

Advisory Opinion #99

Parties: Kevin Porter and City of Clearfield

Issued: March 29, 2011

TOPIC CATEGORIES

Nonconforming Uses and Noncomplying Structures
Interpretation of Ordinances

Bus benches established when they were allowed are entitled to be continued as nonconforming uses. The definition of billboard in the Utah Code includes bus benches with advertising messages. A sign on a bus bench is as much a billboard as a large sign along a freeway.

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ADVISORY OPINION

Advisory Opinion Requested by: Kevin Porter

Local Government Entity: Clearfield City

Applicant for the Land Use Appeal: Kevin Porter

Type of Property: Commercial Bus Benches

Date of this Advisory Opinion: March 29, 2011

Opinion Authored By: Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

When are bus benches entitled to nonconforming use status?

Are bus benches with advertising billboards within the definition found in the Utah Code?

Summary of Advisory Opinion

Because the bus benches were established at a time when they were allowed under the City's land use ordinances, they are entitled to be continued as nonconforming uses. The definition of billboard in the Utah Code includes bus benches with advertising messages. There is nothing in the state law that exempts smaller signs from being billboards. A sign on a bus bench is as much a billboard as a large sign along a freeway.

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 ANN. § 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 Kevin Porter on October 7, 2010. A copy of that request was sent via certified mail to Nancy R. Dean, City Recorder for Clearfield City. The City submitted a response to the Office of the Property Rights Ombudsman, which was received on November 18, 2010.

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, including attachments, filed October 7, 2010 with the Office of the Property Rights Ombudsman by Kevin Porter.
2. Response from Clearfield City, submitted by Brian E. Brower, City Attorney, received on November 18, 2010.

Background

Kevin Porter is the owner of Visual Advertising, which owns 37 bus benches placed in various locations around Clearfield City. Companies lease advertising space on the back of the bus benches, which are placed along the major streets. However, only a few of the benches are located at actual bus stops. Most of the benches are located on private property not owned by Mr. Porter or Visual Advertising. The City states that 10 benches are located on public property (presumably owned by the City).

Mr. Porter has engaged in his business for at least 41 years. For most of that time, the City exerted little or no regulation over the bus benches. Beginning in 2006, the City informed Mr. Porter that he was required to obtain a business license and permits for the benches. This requirement, the City stated, was based on an ordinance first enacted in 1999. As part of the license, the City required that Mr. Porter provide proof that he had permission from the owners of the properties where the benches were located. Mr. Porter states that he provided this proof by 2007, and that the City issued permits for the benches. He also states that the permits and licenses were renewed in 2008 and 2009.

However, in December of 2009, the City informed Mr. Porter that his permits had expired, and that advertising on bus benches was no longer permitted in the City. Mr. Porter states that the City requested that he remove the benches, and withheld his business license. In 2010, the City informed Mr. Porter that he had lost any nonconforming status for the benches, for failure to pay for the required permits. After a meeting with City officials, Mr. Porter was ordered to remove his benches by November 2010. In September 2010, he was cited for operating a business without a license, although he states that the City has withheld licenses from him.

The City states that it acted within its authority to change its ordinances regulating the placement of bus benches, and that Mr. Porter has no claim for nonconforming use status. The City argues that since Mr. Porter has not shown that he has “specific, express legal permission” from the private property owners to place benches on the respective properties, he cannot claim that the benches were ever “legally established” as required by the Utah Code. The City admits that it issued permits to Mr. Porter in 2007, but states that those permits were issued in error, and that he has not complied with the City’s ordinances.

In addition, the City argues that the bus benches are not “billboards,” within the meaning found at § 10-9a-103 of the Utah Code. Specifically, the City argues that a “bench” cannot become a “sign” (and thus not a billboard), simply by placing an advertisement on its back. The City also states that it has consistently treated bus benches as being distinct from billboards, and that the definition in the Utah Code was not meant to include bus bench advertising.¹ The City also maintains that the benches located on public property must be removed, because Mr. Porter does not have permission to use those locations.

Analysis

I. The Benches Are Entitled to Nonconforming Use Status, Because it Appears That Benches Were Allowed Uses Prior to 2006.

Because it appears that bus benches were allowed at the time that Mr. Porter first installed his benches, he may claim nonconforming use status. The Utah Code defines “nonconforming use” as 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
- (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.

UTAH CODE ANN. § 10-9a-103(32). A bus bench is a use of land, which may be regulated by a local government. There has been no evidence presented that the City prohibited bus benches when Mr. Porter first installed his benches sometime around 1969-70. Unless there was a specific prohibition in the City’s ordinances, it must be concluded that bus benches were allowable uses at that time. “[B]ecause zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner.” *Rogers v. West Valley City*, 2006 UT App 302, ¶ 15, 142 P.3d 554, 556.

Mr. Porter contends—and the City does not really dispute—that the benches have been maintained continuously since they were first installed. According to the information submitted for this Opinion, the City did not attempt to regulate Mr. Porter’s benches until 2006-07, after the City

¹ The City offered nothing from the statute’s language or legislative history to support its contention.

implemented ordinance changes requiring that Mr. Porter obtain permits for the benches. Mr. Porter states that he obtained the necessary permits, and was granted a business license until December of 2009, when the City informed him that all bus bench advertising was prohibited.² The City requested that Mr. Porter comply with the City's ordinances, which meant elimination of the bus benches.

Thus, Mr. Porter's bus benches meet the statutory definition of a nonconforming use. They were allowed at the time they were first installed, they have been maintained continuously since that time, and they are now prohibited because of a change in the City's ordinances.

Mr. Porter may claim nonconforming use status even though he is not the owner of the land being used. Nonconforming use status is not necessarily dependent upon property ownership. Sections 10-9a-103(32) and 10-9a-511 of the Utah Code make no distinction between an owner and a tenant establishing a land use.³ Even if Mr. Porter does not own the property where the bus benches are located, he still has an interest in the use, and so may claim nonconforming use status if eligible.

Nonconforming use status is also not dependent upon a written lease agreement with the property owners where the benches are located. A lease with a property owner, while important, does not determine whether a use qualifies for nonconforming status. The absence of a lease does not mean that the use could not have been established while it was allowed under the City's zoning ordinances.⁴ There has been no evidence that the City required that each bus bench location show proof of a lease agreement prior to 2006. Since the use could have been established with or without proof of a lease agreement, failure to prove written leases does not prevent Mr. Porter from obtaining nonconforming use status.⁵

II. The Bus Benches are Billboards, Entitled to the Protections of the Land Use Development and Management Act.

Because bus bench advertising is a type of billboard, they are entitled to the protections provided in §§ 10-9a-512 and -513 of the Utah Code. Whether advertising on a bus bench should be considered a billboard depends on how the definition in the Utah Code is interpreted. A "billboard" is defined as "a freestanding ground sign located on industrial, commercial, or residential property if the sign is designed or intended to direct attention to a business, service, or product that is not sold, offered, or existing on the property where the sign is located." UTAH CODE ANN. § 10-9a-103(3).

² Mr. Porter's business licenses may have included business activities other than bus bench advertising.

³ UTAH CODE ANN. § 10-9a-511 governs nonconforming uses.

⁴ See e.g., *Vial v. Provo City*, 2009 UT App 122, ¶ 16, 210 P.3d 947, 951-52 (Absence of a separate kitchen is not proof that a use was not established, but could be proof that the structure was noncomplying); see also *Thompson v. Logan City*, 2009 UT App 335, ¶ 20, 221 P.3d 907, 912-13 (Failure to establish that a building permit had been issued does not prevent a finding that a nonconforming use was established).

⁵ Permission from the property owners is important, of course. Mr. Porter should obtain permission, and place his bus benches according to the terms of those agreements. The City could require that Mr. Porter obtain permission, because that would probably be a reasonable regulation. Compliance with such a regulation, however, cannot be a condition of nonconforming use status.

A. Standards of Statutory Interpretation

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

If the plain language of an ordinance is sufficiently clear, the analysis ends there. However, further interpretation is necessary if the language is ambiguous.

In interpreting a statute, we look to its plain language. We read statutory provisions literally, unless such a reading would result in an unreasonable or inoperable result. Only if there is ambiguity or absurdity will we depart from the plain language to explore other sources of legislative intent. Our duty to give effect to the plain meaning of a statute, however, should give way if doing so would work a result so absurd that the legislature could not have intended it. If the plain language is unambiguous then we need not look beyond it, and no other interpretive tools are needed in analyzing the statute.

General Construction & Development, Inc. v. Peterson Plumbing Supply, 2011 UT 1, ¶ 8. (citations omitted).

The objective of statutory interpretation is to “harmonize [all] provisions in accordance with the legislative intent and purpose.” *Id.* (internal quotations omitted). “In addition ‘statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and . . . interpretations are to be avoided which render some part of a provision nonsensical or absurd.’” *Perrine*, 911 P.2d 1290, 1292 (quoting *Millet v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980)). Finally, “[t]he plain language of the statute [should be read] as a whole, . . . [interpreting] its provisions in harmony with other statutes in the same chapter and related chapters.” *Mountain Ranch Estates v. Utah Tax Commission*, 2004 UT 86, ¶ 11, 100 P.3d 1206, 1209.

B. Bus Benches Advertisements are Billboards.

Turning to the language of § 10-9a-103(3), then, it is clear that the definition of “billboard” does not depend upon the size of the sign—a small advertising message may be as much a billboard as a large one. The definition does not depend upon the size or type of structure, as long as it is freestanding and on the ground.⁶ This conclusion is supported by language from the Utah Outdoor Advertising Act, which defines “outdoor advertising structure” as “any sign structure, including any necessary devices, supports, appurtenances, and lighting that is part of or supports an outdoor

⁶ Section 10-9a-513 includes additional definitions applicable to billboards. The language establishes a maximum height for billboards located on an interstate highway, and allows a city to establish a maximum height for other billboards on surface streets. The statute does not set a minimum height or size for billboards.

sign.” *Id.*, § 72-7-502(19).⁷ Nothing in these statutes distinguishes a billboard due to the nature of the structure. Benches can be freestanding ground signs just as much as more traditional billboard structures.

C. Bus Bench Advertising is Entitled to the Protections of the Utah Code.

The plain language of these statutes leads to the conclusion that an outdoor bus bench with an advertising message is a “billboard” within the meaning of §§ 10-9a-512 and 513. As a billboard, it is subject to the protections and provisions found in those statutes:

(1) A municipality may only require termination of a billboard and associated property rights through:

- (a) gift;
- (b) purchase;
- (c) agreement;
- (d) exchange; or
- (e) eminent domain.

(2) A termination under Subsection (1)(a), (b), (c), or (d) requires the voluntary consent of the billboard owner.

UTAH CODE ANN. § 10-9a-512. Therefore, the City cannot require the removal of Mr. Porter’s bus benches without payment of fair compensation. Any action that prohibits a billboard can constitute a seizure of the billboard by eminent domain. “A municipality is considered to have initiated the acquisition of a billboard structure by eminent domain if the municipality prevents a billboard owner from: rebuilding, maintaining, repairing, or restoring a billboard structure that is damaged by casualty, an act of God, or vandalism” *Id.*, § 10-9a-513 (2)(a).⁸ The City may still remove the benches, but it must compensate Mr. Turner if it chooses to do so.

By informing Mr. Porter that bus bench advertisements are prohibited, and demanding their removal, the City exercised eminent domain and effectively acquired the benches. The City may either abandon its demand that the benches be removed, or compensate Mr. Porter for the benches that are removed in accordance with condemnation law.

In spite of the protections afforded to billboards, the City may impose reasonable regulations intended to promote the public health, safety, or welfare. These regulations may include licensing, and identification of the sites where the benches are located. The City may also require that Mr. Porter show he has permission from the private property owners to place a bench on the property. If a bench falls into disrepair, the City may ask that Mr. Porter repair it; removal of the bench, however, is possible only under § 10-9a-513.

⁷ The Utah Outdoor Advertising Act (UTAH CODE ANN. §§ 72-7-501 to -516) is a separate enactment, but it is referenced in the Land Use Development and Management Acts (*See* §§ 10-9a-513(2)(b); 17-27a-512(2)(b). Therefore, it can be considered a “related statute,” and it is cited here to provide additional insight into the definition of “billboard.”

⁸ In some limited circumstances, a billboard may be removed without compensation. *See* UTAH CODE ANN. § 10-9a-513(3).

Conclusion

The bus benches are entitled to nonconforming use status, because when they were first installed, they were allowed under the City's ordinances. They are now prohibited by the City's land use code, but they may be continued as nonconforming uses. The City may enforce compliance with licensing and other health and safety ordinances, but noncompliance with such ordinances does not affect nonconforming use status.

The bus benches are billboards, within the definition provided in the Utah Code. A billboard is essentially defined as a freestanding ground sign with an advertising message. The definition does not restrict billboards to large signs only. A small sign on a bus bench falls under the same definition. Since the bus benches are billboards, the City must comply with state laws extending protections to billboards. This does not mean that the City cannot require compliance with reasonable health and safety regulations, including licensing.

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.

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.