.[3]

Local ordinances can sometimes be extraordinarily harsh and arbitrary. For example, one Utah nuisance ordinance lists 34 actions that can be subject to fines and enforcement. These include the predictable ones, such as prostitution and drug houses, but also they include leaving trash cans out, allowing standing water, outdated signs, and an extraordinary definition of a "dangerous condition": [Any use of property which] "shall or may endanger the health, safety, life, limb or property, or cause any hurt, harm, *inconvenience, discomfort,* damage or injury to any one or more individuals in the City" (emphasis added).

What is the penalty for maintaining property (or not maintaining it) so that someone in this particular Utah community is inconvenienced or discomforted? One hundred dollars per day for the first week; $200 per day after the first week. Habitual offenders are charged $500 per day. If the City cannot locate the responsible person who is to be charged with the offense, it can post a notice on the property. If no appeal is filed within 10 days of that posting, no appeal can ever be filed and the fines *cannot be waived*. Sounds pretty harsh to me.

If an appeal is filed in this jurisdiction, the matter comes before a hearing officer, which is the city manager or his designee. If the property owner wishes to appeal, he must demonstrate by a "*preponderance* of the evidence" that any citation given him is not valid before he even gets a hearing. If he loses the appeal and takes the matter to the district court, the court must uphold the city manager's decision if there is *any* substantial evidence to support it. Generally, the testimony of the zoning enforcement officer can be considered as substantial evidence.[4]

In addition to the fines, some communities assign other costs and fees such as administrative fees, inspection fees, abatement costs (including treble damages if the city determines that another abatement is necessary within a year), and collection costs.

In some cities, if you wish to appeal the hearing decision to district court, you must pay to have the recording from the hearing transcribed and the documents involved copied and delivered to the court.

Bottom line: you can't win this game. In my ten years as the state ombudsman for property rights, I did not come up with any answer to the apparent futility of formally challenging a civil zoning complaint against you even when it seems frivolous. You may be correct, and the procedure may violate due process, but the cost and hassle of a full-blown legal challenge is rarely worth it.

In one case where my office was involved, a woman was charged with having too many Mustang cars in her front yard. While those of my generation may find it hard to understand how there could ever be too many Mustangs (or Corvettes), the city considered them abandoned vehicles and started the fines when she did not move the cars 10 days after the first notice hit her front door.

She finally moved them, but during the inspection for compliance, the officer noticed that she had a kitchen dinette set on her back porch, some weeds along her fence line, and that a 25-year-old pine tree in the front yard might obscure the view of drivers attempting to make a turn in the street around her corner lot.

Even though the tree was several feet back from her fence line and the roads that met at her corner are both posted at 25 mph, she was cited for interfering with safe driving. They doubled the fines after the second visit to $50 per day for each infraction. She took in the dinette set and got out her weed eater but did not wish to remove the tree.

She was told she could avoid the fines by trimming all the branches from the tree up to nine or 10 feet, which she thought would look very strange. The tree was only about 30 feet tall. She went to the hearings and lost twice. By this time the tree was about to cost her thousands, but she would not give in. Her home was not generally unkempt; a number of her neighbors had trees that were just as objectionable, and

This tree was the subject of a zoning enforcement action in 1999. A city enforcement officer cited the owner with the claim that the tree interfered wit traffic visibility from a stop sign located where this photo was taken in a 25 mile per hour speed zone. The property owner refused to remove or trim all the branches from the ground up to nine feet in height and appealed the citation. The city eventually let the matter drop, but a large judgment for unpaid fines was placed against the title to the property in the civil enforcement process.

some had solid fences and hedges that were much more obstructive to traffic sight lines on corners much busier than hers.

Finally, it occurred to her to suggest to the city that her tree was a nonconforming, grandfathered use since the sight line ordinance was germinated after the tree. My involvement may have helped a little, and it appeared that the city let the matter die. At least it appeared that a truce had been reached and the matter was over, though the issue of the fines that had accrued by that time was not resolved.

A few months later she went to refinance her house. The lender said a judgment against her had been recorded by the city. The lender would not give her a new loan until the city was paid. The city waved the fines but legally did not have to.

If you feel a complaint against you is unjust, appeal it, but comply with the instruction of the enforcement officer. Perhaps allow some part of the fine to accrue so you have a specific governmental action to appeal and then comply so that the fines do not continue. In the meantime, appeal the first fine and see what happens at the hearing. If you win, you were not in violation. Get a refund and continue your original practice. If you lose, at least you did not have to pay huge, accumulated fines.

I realize that you may not have an easy fix to cure the zoning violation. Attempt to work with the enforcement staff. They will usually attempt to come to some accommodation, but they are not required to do so. Whatever happens, do not ignore the violation. The local ordinances sometimes give the enforcers the right to lien your property with the fines and foreclose on it.

You may wish to take a political approach rather than a legal one. Call your city council person or county commissioner and review the details with them. They may be able to help more than a lawyer or judge can.

The difficulty with civil zoning enforcement is that if you enforce all the fine print in the ordinances, more than half the properties in the municipality (maybe even some *owned* by the municipality) have civil land use violations. The law is meant to be very harsh so that the bad actors are reigned in efficiently. To do that the enforcement officers and administrative law judges are given very broad discretion in what they choose to pursue and what they do not. This is not much different than the power we give policemen and health officials, but the power is granted to them, nonetheless. That's the reality.

Citizen Zoning Enforcement: When Your Neighbor (or the Municipality Itself) is in Violation

Usually, the local municipality or county will have a method in place that you can use to make complaints about zoning violations. Sometimes the complainant is protected to keep his name secret; in which case the compliance officer and not the neighbor makes the complaint. If that happens, you are lucky, because the city or county has done all the heavy lifting to get your neighbor to comply with the rules.

There may be some facts about a given situation that allows your neighbor to avoid compliance. Perhaps the use is "grandfathered" or, to use the legal phrase

"nonconforming." Perhaps a building or use was erected in violation of the ordinance, but innocently. If it would be grossly unfair to make the property owner remove the offending structure or use after making a large investment, the zoning violation cannot be enforced. This is called "zoning estoppel." Both of these concepts are discussed in detail in Chapter 12.

But if the violation is clear and the municipality chooses to enforce its rules, you are probably going to see some changes in the neighborhood. Life will be better. But what if the city is a partner in the violation (as when a subdivision approval is given illegally) or simply does not wish to enforce the relevant ordinances?

In Utah, there is a special provision in the state statute that allows any property owner in the jurisdiction who is "adversely affected" by a land use decision or violation of the land use regulations to enforce the zoning rules.[5] This only applies to those who:

1. own real property adjoining the property where the problem is, and
2. will suffer a damage different in kind than, or an injury distinct from, that of the general community.[6]

When Can Citizens Enforce the Ordinances?

Case Law — Citizens v. Springville City

About twenty years ago, a developer in Springville got approval from the planning commission and city council to construct a planned unit development. Some neighbors did not want the land to become a housing tract, so they took the matter to court.

The neighbors claimed the city had not followed its own ordinances in approving the development. Among other seemingly minor concerns, they noted the subdivision ordinance required that if the land involved had a canal running across it, the plat must include a signature from the canal company that the ditch is accurately drawn on the plat.

Although this would seem to be a minor issue (in fact, the city argued as much), the Utah Supreme Court reminded the city that it (the city) had written the ordinances and it (the city) chose the word "shall" in the reference to the canal company's approval, so it (the city) was bound by the rules just like everyone else.

The court said:

> Municipal zoning authorities are bound by the terms and standards of applicable zoning ordinances and are not at liberty to make land use decisions in derogation thereof.[7] The irony of the City's position on appeal is readily apparent: the City contends that it need only "substantially comply" with ordinances that it has legislatively deemed to be mandatory. Stated simply, the City cannot "change the rules halfway through the game."[8] The City was not entitled to disregard its mandatory ordinances.[9]

If neighbors wish to challenge land use decisions that do not comply specifically with every mandatory provision of the local ordinances, they may. However, the success of such a challenge largely depends on who brings the challenge. The Springville citizens' case goes on to clarify who can actually succeed in a challenge to local land use decisions:

> The City's failure to pass the legality requirement . . . however, does not automatically entitle plaintiffs (the neighbors) to the relief they requested (nullification of the subdivision approval). Rather, plaintiffs must establish that they were prejudiced by the City's noncompliance with its ordinances, or in other words, how, if at all, the City's decision would have been different and what relief, if any, they are entitled to as a result.[10]

If a property owner is going to challenge a local land use decision, they do not even get to first base unless they can show that some right they enjoy on their property has been significantly injured or otherwise "adversely affected." This provision is imposed by the courts and statutes because there could be so much frivolous litigation brought by those who just want to oppose change. Those who wish to enforce the

ordinances are, therefore, required to show what specific harm the conduct of the governmental entity imposes on them that is over and above the general impact an illegal decision has on the community at large.

Generally speaking, citizen/property owners who have a legitimate concern and the wherewithal to mount a challenge have the tools necessary in Utah to succeed if they can point out errors that substantially affect the use and value of their property. If that describes you, then you may have a remedy to your concern even if the municipality is part of the problem.[11]

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1 Utah Code Ann. §10-3-703(1)(b) (municipalities) and §17-53-223(2)(b) (counties).

2 While not precisely decided in response to a facial attack on the administrative code enforcement process, a decision of the Utah Court of Appeals includes an affirmation of the state law allowing administrative code enforcement. "The Utah Legislature has granted general welfare powers to cities which include the power to pass city ordinances. See Utah Code Ann. § 10-8-84 (1999). Also included in this grant of authority is a city's power to use administrative hearing procedures to enforce local ordinances. See, e.g., *Tolman v. Salt Lake County Attorney*, 818 P.2d 23, 28 & n.6 (stating "procedural rules may appear in statutes, ordinances, or even in an administrative body's own rules")." *W. Valley City v. Roberts*, 1999 UT App 358 ¶9.

3 Utah Code Ann. §10-9a-801(3) (municipalities); Utah Code Ann. §17-27a-801(3) (counties). See discussion of how administrative land use decisions are reviewed on appeal in Chapters 3 and 6.

4 Id.

5 Utah Code Ann. §10-9a-802(1)(a) (municipalities) §17-27a-802(1)(a) (counties). Property owners can enforce the ordinance, sue to stop violations or possible future violations, have violating structures removed, or otherwise step into the shoes of the municipality or county and enforce its ordinances for it, but only if they are an "adversely affected party" as defined in Utah Code Ann. §10-9a-103(2) (municipalities) §17-27a-103(2) (counties).

6 Utah Code Ann. §10-9a-103(2) (municipalities) §17-27a-103(2) (counties).

7 *Springville Citizens v. City of Springville*, 1999 UT 25, 979 P.2d 322 (Utah 1999) ¶30. Quoting *Thurston v. Cache County*, 626 P.2d 440, 444 (Utah 1981).

8 *Id.*, Quoting *Brendle v. Draper*, 937 P.2d 1044, 1048 (Utah App. 1997).

9 *Id.*

10 Id.

11 See the discussion of the case of *Culbertson v. Salt Lake County* in Chapter 16.