Advisory Opinion #39

Parties: Shane Carlson and Salt Lake City

Issued: April 28, 2008

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

A proposed change in ownership from an apartment complex to condominium ownership was not a "change in use." The definition of "change of use" specifically stated that a change in ownership is not a change in use. Furthermore, an apartment complex and a condominium complex are both "multi-family uses" allowed under the zoning code. The decision to charge impact fees on the conversion does not mean that the use is being changed. Impact fee ordinances are not zoning regulations.

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ADVISORY OPINION

Conversion of Apartment Buildings to Condominium Ownership

Advisory Opinion Requested by:	Shane Carlson
Local Government Entity:	Salt Lake City
Applicant for the Land Use Approval:	ABC Avenues Development, LLC
Project:	Conversion of Apartment Building to Condominium Ownership
Date of this Advisory Opinion:	April 28, 2008
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

Was the City correct when it determined that an application to convert an apartment complex to condominium-style ownership did not constitute a change of use?

Summary of Advisory Opinion

The City correctly interpreted and applied the "change of use" language in § 21A.62.020 of the City Code. That interpretation is supported by the plain language of the ordinance. A change in ownership does not constitute a change in use. If the nature of the use is unchanged, and the proposed change does not increase the intensity, size, or occupancy of the use, the ordinance cannot be interpreted as meaning that there has been a "change" in the use. The application proposes to convert one type of multi-family dwelling to another type of multi-family dwelling. The complex is a non-conforming use, and the change in ownership status should not affect whether or not the use may continue. Finally, the language from the City's impact fee ordinance does not overrule or impact the language of the City's zoning ordinance.

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 §13-43-205 of the Utah Code. 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.

The request for this Advisory Opinion was first received from Shane Carlson on January 11, 2008. A letter with the request attached was sent via certified mail, return receipt requested, to Christine Meeker, City Recorder, Salt Lake City, at 451 S. State, Salt Lake City, Utah 84111. The return receipt was signed and was received on January 16, 2008, indicating that the City had received it. A response was received from the City on March 20, 2008. Shane Carlson submitted additional information via email on April 9, 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 received January 11, 2008 by the Office of the Property Rights Ombudsman Shane Carlson, including exhibits
2. Response letter from Lynn H. Pace, Deputy City Attorney, received March 20, 2008, including exhibits.
3. Reply letter submitted by Shane Carlson, received via email on April 9, 2008.

Statutes and Ordinances

1. Sections 18.98.020 and 21A.62.040 of the Salt Lake City Code.

Background

In the Fall of 2007, the owner of the DeVille Cliff Apartments, located at 633 East Fourth Avenue in Salt Lake City, applied for preliminary approval to convert the complex to condominium-style ownership. The structure consists of 14 units in two main multi-story buildings. According to the owner, the structure was originally constructed in 1942, and has been operated as an apartment complex since that time. The west building contains six units, with eight in the east building. According to the plat drawing submitted to the City, there are 14

parking stalls to the north of the buildings, or the rear portion of the parcel. The property is zoned "Special Development Pattern Residential District" (SR-1A), and the apartment complex is actually a legal, non-conforming use.[1] The City noted that the building does not meet current parking standards, but, as a non-conforming use, would not be required to increase parking.[2]

City staff reviewed the application, and recommended approval. The City's planning department felt that the conversion was "in the best interest of the City," and was not an intensification or change of the existing use. The City reasoned that since the number of units was not changing, and since there was no structural change to the buildings, converting rental units to privately-owned condos was merely a change in ownership, not in use. As required by the City Code, the application was reviewed by the planning division, as well as the following City Departments: Building Services, Engineering, Fire, Public Utilities, and Transportation.[3] The departments submitted various minor requirements to be met for the conversion, such as installation of smoke detectors, and replacing the rear driveway. The Public Utilities Department stated that the building owner would need to pay $7,630.00 for sewer impact fees, because the conversion constituted a "change in use," under the City's impact fee ordinance.

The Planning Commission approved the application on November 28, 2007. The Greater Avenues Community Council (GACC) appealed that decision to the City's Land Use Appeals Board. The GACC objects to the conversion, because they feel that converting the building from apartments to condos constitutes a change of use for the property, which would terminate the non-conforming use, and force the property owner to comply with current zoning regulations. The GACC also expressed concerns about health and safety problems they claim exist on the property, including rodents, disrepair of buildings, and inadequate garbage control.

Analysis

I. The City's Planning Department Correctly Determined that the Condominium Conversion was not a "Change of Use."

The determination that converting apartments to condominiums was not a "change of use" was a correct interpretation of the City's zoning ordinance. The plain language of § 21A.62.040 of the Salt Lake City Code supports that conclusion. There is no reason to question the City's interpretation and application of its ordinance.

A. Standards of Statutory Interpretation

Statutory interpretation begins with the language of the ordinance. *See Biddle v. Washington Terrace City,* 1999 UT 110, ¶ 14, 993 P.2d 875, 879. The "primary goal . . . is to give effect to

[1] The complex is non-conforming, because multi-family dwellings are not allowed in that zone. However, the use evidently predates that zoning ordinance, and thus has been allowed to continue.
[2] Under current City standards, a multi-family residential complex would be required to provide two parking stalls per bedroom. Since the DeVille units have two bedrooms each, a total of 28 parking stalls would be required.
[3] The Salt Lake City Police Department was also invited to review the application, but did not submit comments.

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. Statutes should be construed so that "all parts thereof [are] relevant and meaningful." *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996). Furthermore, it must be presumed "that each term included in the ordinance was used advisedly." *Carrier v. Salt Lake County*, 2004 UT 98, ¶30, 104 P.3d 1208, 1216. "[I]nterpretations are to be avoided that render some part of a provision nonsensical or absurd." *Millet v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980).

B. Interpreting and Applying § 21A.62.040 of the Salt Lake City Code.

The plain language of § 21A.62.040 supports the City's interpretation that conversion from apartment to condominium is not a "change in use." The language of that section reads as follows:

> "Change of use" means the replacement of an existing use by a new use, or a change in the nature of an existing use which does not increase the size, occupancy, or site requirements. A change of ownership, tenancy, name or management, or a change in product or service within the same use classification where the previous nature of the use, line of business, or other function is substantially unchanged is not a change of use. (See also definition of Land Use Type (Similar Land Use Type).)

Salt Lake City Code, § 21A.62.040 ("Change of Use"). As applied to the DeVille Cliff Apartments, the only aspect of the property that is being changed is the type of ownership, from rented apartments owned by a single entity, to separate ownership of each unit. The language of the ordinance states that changing the ownership, or the type of ownership, does not constitute a "change of use" insofar as the City's zoning ordinance is concerned.

Furthermore, no other material change in the property has been proposed. Other than some repairs and renovations, no new construction will be undertaken. The number of units remains the same, and the buildings will not be altered. The absence of any substantial alteration to the physical nature of the property further supports the interpretation that there has been no change in the use. The ordinance implies that a "change" occurs when there is an increase in the size, occupancy, or site requirements. Because there is no such increase, there has been no "change in use."

The definition of "multi-family dwelling" further confirms the validity of the City's approach. According to that definition, "apartments" and "condominiums" are both types of multi-family dwellings. In other words, the uses are equivalent under the City's zoning ordinance:

> Dwelling, Multi-Family: "Multi-family dwelling" means a building containing three (3) or more dwellings on a single lot. For purposes of determining whether a lot is in multiple-family dwelling use, the following considerations shall apply:

> A. Multiple-family dwelling uses may involve dwelling units intended to be rented and maintained under central ownership or management, or cooperative apartments, condominiums and the like.
>
> B. Any multiple-family dwelling in which dwelling units are available for rental or lease for periods of less than one month shall be considered a hotel/ motel.

Id. § 21A.62.040 ("Dwelling, Multi-Family"). Converting a 14-unit apartment complex to a 14-unit condominium complex is merely changing the ownership status of the same multi-family dwelling. Since the nature of the existing use is unchanged, there has been no change in the land use, and the City correctly interpreted and applied its zoning ordinance. It should also be noted that even if the application had been denied, the DeVille Cliff Apartments would more than likely continue renting apartments, which would be allowed under its non-conforming use status.[4]

C. The Application of § 18.98.020 does not Affect the Interpretation of § 21A.62.040.

The GACC cites to the definition found in Title 18 of the City Code, and the use of that definition to justify charging sewer impact fees on the conversion. At first glance, it does appear incongruous for the City to state that the conversion is not a "change of use" under its zoning ordinance, but that it is a "change in use" under its impact fee ordinance. However, the definitions found in § 18.98.020 only applies to the chapter governing impact fees, and is not a definition governing land use.

The GACC's position seems to be that an apartment complex is operated for profit (or for the intent of gaining a profit), while a condominium complex is a form of private home ownership. Since the conversion means a change from a commercial enterprise to private ownership, it constitutes a "change of use." However, the City's zoning code makes no distinction between multi-family dwellings operated with the intent of making a profit with multi-family dwellings under condominium- or cooperative-style ownership. Since there is no distinction made between multi-family dwellings rented for profit versus those with individually-owned units, there is no real difference between an apartment complex and a condominium complex in the City's zoning ordinance.

Moreover, the language of the "change in use" definition from § 18.92.020 does not necessarily support the GACC's argument. That section defines "change in use" as "a change from commercial use to residential use . . .." The DeVille Cliff Apartment Complex is a residential use, and the proposed condominium complex is also a residential use. The section would not even apply, because the conversion application proposes a change from one residential use (apartments) to another residential use (condominiums). Thus, § 18.98.020 does not override or modify the zoning ordinance, and does not support the conclusion that the condominium conversion is a "change of use."

[4] The GACC expressed concerns over health and safety issues, such as waste management, maintenance of parking canopies, and rodent control. These are valid complaints, but they would apply whether or not the complex was converted to condominiums, and do not impact whether or not the use has been "changed."

Conclusion

The City correctly interpreted and applied the "change of use" language in § 21A.62.020 of the City Code. That interpretation is supported by the plain language of the ordinance. A change in ownership does not constitute a change in use, nor does an application for any proposed change that does not alter the nature of the use, or increase the intensity, size, or occupancy of the use. The application proposes to convert one type of multi-family dwelling to another type of multi-family dwelling. The complex is a non-conforming use, and the change in ownership status should not affect whether or not the use may continue. Finally, the language from the City's impact fee ordinance does not overrule or impact the language of the City's zoning ordinance

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

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, §13-43-205. 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 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

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

Christine Meeker, City Recorder
Salt Lake City
451 S. State Street
Salt Lake City, UT 84114

On this _____ Day of April, 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