Salt Lake City Land Use Appeals Hearing Officer
PLNAPP2020-00943
Appeal from Administrative Decision
1200 South Oak Hills Way – Sideyard Shed
March 15, 2021

This is an appeal from an administrative decision which determined that an existing "shed" structure located on the subject property at 1299 South Oak Hills Way does not qualify as a "noncomplying structure" under the City's land use regulations. The appellant property owner, Martin Szegedi, claims that the interpretation of the ordinance in this instance is incorrect and that the structure has become legal because the City has not previously required either its removal or the removal of other similar structures in the area. The appeal is denied as explained below.

RECORD

The record includes the Staff Report, a document of 83 pages dated March 5, 2021, which includes the City's Administrative Interpretation Letter, an initial appeal brief dated February 15, 2021 filed by Brett Hastings on behalf of the property owner, and a response filed by the City Attorney dated March 5, 2021. A brief dated March 8, 2021 filed by J. Scott Brown on behalf of abutting property owner Norma C. Stromberg is also included. The record includes a recording of the more than ninety-minute long Webex electronic hearing held on March 11, 2021.

BACKGROUND

This matter involves the interpretation and application of language in the Salt Lake City Code at Section 21A.62.040 which defines a legal noncomplying structure as:

> Buildings and structures that serve complying land uses which were legally established on the effective date of any amendment to this title that makes the structure not comply with the applicable yard area, height, and/or bulk regulations of this title.

And at 21A.38.010.A.2 regarding noncomplying structures, stating:

> Noncomplying structures and improvements include legally constructed principal and accessory buildings, structures and property improvements, that do not comply with the applicable bulk and/or yard area regulations and design standards of this title such as setbacks and parking in the zoning districts in which the buildings or structures are located.

Findings of Fact:

1. On the property at 1200 South Oak Hills Way is a single family home which is allowed as a principal use in the R-1/12,000 zoning district.

2. Also on the property is a structure which has been referred to here as a "shed" which has been and continues to be used to shelter yard tools and equipment.
3. The shed originally included a flat roof placed over an area with walls on two sides and a small part of a third side. It has been used to shelter a lawn mower and other tools and equipment.
4. The shed was originally constructed in 2005 or at some time before that year.
5. The shed is located within the side yard of the residence.
6. The minimum side yard setback in the zone is eight feet.
7. The shed encroaches into the minimum side yard setback.
8. Salt Lake City has made no effort prior to 2020 to demand that the shed be removed or altered to comply with city ordinances.
9. Early in 2020, the property owner made physical changes to the shed, including replacement of the flat roof with a gabled roof located at least 2.5 feet higher than the original height of the flat roof. Some windows and side walls were also added.
10. In July of 2020 representatives of the abutting landowner filed a complaint with the City zoning enforcement, alleging that the changes to the shed were illegal.
11. The City took action to respond to the complaint and issued a stop work order for the shed alterations.
12. The property owner filed plans for a building permit to cover the shed alternations.
13. City staff directed the property owner to seek an administrative interpretation as to the legal status of the shed. This was submitted by the property owner on September 15, 2020.
14. In response, the Zoning Administrator determined that the shed did not meet the definition in the code for a legal noncomplying structure and was therefore an "illegal structure" in an Administrative Interpretation dated November 9, 2020.
15. The interpretation states that "the portions of the shed located within the side yard are not considered legal noncomplying and are not allowed. Portions of the shed outside the side yard are considered legal complying and are allowed." (emphasis added).
16. The property owner filed a timely appeal of the interpretation. That appeal is now before the hearing officer.
17. If the interpretation by the Zoning Administrator is not reversed in this appeal, the building permit will be denied.

CONCLUSIONS OF LAW:

1. In his appeal the property owner argues that (1) the shed should be considered a legal noncomplying structure under the equitable doctrines of latches and waiver, (2) the City is estopped from deeming the shed illegal as it has been treated as a taxable structure for over 20 years, and (3) that forced removal of the shed would be arbitrary, capricious, and illegal.
2. The property owner provided photographs of thirty-one other properties which he alleges involve sheds which encroach within the minimum side yard area of homes in the area where his home is located.
3. The existing shed does not comply with the current requirements of the City Code.
4. There is no evidence in the record that the shed complied with any version of the Code that may have been in existence at any time when the shed was likely to have been constructed.

5. The shed was therefore never legally constructed or established.
6. The shed does not, therefore, meet the definition of a Legal Noncomplying Structure in the City Code.
7. Appellants arguments about equitable defenses to equitable remedies are not relevant to the narrow issue of how the Code defines a non-complying structure.
8. The administrator's decision goes beyond the interpretation of the ordinance and includes a conclusion that portions of the shed are "not allowed", which is a broader conclusion than to state that the shed does not qualify as a legally noncomplying structure under the code.
9. The property owner's equitable arguments that the shed should be allowed under other legal doctrines are thus properly before the hearing officer.
10. The property owner cites the case of *Salt Lake County v. Kartchner,* 552 P.2d 136, as controlling in this instance. In *Kartchner*, the Utah Supreme Court was sitting as a court in equity, which it did, according to the opinion, because the district court in that case had ordered an equitable remedy (an injunction) to the violations of the ordinances there.
11. In Kartchner, a county building inspector had issued a notice for the property owner to get a permit to allow him to construct the carport at his residence which was "in the initial stage" of construction without a permit. The notice was left at the property owner's front door in May of 1972. The notice did not include a stop work order or notice of a setback violation. Six months later, in November of 1972, when the carport was "almost completed", the county inspector left another notice, advising the property owner that he needed a building permit for the carport, and stating that the location of the carport violated the setback regulations. In February of 1973 a county inspector made the first personal contact with the property owner. The county then obtained the equitable remedy of an injunction from the district court, ordering that 6 ½ feet of the carport be removed.
12. It is difficult to read *Kartchner* and come to the conclusion that the only factor the decision turned upon was a factor noted by the court that six other homes in the near vicinity had violations of the setback ordinances. The Court cited a variety of issues that it heard as a court in equity to decide whether an equitable remedy such as an injunction was appropriate under the circumstances. These included:
    a. Failure of the county to inform the property owner of his zoning infraction at the time of the first notice. *Id.*138.
    b. The proven existence of similar violations against which no injunction had been sought, as conceded by witnesses appearing on behalf of the county in the record. *Id*. 139.
    c. Measuring the setbacks of houses in the area but excluding houses located on corner lots. *Id*. 139.
    d. The property owner in would suffer a $2,000 loss in the improvements he had constructed. *Id*. 140.
    e. The faulty notice provided to the property owner. *Id.* 140.
13. The facts of this matter do not constitute the "exceptional" circumstances stated *Kartchner* which would trigger the equitable remedies the property owner asserts.
    a. There is no evidence here that the City failed to notify the property owner of the issues being considered here at the first contact.

b. While there are photographs in the record which allegedly show that the same violations observed on the property owner's property may exist on 31 or more other properties in the same area, there is no evidence in the record as to how the City has responded to complaints about those structures if indeed other complaints were filed. The issue here is not whether other violations exist, but whether there is an established pattern of conduct on the part of the City which does not uniformly apply the law or which discriminates against certain individuals or classes of individuals in that enforcement. Photos of other properties do not, in an of themselves, establish a pattern of conduct by the City. Also, the other violations in *Kartchner* were established by proof in the District Court and were not merely allegations.

c. The injury to the property owner in *Kartchner* appears to have resulted from the property owner proceeding unaware of the violation of the land use regulations after the county failed to inform him of the violations in its first notice. It appears that, under *Kartchner*, once the local government entity takes it upon itself to point out a violation of the ordinances, such as constructing a car port without a building permit, it should also identify any other obvious violations of the ordinances which are also clearly observable. In the current case the City it is not alleged that the City gave only partial notice of some of the alleged violations. There was no delay of almost a year, as in *Kartchner*, between the time that agents of the municipality become aware of the setback violation and its seeking the removal of the structure.

14. For these reasons, *Kartchner* is distinguished here. It appears likely and perhaps probable that the Supreme Court, sitting in equity and balancing facts rather than being tied strictly to the record of the proceeding below, considered a variety of factors in determining that the county did not have "clean hands" in seeking the severe remedy of a forced removal of the structure.
15. As stated in *Kartchner*, "Estoppel, waiver and laches ordinarily do not constitute a defense to a suite for injunctive relief against alleged violations of the zoning laws, unless the circumstances are exceptional. . . Ordinarily a municipality is not precluded from enforcing its zoning regulations, when its officers have remained inactive in the face of such violations. The promulgation of zoning ordinances constitutes a governmental function. This government power usually may not be forfeited by the action of local officers in disregard of the ordinances." *Id.* 138.
16. The hearing officer sits here to decide an equitable issue. "An application for injunctive relief is addressed to the conscience of the chancellor, who may in the exercise of sound discretion either grant or deny the prayer as the circumstances require." Id. 139, citing *Shell Oil v. Stiffler*, 87 Utah 176, 48 P.2d 503 (1936).
17. The property owner here argues that the City has waived its power to enforce its side yard setback ordinance because of failure to do so in more than 31 other instances. The City responds that it enforces zoning violations on a complaint basis. The property owner cites no case law holding that to enforce an ordinance on a complaint basis is illegal. Rather, according to the Supreme Court, "The Court specifically finds in this case that the purpose of the occupancy ordinance has not been abrogated or annulled by the policy of the City proceeding primarily on a complaint basis, and that that policy is neither "naturally calculated" nor "deliberately intended" to bring about non-compliance. On the contrary, the Court believes the policy of the City has been toward

securing compliance with the least harassment, and least interference with owners in the use of their properties." *Provo City v. Hansen*, 585 P.2d 461 (Utah 1978).

18. "Although a mandatory injunction is within the scope of relief available to remedy the violation of a zoning ordinance, the grant or denial of such a harsh remedy is in the sound discretion of the district court. See Salt Lake County v. Kartchner, 552 P.2d 136, 138 (Utah 1976); Utah County v. Baxter, 635 P.2d 61, 64 (Utah 1981); Utah County v. Young, 615 P.2d 1265, 1267 (Utah 1980). We have stated that 'injunctive relief is available only when intervention of a court of equity is essential to protect against 'irreparable injury,' 'Baxter, 635 P.2d at 64, and where granting it is consistent with the 'basic principles of justice and equity.' Young, 615 P.2d at 1267. *Culbertson v. Salt Lake County*, 2001 UT 108, ¶51.
19. While a private individual must show irreparable injury to obtain an injunction for a violation of land use regulations, this is not the case with a municipality. Because a violation of a zoning ordinance is also a crime, a showing that the zoning ordinance has been violated is tantamount to a showing of irreparable injury. *Id.* ¶51.
20. The property owner's arguments related to uniform enforcement of the laws and equal protection are presented generally here but are not considered because they were presented without citation to any authority demonstrating that these constitutional protections have been enforced in similar factual situations. Such arguments are very difficult to make in the land use context. *Patterson v. American Fork City*, 2003 UT 7 ¶¶33-34. There has been no demonstration here of personal animus against the property owner by the City.
21. The shed on the subject property was never legal, does not meet the definition of a legal noncomplying structure, and, as stated by the zoning administrator, is not allowed.

ANALYSIS

The general language in the case law, including *Kartchner*, confirms that the equitable defenses of laches, waiver and estoppel are allowed against local governmental actions only under exceptional circumstances. Such circumstances do not exist here. *Kartchner* appears to have turned, in part, on specific and affirmative actions of the county agents, including the notices provided, the timing of the notices, and the methods used to calculate average setbacks. While there is also the allegation of a specific set of non-actions in allowing other similar violations to exist in *Kartchner* as in this case, there are no allegations of specific and affirmative actions by the City here such as those in *Kartchner*.

The position of the property owner here appears to be that if the City does not affirmatively pursue a zoning violation for a period of time, here at least sixteen years, then the ability of the City to abate those violations is extinguished. Here the City pursues zoning violations on a complaint basis. The property owner's argument would basically eviscerate the City's setback ordinances and render them of no effect unless either (1) each violation is quickly followed by a neighbor's complaint or (2) the City hires a sufficient number of zoning enforcement officers to continually monitor the placement of accessory buildings on each residential lot in the City.

But no case law is cited to support that position. Instead, the case law comes to a different conclusion:

> This court has recognized there are circumstances where it is inequitable to enforce a zoning ordinance." Xanthos v. Bd. of Adjustment of Salt Lake City, 685 P.2d 1032, 1037 (Utah 1984).

> To invoke the doctrine of equitable estoppel in a zoning case, "the county must have committed an act or omission upon which the developer could rely in good faith in making substantial changes in position or incurring extensive expenses." Utah County v. Young, 615 P.2d 1265, 1267 (Utah 1980). "The action upon which the developer claims reliance must be of a *clear, definite and affirmative nature*." Id. (*emphasis added*).
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> "If the claim be based on an omission of the local zoning authority, omission means a negligent or culpable omission where the party failing to act was under a duty to do so. *Silence or inaction will not operate to work an estoppel*." *Id.* 1267-1268. (*emphasis added*).

The property owner also argues that he could assume the shed on the property he acquired a few years ago was legal because it existed on the property and had apparently existed for some time. This also is counter to Utah case law involving the principles of equitable estoppel, which holds:

> "Finally, and most importantly, the landowner has a duty to inquire and confer with the local zoning authority regarding the uses of the property that would be permitted." *Id.* 1268.

Here the property owner argues the City inaction triggers his estoppel defense. He does not allege a "clear, definite and affirmative" action by the City upon which he reasonably relied. While the property owner here assumed that if the shed existed, it must be legal, it cannot be concluded that such an assumption ties the hands of local zoning enforcement.

Setback restrictions in single family zones may be one of the handful of regulations common to every zoning ordinance in existence. If a property owner is presumed to be aware of land use regulations or have any duty to be aware of what might constitute a violation, he would most likely be presumed to know that side yard setback requirements are not just common but universal in single family residential zones. He could also be presumed to understand that the extended work he undertook on the premises might require a building permit. Had he sought that permit, he could have been informed of the illegal nature of the shed before he spent funds to renovate it.

It is fair to conclude that the property owner could reasonably assume that if the shed was in violation that the City had not attempted to enforce the violation. He might also assume that the City had a policy not to seek out and abate such violations. But it was not reasonable to assume, for purposes of equitable estoppel, that the mere existence of the shed – or the existence of other similar structures in the side yards of properties in the area – was sufficient proof that the location of the home-made shed was legal and thus could not be in violation of the ordinance.

The Administrative Decision is upheld. The appeal is denied.

Dated this 15th day of March, 2021.

Craig M Call, hearing officer