

Advisory Opinion #224

Parties: Ruth S. Eyre Trust and Logan City

Issued: June 10, 2020

TOPIC CATEGORY:

Nonconforming Uses & Structures

Legal nonconforming rights are established by state law, but must be officially recognized according to the procedures of local ordinances. The issue of a grandfathered right to use a property for multiple living units is wholly separate from a grandfathered right to a certain occupancy level for any given living unit. Because the Trust only applied for and obtained a certificate for a legal triplex as a nonconforming use, but did not additionally request or establish a legal nonconforming use regarding occupancy for any of the dwellings in the triplex, it has yet to establish a vested right to a higher occupancy for any particular dwelling, and the City's revocation of the owner's business license based on exceeding current occupancy ordinances is consistent with the City Code and is not illegal.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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ADVISORY OPINION

Advisory Opinion Requested By: Joseph M. Chambers, Ruth S. Eyre Trust

Local Government Entity: Logan City

Type of Property: Residential

Date of this Advisory Opinion: June 10, 2020

Opinion Authored By: Richard B. Plehn, Attorney
Office of the Property Rights Ombudsman

ISSUE

Has the property owner established a legal nonconforming use for a higher occupancy than current city ordinance allows, and is the revocation of the property owner's business license based on current occupancy standards legal?

SUMMARY OF ADVISORY OPINION

A land use that is legally established prior to a City ordinance prohibiting the use is allowed to continue under state law as a legal nonconforming, or "grandfathered," right. Local governing bodies are delegated the authority to provide for the procedure and process to formally recognize and establish such rights by local ordinance. Logan City has provided an application process to establish a legal nonconforming status. Logan City code requires separate approvals for each nonconformity, though requests for multiple approvals can be part of the same application.

The issue of a grandfathered right to use a property for multiple living units is wholly separate from a grandfathered right to a certain occupancy level for any given living unit. The property owner previously applied for and obtained a certificate for a legal triplex as a nonconforming use, but that application did not additionally establish a legal nonconforming use regarding occupancy for any of the dwellings in the triplex.

It is the property owner's burden to establish any legal nonconformity. Because the property owner has yet to establish a vested right to a higher occupancy for any particular dwelling, the

City's revocation of the owner's business license based on exceeding current occupancy ordinances is consistent with Logan City Code and is not illegal. The property owner, in this case, may be able establish a legal nonconforming right to a higher occupancy allowance than what current code restrictions allow, but they must to follow the procedures outlined in City Code to do so.

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 Title 13, Chapter 43, Section 205 of the Utah Code. 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 Joseph M. Chambers, on behalf of the Ruth S. Eyre Trust on December 24, 2019. A copy of that request was sent via certified mail to Teresa Harris, Logan City Recorder, 290 North 100 West, Logan, Utah 84321 on December 27, 2019.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for an Advisory Opinion, submitted by Joseph M. Chambers, counsel for the Ruth S. Eyre Trust, received December 24, 2019.
2. Letter from Craig J. Carlston, Assistant Logan City Attorney, received January 8, 2020.
3. Letter from Joseph M. Chambers, received February 3, 2020.

BACKGROUND

The Ruth S. Eyre Trust ("Trust") is the record title owner of residential property in the college town of Logan, Utah, located at 518 East 500 North ("Subject Property"), just two blocks from the Utah State University campus. The structure on the property is a house built in 1956 by Ruth S. Eyre and her late husband Dean. The home was originally built as a triplex, with two separately metered one-bedroom apartments located on the second story of the home,¹ while the main floor and basement comprised the third dwelling unit. The basement additionally contains 'dorm' style bedrooms that share the common areas of the main floor/basement unit with the main floor occupants. These dorm rooms exist today exactly as they did in 1956 with all original, built it furniture including beds, desks, dressers and closets. The Trust alleges that since the home's construction, the main floor/basement unit has been consistently and continuously

¹ Not visible from the front, but enclosed by a dormer in the rear.

occupied by the Eyre family, and that the Eyre family has consistently shared the basement common areas with single college students who exclusively occupy the basement dorm rooms as their bedrooms.²

At the time the Subject Property was built, on-campus housing did not yet exist and nearly all single-student housing was located off-campus in the neighborhood of the Subject Property. Logan City passed its first zoning ordinances restricting the number of living units on a building lot sometime in the 1950s. At the time it was built, the Subject Property was zoned R-2 which would have allowed for three dwelling units. The Trust alleges that in 1990, not long after Logan City first adopted occupancy restrictions, Ms. Eyre paid a fee for a variance, assumedly related to occupancy, but no evidence of the variance or its details has been submitted.

In May 2008, Ms. Eyre received a Notice of Occupancy Restriction regarding another property of hers owned in Logan City. In response, Ms. Eyre wrote a letter to the City dated December 4, 2008 regarding both of her properties,³ including the Subject Property at 518 East 500 North, which at that time was still her personal residence. As to the Subject Property, Ms. Eyre stated that it was originally built and legally established as a triplex, mentioning the two small apartments on the second story (with her impliedly occupying the main floor of the house as the third unit), and included a copy of the issued building permits for the two apartments. The letter states that she had been renting *the apartments* continuously to tenants for the 52 years she had lived there (no mention is made of any tenants in the basement dorm rooms). She states that she is concerned she will likewise receive an occupancy notice for this property, and proposed that the City “[c]ertify my residence at 518 East 500 North is a legally established and existing multifamily dwelling AS BUILT.”

In April of 2011, Ms. Eye received a letter informing her of an occupancy restriction placed on the Subject Property because it was located in the Neighborhood Residential Core (NRC) zoning district which only allows one single dwelling unit occupied by one family. The letter references Logan City code sections on Residential Zoning Districts, as well as the Section containing definitions for “Dwelling Unit” and “Family.”⁴ The letter stated that the restriction could be removed if the City were provided evidence that more than one dwelling unit had been established legally. Otherwise, the restriction would serve to notify future buyers that the property was a “single family” property.

Kevan Eyre, Ruth’s son and co-trustee of the Trust, submitted an Application to Determine Legally Existing Nonconforming Status (“Application”).⁵ In a box labeled “Current use of

² No other information is provided as to the makeup of the Eyre family or the historical living arrangement within the home, as it is also stated that the main floor and basement were planned and built for the “growing” Eyre family. The materials nevertheless state that rents from these dorm rooms helped support the Eyre family upon Dean Eyre’s passing, which was in 1960.

³ It appears there is a dispute as to whether the City had received this letter prior to the Trust’s counsel recently providing a copy to the Assistant City attorney.

⁴ LOGAN DEVELOPMENT CODE §§ 17.13 (2011), 17.62 (2011).

⁵ There appears to be some uncertainty as to when this application was submitted to the City. The Trust maintains that it was submitted on December 4, 2008 together with the letter from Ms. Eyre of the same date. The City, however, was unable to independently locate either document in its records apart from receiving copies from Trust’s counsel for purposes of this opinion. Clearly the City had received at least the application at some point in the past as it resulted in the issuance of a Certificate in February 2012. The City therefore does not appear to challenge the

property (e.g., number of units),” the applicant put “3 separate living units (main house and two apartments).” The Application appears to have included the building permit from 1956 and a site plan, and the Trust maintains that the December 4, 2008 letter was also included.⁶ However, nothing in the Application, the December 4, 2008 letter, or any other written information provided with the Application mentions the basement dorm rooms or describes occupancy as a nonconforming use of the main floor/basement unit, or any of the dwelling units on the property.

The City issued a Legally Existing Nonconforming Structure Certificate dated February 3, 2012. The Certificate notes that “The application requested that the existing three (3) units be certified as a legally existing nonconforming use. The use of this property as three (3) units is determined to be a legally existing non-conforming use, or grandfathered.” The Certificate states “[t]his nonconforming use shall not be added to, nor enlarged in any manner, except as in conformance with Chapter 17.59 of the Logan City Land Development Code.”⁷ The Certificate makes no mention of the allowed occupancy of the three units.

Shortly afterwards, in 2013, Ms. Eyre passed away. In May 21, 2019, the City issued a Notice of Occupancy Limitations request letter, which requires that property owners and agents provide a written lease containing tenant information or a zoning occupancy disclosure form within seven days of a request by a city code official or police officer investigating any code violation.⁸ In November and December 2019, the City confirmed that the main floor/basement unit was being occupied by six unrelated individuals with five people living in the basement and one individual living on the main floor.

The City made a determination that this arrangement violated Logan City code limiting occupancy of a single dwelling unit to a family or no more than three unrelated individuals,⁹ and the City Division of Business Licensing issued a Notice of Revocation dated December 18, 2019 to Kevan Eyre, as Trustee of the Ruth S. Eyre Trust, stating that the Trust’s landlord business license had been revoked for violation of occupancy requirements as stated in the Logan Land Development Code.

Counsel for the Ruth S. Eyre Trust has requested this Advisory Opinion to determine whether the property owner has a legal nonconforming right to occupy the unit with more than three unrelated persons, and, whether the revocation of the business license is/was illegal.

ANALYSIS

Utah’s Municipal Land Use Development and Management Act (LUDMA) specifically allows for the continuance of legal nonconforming uses.¹⁰ LUDMA defines a “nonconforming use” to mean a use of land that “(a) legally existed before its current land use designation; (b) has been maintained continuously since the time the land use ordinance governing the land changed; and

accuracy of the application, though it appears not to readily accept the December 4, 2008 letter as having been included with the application.

⁶ See supra, note 4.

⁷ Chapter 17.59 (2011) of the development code was renumbered to 17.52. Ordinance No. 18-08 (August 7, 2018).

⁸ LOGAN CITY CODE § 5.17.095 C (Ord. 13-54, 2013).

⁹ LOGAN DEVELOPMENT CODE § 17.08.040 (2019).

¹⁰ UTAH CODE ANN. § 10-9a-511(1).

(c) because of one or more subsequent land use ordinance changes, does not conform to the regulations that now govern the use of the land.”¹¹

Here, there are two independent land uses for which grandfathered rights must be separately established for the Trust’s historical operations to be continued legally under current city ordinances. First is a grandfathered right to use the house on the Subject Property as a legal triplex as current ordinances prohibit multiple dwelling units for a residential structure in the Subject Property’s residential zone. The second is a grandfathered right to occupy any one dwelling above current limits, as current ordinances limit occupancy of any given dwelling to a single family or no more than three unrelated persons.

The Trust has conflated the two uses as they relate to the Subject Property. The fact that the home constructed in 1956 was built as three dwelling units prior to any applicable zoning ordinance restricting the number of units on a parcel serves only to establish the existence of a legal nonconforming use as to the number of allowed dwelling units in the structure. The allowed occupancy of each of the units is a separate matter.

I. The 2012 Certificate Established Only a Grandfathered Use as a Legal Triplex

Under the legal framework established in state law, nonconforming uses are allowed to continue, but local governments set the terms of how nonconformity is formally established and even how long they can continue. LUDMA provides that the local government’s legislative body “may provide for: *the establishment*, restoration, reconstruction, extension, alteration, expansion substitution of nonconforming uses upon the terms and conditions set forth in the land use ordinance.”¹² Local governments may even determine when or if nonconforming uses terminate, so long as it provides a formula establishing a reasonable time period for the owner to amortize his/her investment in the nonconforming use.¹³

Logan City’s Land Development Code provides that any legally existing land use, structure, or sign allowed under a prior code is allowed to continue as a legally existing land use, structure, or sign in conformance with the provisions of Chapter 17.52 on Legally Existing Nonconformities.¹⁴ Most notably, this chapter spells out and highlights the distinction between different nonconformities, and the need to adequately address each separately:

“Each of the sections in this Chapter addressing the process for obtaining approvals for nonconforming uses, nonconforming structures . . . and other legally existing nonconformities are separate components of an approval. There can be a nonconforming use in a conforming structure; a conforming use in a nonconforming structure; a nonconforming use in a nonconforming structure,

¹¹ UTAH CODE ANN. § 10-9a-103(41).

¹² UTAH CODE ANN. § 10-9a-511(2) (emphasis added).

¹³ *Id.*

¹⁴ LOGAN DEVELOPMENT CODE § 17.02.020.

among other considerations. Each issue of nonconformity requires a separate action. These actions may occur as a part of the same application.”¹⁵

To establish a legal nonconformity, Logan City has provided a form entitled “Application to Determine Legally Existing Nonconforming Status.” The Application completed by the Trust stated that among other items to include with the application should be a “[d]escription of the nonconformity, include as much detail as possible.” The form also contained the following disclaimer:

“The burden of proof that the nonconformity was established legally rests with the owner, not the City. (Land Development Code §17.59.040 B) The applicant must provide all applicable information to the Department of Community Development. If the owner cannot provide information to prove the nonconformity was legally established or the Department of Community cannot find proof that the nonconformity was legally established, the property will not be granted legally existing nonconforming status. This may result in enforcement action being taken against the nonconforming property.”¹⁶

The Application completed by Kevan Eyre for the subject property described the use of property as “3 separate living units (main house and two apartments).” This statement refers to the number of units only, and contains no information on occupancy of any given unit. The Application appears to have included the building permit from 1956 and a site plan, which only serve to illustrate the qualities of the residential structure as having more than one unit. There is some dispute as to whether the Application was accompanied by the December 4, 2008 letter signed by Ms. Eyre, but even that letter served only to request that the Subject Property be certified as a legally existing triplex, and gave no information on the occupancy of each dwelling.

The resulting “Legally Existing Nonconforming Structure Certificate” issued on February 3, 2012 describes the recognized nonconformity as consisting solely of the right to use the structure as a triplex comprising three dwelling units. The certificate cannot be relied on, therefore, to certify occupancy allowances or any other nonconformity besides the establishment of a nonconforming use to three separate dwelling units in the structure of the Subject Property.

II. The Trust Has Not Properly Established Occupancy as a Nonconforming Use

As the plain language of the 2012 Certificate served only to certify a legal nonconforming use for three dwelling units for the Subject Property, it seems clear that any separate issue of occupancy as a nonconforming use related to the Subject Property has not been formally established. The City’s arguments confirm this, as it alleges the City has made multiple requests that the Trust apply for the recognition of the purported grandfathered occupancy allowances in

¹⁵ LOGAN DEVELOPMENT CODE § 17.52.030 F (2019). While this opinion deals with a timeline of events going back several years, this provision has not substantively changed since its enactment, though it has since been renumbered. *See* LOGAN DEVELOPMENT CODE § 17.59.030 F (2015).

¹⁶ Emphasis in original. Citation refers to a prior version of the code (2011), which is now § 17.52.040 B (2019).

the units with the City, and that the Trust has refused to apply, claiming that the 2012 Certificate already recognizes such a right.

While no additional information has been provided about these purported requests made by the City, the Trust has not denied it. The Trust argues that the continuation of vested rights is not dependent on the City's acknowledgment of those rights by what it deems "hoop"-jumping. However, because municipalities are allowed to establish the process to determine legal nonconformities, in order to establish a legal nonconforming use, it must be done according to the procedural requirements of local ordinances.

We must therefore determine whether the prior Application meets the burden under state law to establish occupancy of more than three unrelated people in the main floor/basement dwelling unit as a legal nonconforming use of the Subject Property. This office determines that it does not.

A nonconforming use has three elements under state law:

- (1) The use legally existed before its current land use designation;
- (2) The use has been maintained continuously since the time the land use ordinance governing the land changed; and
- (3) Because of one or more subsequent land use ordinance changes, the use does not conform to the regulations that now govern the use of the land.¹⁷

LUDMA provides that unless a municipality establishes an ordinance stating otherwise, the property owner shall have the burden of establishing the legal existence of a nonconforming use.¹⁸ Consistent with this default presumption under state law, Logan City's development code provides that the burden of proof to establish that a nonconformity lawfully exists rests with the owner, not the City.¹⁹

As it is the property owner's burden to establish the existence of a nonconforming use, the owner must marshal the evidence to satisfy each of the three elements. The concept of burden of proof actually encompasses two distinct burdens: the burden of production and the burden of persuasion: The burden of production refers to a party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder; The burden of persuasion is the duty to convince the fact-finder to view the facts in a way that favors that party.²⁰

In this matter, the Trust's Application did not include any information regarding occupancy to satisfy even one of the above elements to meet its burden of production, let alone satisfy the burden of persuasion by the strength of the evidence. As to the first element, the Application does not mention the current occupancy of any of the structure's units, nor when that occupancy began. The Application does not mention when occupancy land use restrictions were enacted for the subject property, nor does it mention that the occupancy has been continuous since that time. Because of this, the Trust has not met its burden to establish occupancy as a legal nonconforming

¹⁷ UTAH CODE ANN. § 10-9a-103(41).

¹⁸ UTAH CODE ANN. § 10-9a-511(4).

¹⁹ LOGAN DEVELOPMENT CODE § 17.52.040 B.

²⁰ *State v. Cox*, 2012 UT App 234, ¶ 5, 286 P.3d 15.

use. The Application cannot therefore be considered as establishing nonconformity rights to both a legal nonconforming triplex *and* a nonconforming occupancy allowance, without a separate application to address occupancy specifically.

To be clear, this Opinion does not address or draw conclusions about whether the Trust *could* meet the burden of proof to establish a nonconforming use in occupancy. It simply concludes that the property owner has, to this point, failed to establish a legal nonconforming right to occupancy through the city’s legal framework for establishing such a right. It may yet do so by submitting the proper applications and providing the appropriate evidence.

III. Revocation of the business license was lawful

Grandfathered rights must be established according to local ordinances. Logan City requires a Grandfathering Certificate to recognize a legal nonconformity. In absence of a granted permit, “[n]o use may be considered a legally existing nonconforming use under the provisions of this Title if the use was never lawfully established.”²¹ Until or unless the Trust obtains a Grandfathering Certificate addressing occupancy, specifically, it has no legal existing nonconforming use in occupancy.

The Subject Property is located in a Neighborhood Residential (NR) zone. In all neighborhood residential zones, residentially occupancy of a dwelling unit is limited to no more than three unrelated individuals.²² Property owners who maintain rental dwelling units must have a business license from the City.²³ The issuance of a landlord business license does not have the effect of recognizing a nonconformity,²⁴ and may be revoked if allowed to be occupied contrary to city ordinances, including occupancy restrictions.²⁵

In this matter, the City confirmed that the main floor/basement dwelling unit of the Subject Property was being occupied by six unrelated individuals, exceeding the City Code’s current occupancy allowances. The City alleges that it has made multiple requests that the Trust apply for recognition of the purported grandfathered occupancy level, and that the Trust has refused to apply. The City appears to have sent a notice to the Trust as early as May 2019, asking for an assurance of compliance with occupancy restrictions. Logan City Code requires a response to such a notice within seven days.²⁶ The City did not finally take action to revoke the Trust’s landlord business license until December 2019.

Because the Trust has yet to legally establish a legal nonconforming use for occupancy, and because a property owner must comply with occupancy restrictions in order to maintain a landlord business license, the City appears to have complied with its ordinances by revoking the Trust’s landlord business license, having issued the appropriate notice of violation and not receiving a response within the time frame allotted.

²¹ LOGAN DEVELOPMENT CODE § 17.52.050 G.

²² LOGAN DEVELOPMENT CODE § 17.08.040.

²³ LOGAN DEVELOPMENT CODE § 5.17.020 A.

²⁴ LOGAN DEVELOPMENT CODE § 5.17.070 B.

²⁵ LOGAN DEVELOPMENT CODE § 5.17.080 E.

²⁶ LOGAN DEVELOPMENT CODE § 5.17.095 C (Ord. 13-54, 2013).

CONCLUSION

State law allows for the continuation of nonconforming uses. Local ordinances establish the procedure for the recognition of nonconformity rights. Upon submitting the required application, the Trust obtained a certificate granting legal nonconforming status for the structure of the subject property to be used as three separate dwelling units. The Trust did not, by that same application, establish a legal nonconforming use to occupancy of any of those dwelling units in excess of current occupancy restrictions. Because occupancy has not been established as a legal nonconforming use, the City did not wrongfully revoke the Trust's landlord business license for exceeding current occupancy restrictions for one of the units of the Subject Property.

Jordan S. Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

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.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in UTAH CODE § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.

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 § 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:

Teresa Harris, City Recorder
Logan City
290 North 100 West
Logan, Utah 84321

On June 12, 2020, 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