

# Advisory Opinion #113

Parties: Ernie Sandoval and West Valley City  
Issued: March 29, 2012

## TOPIC CATEGORIES

### **Nonconforming Uses and Noncomplying Structures Interpretation of Ordinances**

Property owners may continue to use a noncomplying structure. Involuntary removal of a structure for road widening does not constitute abandonment if the owner sought to restore the structure with reasonable diligence.

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The Office of the Property Rights Ombudsman  
Utah Department of Commerce  
PO Box 146702  
160 E. 300 South, 2<sup>nd</sup> Floor  
Salt Lake City, Utah 84114

(801) 530-6391  
1-877-882-4662  
Fax: (801) 530-6338  
[www.propertyrights.utah.gov](http://www.propertyrights.utah.gov)  
[propertyrights@utah.gov](mailto:propertyrights@utah.gov)



GARY R. HERBERT  
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GREG BELL  
*Lieutenant Governor*

# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

### ADVISORY OPINION

Advisory Opinion Requested by:	Ernie Sandoval
Local Government Entity:	West Valley City
Applicant for the Land Use Approval:	Ernie Sandoval
Type of Property:	Commercial/Shopping Center
Date of this Advisory Opinion:	March 29, 2012
Opinion Authored By:	Elliot Lawrence, Attorney J. Taylor Adams, Legal Intern Office of the Property Rights Ombudsman

### Issues

Can West Valley City prevent reconstruction of a nonconforming sign that was taken down because of a road widening project?

### Summary of Advisory Opinion

Property owners have a vested right to continue use of a noncomplying structure, provided that the structure is not abandoned. Involuntary removal of a structure by condemnation entitles the property owner to continue the noncomplying structure when it is rebuilt. The burden to establish abandonment of a nonconforming use or noncomplying structure is with the party claiming the abandonment. Discontinued use of the structure might not constitute abandonment if the property owner seeks with reasonable diligence to continue the use but is prevented from doing so by factors outside his or her control.

Mr. Sandoval's sign was involuntarily removed in order to accommodate a road widening project. This removal did not cause the loss of his right to continue to use the noncomplying structure. Moreover, the City has not met its burden to prove abandonment of the structure. Accordingly, unless it can meet that burden, Mr. Sandoval may reestablish the noncomplying structure.

## **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 § 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 Ernie Sandoval, on August 30, 2011. A copy of that request was sent via certified mail to Sheri C. McKendrick, Recorder, for West Valley City, at 3600 Constitution Blvd, West Valley City, Utah, 84119. The return receipt was signed and delivered on September 7, 2011, indicating it had been received by the City. Ms. Claire Gillmore, Deputy City Attorney for West Valley City, submitted a response to the request for the advisory opinion on behalf of the City to the Office of the Property Rights Ombudsman on September 27, 2011. A copy of this response from the City was sent to Mr. Sandoval on September 28, 2011.

## **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, submitted by Ernie Sandoval, and received by the Office of the Property Rights Ombudsman, August 30, 2011, including attached exhibits.
2. Response submitted on behalf of West Valley City by Claire Gillmore, Deputy City Attorney, dated September 27, 2011, and all attached documents.

## **Background**

Ernie Sandoval is the property manager of Cougar Place Shopping Center in West Valley City. In 1994, the shopping center erected a pole sign which is 32 feet tall and 18 feet wide (576 square feet). When the Pole Sign was constructed, it complied with the City's ordinances, but the City enacted new restrictions in 2001 limiting the height of pole signs to 25 feet and the signage area to 200 square feet (WEST VALLEY CITY MUNICIPAL CODE §§ 11-5-106(9), 11-6-104(2)(a)). The City recognizes that Mr. Sandoval's sign became a nonconforming use under the 2001 requirements. Beginning in 2008 or 2009, the Utah Department of Transportation (UDOT) widened 3500 South, and the Pole Sign had to be taken down in order for the construction to move forward. Mr. Sandoval anticipated that the sign would be rebuilt after the project was completed, although it would need to be moved several feet from its original location due to the road project.

At one point, UDOT expressed willingness to help reconstruct the sign, pending approval from the City.

The City asserts that the Sign is no longer qualifies as a noncomplying structure, and so Mr. Sandoval's sign must conform to current ordinances. The City points out that the sign was removed in 2008 or 2009. The city received no request from Mr. Sandoval at that time for an extension of the nonconforming status of the sign, and the sign was not replaced for more than a year after the project began. "When Mr. Sandoval's sign was removed and he made no effort to extend his nonconforming use or seek approval from the City, he abandoned his nonconforming use, meaning that all future signs on his property must comply with the City's sign ordinance." (Statement provided by West Valley City, 9/27/2011).

Mr. Sandoval disagrees, stating that the Sign was not removed voluntarily, but was necessary due to the road widening project. In addition, Mr. Sandoval states that he has requested permission to reconstruct the Sign, but the City has refused to consider his request.

## **Analysis**

### **I. The Sign is Entitled to Noncomplying Structure Status.**

The pole sign at the Cougar Place Shopping Center is a noncomplying structure, which enjoys some protections, although state law allows the City to regulate the expansion or alteration of the use. A noncomplying structure is

a structure that:

- (a) legally existed before its current land use designation; and
- (b) because of one or more subsequent land use ordinance changes, does not conform to the setback, height restrictions, or other regulations, which govern the use of land.

UTAH CODE ANN. § 10-9a-103(31). Since the Sign is not a "use," it should be classified as a noncomplying structure.<sup>1</sup>

Restrictions on nonconforming uses and noncomplying structures must respect the owner's right to the lawful use of property. *Rock Manor Trust v. State Road Commission*, 550 P.2d 205, 206 (Utah 1976). "Moreover, because zoning ordinances are in derogation of property owner's

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<sup>1</sup> A noncomplying structure is similar to but distinct from a nonconforming use. A use is an activity that is carried out on property, while a structure is a permanent building or other installation on property (such as the pole sign). A structure may be noncomplying, even though the use associated with the structure is allowed. The City allows signs, but not as large as the one in question at the Cougar Place Shopping Center. In other words, the use is allowed, but the structure does not conform to the City's current ordinances. Section 10-9a-511 governs both nonconforming uses and noncomplying structures. It is not known whether the sign has received an "official" designation as a noncomplying structure.

common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed in favor of the property owner.” *Hugoe v. Woods Cross City*, 1999 UT App 281, ¶ 8, 988 P.2d 456, 458 (citations and alterations omitted).

Although noncomplying structure status affords property owners the right to continued maintenance of a structure, local governments have authority to enact ordinances governing “the establishment, restoration, reconstruction, extension, alteration, expansion, or substitution of nonconforming uses upon the terms and conditions set forth in the land use ordinance.” *Id.* § 10-9a-511(2)(a). The City is able to enact ordinances and make land use decisions which place restrictions on noncomplying structures provided certain conditions, laid out in the Utah Code, are met.<sup>2</sup>

## **II. Because The Noncomplying Structure was Removed Involuntarily, it is Entitled to the Protections Afforded by the Utah Code.**

According to the City’s ordinance, a nonconforming sign that is removed cannot be reconstructed. “A nonconforming sign shall not be altered, reconstructed, raised, moved, placed, extended, or enlarged, unless said sign is changed so as to conform to all provisions of this Title.” WEST VALLEY CITY MUNICIPAL CODE § 11-7-101. This ordinance seems to directly contradict the language found in the State’s statute governing nonconforming uses and noncomplying structures:

A municipality *may not prohibit* the reconstruction or restoration of a noncomplying structure or terminate the nonconforming use of a structure that is involuntarily destroyed in whole or in part due to fire or other calamity unless the structure or use has been abandoned. A municipality may prohibit the reconstruction or restoration of a noncomplying structure or terminate the nonconforming use if: . . . the property owner has voluntarily demolished a majority of the noncomplying structure or the building that houses the nonconforming use.

UTAH CODE ANN. § 10-9a-511(3) (emphasis added).

The City’s ordinances states that no nonconforming sign shall be reconstructed unless it is changed to comply with the current ordinance, even if it is involuntarily destroyed by a natural disaster.

Nonconforming signs which have been allowed to deteriorate or which have been damaged by fire, explosion, act of nature, or an act of a public enemy, or damaged by any other cause, to the extent of more than 50 percent of its assessed value shall, if repaired or rebuilt, be repaired or rebuilt in conformity with the regulations of this Title.

WEST VALLEY CITY MUNICIPAL CODE § 11-7-102.

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<sup>2</sup> In addition, a nonconforming use or noncomplying structure is also subject to reasonable regulation meant to promote the health, safety, or welfare of the public, as are all property uses. In other words, nonconforming status grants an owner the right to continue the use or structure, but does not exempt them from other public health, safety, or welfare regulations governing the use or structure.

However, the Utah Code guarantees that if the sign had been destroyed by a “fire or other calamity,” the City could not legally prevent Mr. Sandoval from rebuilding it, assuming he did so in a timely manner. The City’s ordinance thus conflicts with the state statute. To the extent it conflicts, the City’s authority must yield to State statute.<sup>3</sup>

The sign was not destroyed by fire or other natural disaster, but the statute places emphasis on whether the destruction was voluntary. The statute does not directly address involuntary destruction of a noncomplying structure due to condemnation. While condemnation does not constitute a calamity, it certainly does not amount to the property owner voluntarily demolishing the structure. The important distinction made by the statute seems not to be the exact cause of the destruction of the noncomplying structure, but rather whether that destruction was voluntary on the part of the property owner.

Mr. Sandoval did not choose to take down the Sign. It was located on a parcel of property that was condemned by a public agency for the purpose of widening the road. If Mr. Sandoval had refused to remove the Sign, the agency could have compelled its removal through eminent domain. In agreeing to let UDOT take the Sign down, Mr. Sandoval did not voluntarily demolish the nonconforming structure. The protections provided in § 10-9a-511 of the Utah Code should extend to the Sign, and the City must allow reconstruction, as long as the Sign has not been abandoned.

### **III. The City Did Not Meet Its Burden to Establish Abandonment of the Noncomplying Structure.**

By claiming abandonment, the City has the burden to show that the Sign no longer qualifies for noncomplying status. “Any party claiming that a nonconforming use has been abandoned shall have the burden of establishing the abandonment.” UTAH CODE ANN. § 10-9a-511(4)(b). The statute allows the municipality to presume abandonment of the noncomplying structure if one or more of the following conditions are met:

- (i) a majority of the primary structure associated with the nonconforming use has been voluntarily demolished without prior written agreement with the municipality regarding an extension of the nonconforming use;
- (ii) the use has been discontinued for a minimum of one year; or
- (iii) the primary structure associated with the nonconforming use remains vacant for a period of one year.

*Id.*, § 10-9a-511(4)(c).

The City claims that the lack of an agreement, written or otherwise, concerning the continuation of the nonconforming use prior to the removal of the sign is grounds for the presumption of

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<sup>3</sup> “Local governments, as subdivisions of the State, exercise those powers granted to them by the State Legislature . . . and the exercise of a delegated power is subject to the limitations imposed by state statutes and state and federal constitutions.” *State v. Hutchinson*, 624 P.2d 1116, 1121 (Utah 1980); see also *Carter v. Lehi City*, 2012 UT 2, ¶ 86.

abandonment. However, this interpretation again passes over the important distinction made by the statute in using the word “voluntarily.” The removal of the sign in this case was involuntary and therefore the lack of an agreement does not trigger the statute and is not grounds for the presumption of abandonment.

The City also claims that the noncomplying sign may be presumed to be abandoned on the grounds that the use was discontinued for at least a year. However, Mr. Sandoval cannot reasonably be expected to have replaced the sign within a year of its removal if he was prevented from doing so by the ongoing construction project. Because of the nature of the work that UDOT does, it is very likely that they obtained easements on the property which would have barred Mr. Sandoval from replacing the sign until such easements expired. The period of one year should begin from the point at which Mr. Sandoval became able—within reason—to replace the sign.

Mr. Sandoval claims that he began seeking permission to reconstruct the Sign as soon as the project was finished. If true, then Mr. Sandoval cannot be said to have abandoned the use. If a nonconforming use is discontinued for a period of at least one year, the use is considered abandoned, even if the owner intended to continue the use. *See Rogers v. West Valley City*, 2006 UT App 302, ¶ 21. However, an owner may overcome the presumption that the use was abandoned by actively seeking to continue the use. *See Vial v. Provo City*, 2009 UT App 122, ¶ 23.<sup>4</sup> The burden rests with the City to show that the use has been abandoned. The City has not met that burden with the information provided with this Opinion. In order to prove abandonment, the City must provide information to show that the structure was discontinued for more than a year from the time it was possible to seek to rebuild the sign. If the City’s burden has been met, Mr. Sandoval may be able to rebut the presumption of abandonment if he can show that he acted with reasonable diligence to preserve his right to the noncomplying structure. However, because the City has not established abandonment and Mr. Sandoval has not shown that he proceeded with reasonable diligence, this Opinion cannot determine if the sign may be replaced or not.

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<sup>4</sup> The *Vial* decision approved language from the Provo Municipal Code, which provided that a presumption of abandonment may be rebutted by evidence that the owner maintained the use, or actively and attempted to preserve the use. Given the important property rights involved, it stands to reason that a property owner should not lose a vested right to continue a nonconforming use if, despite diligent efforts to preserve that right, circumstances prevent the owner from maintaining the use.

## **Conclusion**

The sign at the Cougar Place Shopping Center was most likely a noncomplying structure, which is allowed to continue as a type of vested right. The City is authorized to regulate remodeling, reconstruction, or alteration of a noncomplying structure, but the City's authority must respect the property owner's right to continue the noncomplying structure. The City authority, however, must be construed so that it is consistent with the Utah Code. Section 10-9a-511 bars municipalities from preventing the reconstruction of noncomplying structures under certain circumstances.

The important distinction in § 10-9a-511 seems to be whether the noncomplying structure was demolished voluntarily. Demolition of a noncomplying structure due to a condemnation by a public agency is not directly addressed in the statute. Nevertheless, ambiguity should be resolved in favor of the property owner. It is reasonable to include condemnation with the involuntary causes of demolition mentioned by the statute. Thus the City cannot prevent the reconstruction of the sign unless it is determined that the sign was abandoned.

The burden to establish abandonment of a nonconforming use or a noncomplying structure is with the party claiming the abandonment. The City did not meet that burden in this case. The presumption of abandonment has been based on the lack of a written agreement and the use of the sign having been discontinued for at least a year. A written agreement prior to the time of the removal of the noncomplying structure is required when the structure is demolished voluntarily. This does not seem to apply here. Furthermore, the time limit of one year does not apply if the property owner was prevented from maintaining his right despite his diligent efforts. As this may be the case with Mr. Sandoval, the City has not met its burden to show that he abandoned his sign.

Brent N. Bateman, 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.**

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**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.**