GARY R. HERBERT
*Governor*

SPENCER J. COX
*Lieutenant Governor*

State of Utah
Department of Commerce

TOOELE COUNTY CORPORATON
CONTRACT # 16-11-04

**OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN**

FRANCINE A. GIANI
*Executive Director*

BRENT N. BATEMAN
*Lead Attorney, Office of the Property Rights Ombudsman*

# ADVISORY OPINION

| | |
|---|---|
| Advisory Opinion Requested By: | Scott Hunter |
| Local Government Entity: | Tooele County |
| Applicant for Land Use Approval: | South Rim, LC |
| Type of Property: | Gravel Pit |
| Date of this Advisory Opinion: | November 29, 2016 |
| Opinion Authored By: | Brent N. Bateman<br>Office of the Property Rights Ombudsman |

## ISSUE

Did the 1996 conditional use permit for gravel extraction expire, or is it valid today even though the zoning has changed?

## SUMMARY OF ADVISORY OPINION

The 1996 conditional use permit did not expire on its own terms, because the expiration condition was never expressed in the permit approval. Likewise, the 1996 conditional use permit did not expire by the terms of the Tooele County ordinances, because the provisions causing expiration of the permit did not apply to the property.

Nevertheless, the zoning has changed on the property. The new zoning does not allow gravel extraction. When the zoning changed, the active gravel pit became a legal nonconforming use, and its continuance will depend on whether it has been abandoned. The remaining property previously covered under the conditional use permit for gravel extraction, but never actually used for gravel extraction, has neither a conditional use permit nor legal nonconforming status at present.

## 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.

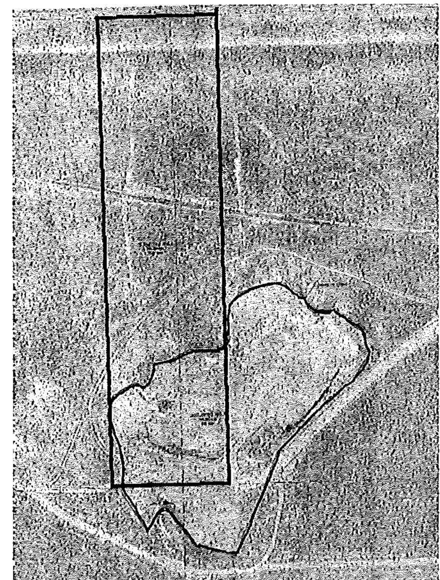
A Request for an Advisory Opinion was received from Mr. Scott Hunter on September 16, 2016. A copy of that request was sent via certified mail to Marilyn K. Gillette, County Clerk, Tooele County, 47 South Main, #318, Tooele, UT 84074.

## 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 Mr. Scott Hunter on September 16, 2016, with attachments.
2. Letter submitted by Mr. Gary K. Searle, Chief Deputy Tooele County Attorney, received October 18, 2016, with attachments.
3. Response submitted by Mr. Hunter, via email, received October 20, 2016, with attachments.
4. Response submitted by Mr. Searle, via email, received October 21, 2016.

## BACKGROUND



According to available imagery, a small gravel pit (the Pit) has existed in the South Mountain area of Tooele County since at least 1977. A portion of the Pit lies within a long rectangular 10 acre parcel (the 10 Acre Parcel) as shown here. The remainder of the Pit, approximately 6 acres, lies outside of the 10 Acre Parcel.

In October 1996, Tooele County, the then-owner of the 10 Acre Parcel applied for a conditional use permit (CUP) for gravel extraction. The County granted the County's requested permit. The CUP covers the 10 Acre Parcel only. It does not appear that any permit was ever obtained for the portion of the Pit outside of the 10 Acre Parcel.

The application file for the 1996 CUP on the 10 Acre Parcel includes a document titled *Staff Recommendations for Conditioned[sic] Issued.* This document contains the recommendations of County staff for approval of the CUP application. In relevant part, this document states that:

> 5. Therefore, the Department of Engineering staff recommends the following for items for consideration as conditions to be issued by the Tooele County Planning Commission.
>    a. The applicant shall submit for approval an operation plan addressing Item 27-6 of chapter 27 of the Uniform Zoning Ordinance of Tooele County. This plan shall address the operation for the next five years.
>    b. The applicant shall not be required to maintain a reclamation bond.
>    c. This permit shall be reviewed and site inspected annually and will expire five years from the date of approval.

The CUP was approved at the October 16, 1996 Tooele County Planning Commission meeting. The minutes of this meeting relating to this item read exactly as follows, in their entirety:

> **Application for Conditional Use Permit #0134-96, Gravel Permit, South Mountain – Tooele County**
>
> Mr. McKendrick stated that this was an existing gravel permit and is located on 10 acres in an MU-40 zone. It is very limited as to what is extracted.
>
> Gilbert Davies made a motion to approve application for Conditional Use Permit #0134-96, Gravel Permit, South Mountain – Tooele County. John Olsen seconded the motion.
>
> By verbal roll call:

| | |
|---|---|
| Lois McArthur | Yes |
| John Olson | Yes |
| Shirley Worthington | Yes |
| Gilbert Davies | Yes |
| Craig Vorwaller | Yes |
| John Beagley | Yes |

This record contains no mention of the staff recommendations, nor of adoption of any conditions upon approval of the permit. No other permit, document, or record of approval of this CUP is found.

Tooele County ordinances require, in the Chapter titled *Mining and Extraction Zone (MG-EX)*, that gravel pit owners submit a 5 year operations plan, and that at the expiration of the 5 year plan, either a new five year plan be submitted or closure and reclamation of the site should commence. It does not appear that the 10 Acre Parcel, nor any part of the Pit, were ever within the zone titled *Mining and Extraction Zone (MG-EX).* It appears that the Pit owners never submitted any 5 year operations plan, nor was the site ever reclaimed.

In the years following the grant of the 1996 CUP, residential development has crept toward the Pit. According to the parties, sometime in the early 2000s, the zoning on the Pit was changed. It is not clear from the documents submitted exactly what changes took place, but both parties agree that following the zone change, no part of the Pit is zoned for gravel extraction.

The current owner of the 10 Acre Parcel now owns many other parcels contiguous to the Pit. The owner plans to significantly expand both the size of the Pit and the volume of material extracted. The current owner's total plan is to establish a 160 acre gravel operation. On October 21, 2014, the Tooele County Planner sent a letter to the current owner that reads as follows:

> The Tooele County Planning staff has reviewed the status of your property (ID # 06-023-0-0011) and found it to be a legally grandfathered use as a sand and gravel excavation use. A conditional use permit was issued for the property in 1996 and because conditional use permits run with the property and not the owner, the use legally exists. We would only ask that a new 5-year operation plan be submitted for the current operations as required under Section 27-3(2) of the Tooele County Land Use Ordinance.

Thus the County found that a legally nonconforming use exists on the 10 Acre Parcel for sand and gravel excavation, and so notified the current owner. The owner submitted a 5 year plan on the entire 160 acre extraction area, and the County Zoning Official approved that plan.

Some neighbors in the area dislike having a gravel pit so close to their homes. One of those neighbors, Scott Hunter, has requested this Advisory Opinion to determine whether or not the permit to extract gravel is valid. He argues that the CUP for the 10 Acre Property expired by its terms. Alternately, he argues that the use of the property cannot be expanded to a large gravel operation and still maintain its grandfathered status.

Having reviewed the matter, the County now acknowledges that there never was a CUP for a 160 acre gravel operation, and has so notified the current owner. However, the County argues that the CUP remains valid for the 10 Acre Parcel, upon which the CUP was originally granted. The County further argues that the excavated area outside of the 10 acre parcel is legally nonconforming, and extraction operations there may continue.

## ANALYSIS

Since the County clarified that the entire 160 acre area does not have legal nonconforming use status, no question remains regarding expansion of the Pit. The 160 acre gravel operation will require a zoning change to a zone that allows gravel extraction. If a zone change is granted, the operation will then require a permit for gravel extraction. However, two questions remain: (1) the status of the 1996 CUP on the 10 Acre Parcel, and (2) whether the Pit, inside or outside of the 10 Acre Parcel, is a legal nonconforming use permitting continued gravel extraction there.

## 1. The Conditional Use Permit on the 10 Acre Parcel

*a. The CUP Did Not Expire on its Own Terms*

Mr. Hunter first argues that the CUP for the 10 Acre Parcel expired by its own terms. This argument is based upon the document titled *Staff Recommendations for Conditioned[sic] Issued,* which states that "This permit shall be reviewed and site inspected annually and will expire five years from the date of approval."

This expiration condition was not included in the permit approval. UTAH CODE § 17-27a-508(1)(i) indicates how a county may legitimately impose a requirement on a land use permit:

> (i) A county may not impose on a holder of an issued land use permit or a final, unexpired subdivision plat a requirement that is not expressed:
> (i) in a land use permit;
> (ii) on the subdivision plat;
> (iii) in a document on which the land use permit or subdivision plat is based;
> (iv) in the written record evidencing approval of the land use permit or subdivision plat;
> (v) in this chapter; or
> (vi) in a county ordinance.

According to this statute, a County may not impose an unexpressed requirement. Moreover, any requirement must be expressed in one of the six listed sources.

The expiration condition is expressed only in the document titled *Staff Recommendations for Conditioned[sic] Issued.* It is expressed nowhere else. There is no written separate (i) land use permit or (ii) subdivision plat. Accordingly, there is no (iii) document on which a land use permit or subdivision plat is based. The (iv) written record evidencing approval, *i.e,* the minutes of the Planning Commission meeting, do exist. But the expiration condition is not found there expressly or by reference. Finally, no expiration condition is found in (v) this chapter of the State Code, or in (vi) the county ordinance. Thus, the expiration condition is not expressed in any of these sources. According to the statue, the unexpressed expiration condition cannot be imposed.

The only document expressing the condition clearly states that it contains the "recommendations" of staff "for consideration as conditions." Nothing in the approval or the CUP approval references or adopts these staff recommendations. In land use approvals, staff recommendations are often rejected or significantly modified in granting the actual permit. We cannot assume that the recommendations of staff have been adopted unless that adoption has been clearly expressed. The only written record evidencing approval of the permit, the minutes, include only one statement that could possibly be considered a condition: "It is very limited as to what is extracted." This does not reference any statement in the *Staff Recommendations*. We cannot simply assume that a condition was imposed, just because the condition was recommended by staff. Accordingly, the expiration condition was not adopted and the permit did not expire after five years.

*b. The CUP Did Not Expire Due to County Ordinance*

Mr. Hunter also argues that Tooele County Ordinance 27-3 requires a five year operation plan, and either a new five year plan or closure and reclamation of the site when the five year plan expires.

Tooele County Ordinance 27-3 states that:

> All commercial pit operations shall work under an approved five year operation plan. Upon expiration of the previous plan, a new five year plan shall be submitted; otherwise closure and reclamation operations shall begin within six months.

It appears that this requirement was never applicable to the property. Tooele County Ordinance 27-3 is a requirement imposed upon properties within the *Mining, Quarry, Sand, and Gravel Excavation Zone (MG-EX)*. The documents submitted do not indicate that the 10 Acre Parcel was ever within this zone. Thus, the condition cannot be said to apply to the 10 Acre Parcel.

A property owner must comply with the legal requirements placed upon the land by the applicable zoning ordinance. However, a property owner cannot be expected to comply with legal requirements not applicable to the zone in which the land appears, just because those legal requirements appear elsewhere in the Code. Thus, this legal requirement is not applicable to the 10 Acre Parcel, and the CUP did not expire.

**2. The Legal Nonconforming Use Status of the Pit**

Just because the CUP did not expire, it is not necessarily still in effect. Both parties indicate that the current zoning of the Pit is different from the zoning that existed at the time the CUP was issued, and the current zoning does not allow gravel pits. If that is the case, the 10 Acre Parcel no longer has a CUP to operate a gravel pit, because the original CUP is no longer legal. Accordingly, the area of the 10 Acre Parcel that has never been *used* as a gravel pit has no current CUP for gravel extraction.

*a. Legal Nonconforming Uses*

Conversely, the area of the Pit, both inside and outside of the 10 Acre Parcel, may currently maintain a legal nonconforming use right as a gravel pit. Uses of property that were legal when first established, but are now illegal due to a change in the law since the use was established, and have maintained the use continuously since the use became illegal, have a property right called a legal nonconforming use. UTAH CODE 17-27a-103(38) defines a Nonconforming Use:

> A "Nonconforming use" is defined as 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 regulation 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.

Nonconforming uses may be legally maintained once the use becomes illegal: "Except as provided in this section, a nonconforming use or a noncomplying structure may be continued by the present or a future property owner." UTAH CODE 17-27a-510(1)(a). However, once a use becomes nonconforming, it is subject to state laws and local ordinances regarding legal nonconforming uses. The state statute provides:

> The legislative body may provide for:
> (a) the establishment, restoration, reconstruction, extension, alteration, expansion, or substitution of nonconforming uses upon the terms and conditions set forth in the land use ordinance;
> (b) the termination of all nonconforming uses, except billboards, by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of his investment in the nonconforming use, if any; and
> (c) the termination of a nonconforming use due to its abandonment.

UTAH CODE 17-27a-510(2). Thus, once a use becomes legally nonconforming, it can continue, subject to state laws and local ordinances, including laws and ordinances on abandonment.

Tooele County ordinances do contain an abandonment provision:

> (2) Wherever a nonconforming use has been discontinued for a period of one year, such use shall not thereafter be re-established, and any future use shall be in conformance with the provisions of the land use ordinance.

*Land Use Ordinance of Tooele County*, 5-6(2). Accordingly, in Tooele County, if a legally nonconforming use ceases operation for a period of one year, it is abandoned, and the use cannot be resumed without obtaining a new permit.

*b. The Pit is a Legal Nonconforming Use Unless it was Abandoned*

The parties each indicate that the land use ordinances have changed at the Pit, and that gravel extraction is no longer a legal use. Once that happened, the CUP in the 10 Acre Parcel became illegal, and the Pit itself became legally nonconforming. Accordingly, the Pit can continue to operate in the size and manner to which it has been continuously maintained as a legal nonconforming use.

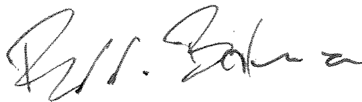
Nothing submitted by the parties indicates clearly whether or not the Pit has continuously operated since it became legally nonconforming "sometime in the early 2000s." Accordingly, if the Pit has not been used as a gravel pit for any one-year period, it may have been abandoned. If so, the legal nonconforming status has been lost, and the pit cannot be operated unless a new conditional use permit is obtained in accordance with the current zoning. Note that the party attempting to prove that abandonment has occurred has the burden to prove abandonment. UTAH

CODE 17-27a-510(4)(b). Accordingly, if abandonment cannot be proven, and continuous use as a gravel pit has been maintained, the Pit is a legally nonconforming use and can continue.

## CONCLUSION

The Conditional Use Permit for the 10 Acre Parcel did not expire by its terms or by Tooele County Ordinance. However, once the zoning changed for the 10 Acre Parcel to a zone that does not allow gravel pits, the CUP became illegal. At that point, the portion of the 10 Acre Parcel actually used as a gravel pit became a legally nonconforming use, and may still be so today unless it was abandoned. The remainder of the 10 Acre Parcel, not used as a gravel pit, no longer has a CUP for gravel extraction.

The active portion of the Pit outside of the 10 Acre Parcel may also be a legally nonconforming use if it has not been abandoned.



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.**

**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**

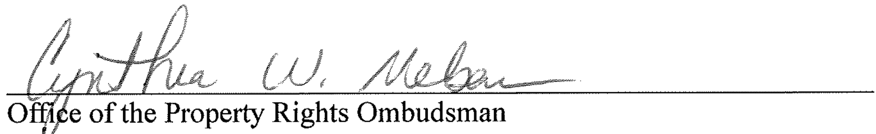
Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with UTAH CODE § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

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:

Marilyn K. Gillette, County Clerk
Tooele County
47 South Main, #318
Tooele, Utah 84074

On this 29th Day of November, 2016, 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