

Salt Lake City Land Use Appeals Hearing Officer
Joy Emory/Patrick Watson Appeal – Property at 1076 East 200 South
Nonconforming Use – Rooming House
PLNAPP2016-00160
June 10, 2016

This is an appeal of a decision by the City Zoning Administrator finding a current building permit for interior remodeling of a building located at 1076 East 200 South to be valid. The permit is key in allowing the conversion from a former 24-bed rooming house to a 20-unit multi-family dwelling.

The decision that the current building permits are valid and that a legal nonconforming use continues and was not abandoned. The decision of the Zoning Administrator is *sustained*. The appeal of that decision is *denied*.

THE RECORD

Public hearings on this matter were held before Craig M. Call, Land Use Appeals Hearing Officer for Salt Lake City on May 4 and June 6, 2016. The individuals bringing this appeal, Joy Emory and Patrick Watson appeared, along with their attorney, Ryan Wallace. Property owner Tom Fox appeared with his counsel, J. Craig Smith and Hyrum Bosserman. Also present from the City Staff were Paul Nielson, City Attorney; Casey Stewart, Senior Planner; Joel Paterson, Zoning Administrator; and Cheri Coffey, Assistant Planning Director. Greg Mikolash of the City's Building Inspection staff appeared to provide information on building permit procedure and practices. Public comment was also received from Melissa Hubble, Jeff Taylor, Maria Koshy, Marie Taylor, Rebecca Ashurst, Jeff Burkes, Rusty Gray, Bill Fox, Kent Williams, Nate Barnson and Sarah Ashers. The hearings included more than three and a half hours of discussion. An audio tape recording was made of all sessions.

The record of this matter includes a number of submittals and email communications between representatives of all parties. These documents include:

- Original Appeal Filed by Appellant, attached to the Staff Report prepared by the City as Attachment B and accompanied by declarations and evidence, as well as a legal memorandum dated May 18, 2016, prepared by Tyler Buswell and Ryan Wallace.
- Brief of the City Staff, styled as a Staff Report, dated May 4, 2016 and including the Appeal filed in this matter, supporting documents for the Appeal, and other documents provided by the City Staff. Supplemental information was also provided by the City Attorney's office on or about May 17, 2016 in the form of responses to issues raised by the hearing officer.

- Legal Analysis for the Property Owner, provided by Tom Fox, and prepared by J. Craig Smith, in the form of a letter to the hearing officer dated May 18, 2016. A second letter from Smith to the Hearing Officer dated June 6, 2016, is also part of the record.
- The record also includes the Hearing Officer's Request for Legal Comments dated May 5, 2016 and the Hearing Officers Notes which were provided to those involved as principals on June 3, 2016.
- The record also includes a number of email communications among the individuals involved in this matter as well as other written or emailed comments and documents submitted by the public.
- It is noted that among the submittals by both the Appellants and the Property Owner are sworn statements, declarations and affidavits made under oath. The dignity and formality of this evidence have clearly established the facts involved.
- An audio recording of both sessions of the hearing conducted in this matter is also part of the record.

The briefing of all parties is of high quality, thorough, and includes arguments that are well-articulated. This is particularly appreciated and noted.

STANDARD OF REVIEW

Section F - Salt Lake Land Use Appeals Hearing Officer Policies and Procedures:

Where the Land Use Appeals Hearing Officer hears a matter brought on appeal from a decision by the Staff or any other administrative matter not previously decided by the Planning Commission or Historic Landmark Commission, or hears a variance request, the matter shall be heard *de novo*, which means that the item shall be newly considered and shall not be decided based on the facts or law previously reviewed.

The standard of review in this case is to determine, after a *de novo* review, whether the Appellants have met their burden to demonstrate that there is no substantial evidence to support the decision of the zoning administrator or that the decision is illegal – contrary to the applicable ordinances, statutes, and case law. Some deference may be extended to the decision of the Zoning Administrator in his legal conclusions in the interpretation and application of city ordinances. *Carrier v. Salt Lake County*, 2004 UT 98, ¶26, f.6.

ISSUE

Does a legal nonconforming use as a rooming house exist for the property located at 1076 East 200 South or was that nonconforming use lost through abandonment? Are the building permits issued for the renovation of that facility valid?

JURISDICTION AND STANDING

The Appellants Emory and Watson filed a timely appeal from the decision of the Zoning Administrator in this matter. They have standing in that they own property which is contiguous

to the property which is the subject of this dispute. In their comments and the comments of their neighbors during the hearings they established that the presence of the rooming house use has negative aspects and affects them directly. “A private individual must both allege and prove special damages peculiar to himself in order to entitle him to maintain an action to enjoin violation of a zoning ordinance. His damage must be over and above the public injury which may be caused by the violation of the zoning ordinance.” *Padjen v. Shipley*, 553 P.2d 938, 939 (Utah 1976), cited in *Culbertson v. Salt Lake County Board of Commrs.*, 2001 UT 108, ¶54.

This matter is appropriately before the Appeal Authority as a challenge to a land use decision must be appealed to the Appeal Authority, which in Salt Lake City is a Land Use Hearing Officer, before the matter can be heard by the District Court. Utah Code Ann. §10-9a-801(1).

FINDINGS OF FACT:

1. The subject property is located at 1076 East 200 South in Salt Lake City.
2. A zoning certificate was issued by the City in 1994 for a 24 unit rooming house.
3. The Zoning was changed in 1995, prohibiting the establishment of a 24 unit rooming house on the property. The rooming house use became a legal non-conforming use.
4. On February 7, 2000, a zoning certificate is issued for the 24 unit rooming house.
5. On July 16, 2013, officials of the City issued an administrative interpretation concluding the rooming house use was a legal nonconforming use and can be legally converted to a SRO (Single Room Occupancy) facility. No appeal is filed from this administrative interpretation.
6. The current property owner, Lake Fox Investments LLC acquired the property on October 15, 2013.
7. The last tenants vacated the property prior to November, 2013.
8. If the property owner decided to continue the use, he would have been required to perform significant maintenance and repairs to do so.
9. Revisions were made by the Salt Lake City Council to the Salt Lake City Ordinances dealing with the abandonment provisions of the code related to nonconforming uses, effective November 12, 2013. The stated purpose of the amendment was to eliminate undesirable non-conforming uses. (See P. 21 of staff report).
10. In making the revisions, the City Council repealed language which provided that a property owner may maintain a right to a nonconforming use if they can show that the owner of the land:
 1. Has been maintaining the land in accordance with the building code and did not intend to discontinue the use;
 2. Has been actively and continuously marketing the land or structure for sale or lease; or
 3. Has been engaged in other activities evidencing an intent not to abandon. P.22 of staff report.
11. In December, 2013 Thomas Fox begins developing a plan for intended renovation of building. He brings plumbers, electricians, and demolition workers through the building.
12. Sometime between October 2013 and present electrician Rusty Gray performs electrical and power-related services at the property.

13. On February 3, 2014, a building permit was issued for interior demolition. Permit was for preparation in determining the developmental feasibility of the structure and is not a building permit for remodeling a specific number of units. Such a permit is sometimes referred to as an “exploratory permit”.
14. Between February and July, 2014 – Fox hires Viliami Nusi to perform demolition and cleanup. Nusi is paid \$5965.00 or so total for his services in several payments over a period of months.
15. In March of 2014 the business license for a 24 unit rooming house expires, according to a letter of April 25, 2016 by Jennifer Madrigal, Landlord/Tenant Licensing Coordinator.
16. On March 11, 2014 City Official Everett Joyce states in an email that if a change of use permit is obtained prior to November 12, 2014, the owner has not abandoned the use.
17. On March 14, 2014 Joyce states that the new standards in the November 2013 amendments to the abandonment code would apply to an abandonment that lasted one year after the date of the enactment. (See May 4 Staff Report p. 27-28).
18. In April, 2014 – Fox hires Noe Guzman to repair and replace leaking rain gutters and downspouts. Paid \$1280.00.
19. On or about August 3, 2014 the building permit is 180 days old and has not been renewed.
20. During August of 2014 Fox contacted Jared Palfreyman with LEI Engineers to discuss structural issues.
21. On August 29, 2014 LEI engineers deliver a letter to Fox with detailed structural recommendations.
22. During September to November, 2014 William C Fox designs, fabricates and constructs 24 steel door frames for the building.
23. By November 12, 2014, no application had been submitted for a change of use permit.
24. The building owner submitted no plans during the first 180 days that the exploratory permit was in place.
25. City conducted no inspections during the first 180 days after issuing the exploratory building permit.
26. During December, 2014 R&R Professional Concrete Cutting demolishes and cuts two wall openings.
27. During December, 2014 Viliami Nusi delivers construction materials to the building. He is paid \$465.00 in several checks for his services.
28. On March 26, 2015 property owner Fox pays Barker Design \$4,859.50 to prepare plans for renovations.
29. During April of 2015 property owner Fox meets with a city representative for inspection of building.
30. On April 22 or 23, 2015, a city building official states that the exploratory permit is still active and is extended for 180 days. (See p. 18 of staff report).
31. In May of 2015 Fox gets an email from city advising him that he can proceed with plans, details needed for a building permit.
32. During the period from January to March 2015 Fox evaluates plans and works with Capital Realty Advisors and lenders to obtain financing.

33. In June of 2015 Jason Barker, an architect, meets with Fox and discusses renovations. Works with Fox and city to refine plans through March of 2016.
34. On June 24, 2015 Jason Barker delivers final plans for building renovations to Fox.
35. There was no period of 180 days in this case where no activity was conducted by Fox or his contractors agents or employees in furtherance of the exploratory permit.
36. There has been no period of 180 days between February 3, 2014 and July 2, 2015 when some activity in furtherance of the SRO use was not conducted on the property.
37. On July 2, 2015, Fox filed a formal application for a building permit to allow construction.
38. From December, 2015 to January, 2016 Viliami Nusi performs demolition, clean-up and related services at the building. He is paid \$1080.00 in several checks.
39. Between January and February of 2016 the City Staff conducts its third and fourth review of permit.
40. In January, 2016 Nathanael Barnson obtains construction financing for Fox.
41. On February 29, 2016 the zoning administrator enters his decision that the nonconforming use remains valid.
42. On March 9, 2016, a building permit is issued for SRO construction.
43. On March 9, 2015 Joy Emory and Patrick Watson filed a timely appeal of the administrative determination.
44. By affidavit, Fox says he spent \$60,000 pursuing the renovations of the building. This estimate includes maintenance, financing costs, exploratory demolition, the fabrication of door frames and professional services by engineers and others.
45. According to the comments of Gregory Mikolash of the City Building Department, it is the policy and practice of the City that a building permit does not expire so long as some activity in furtherance of the permit is conducted on the property. If the 180 day period of nonactivity has not run, any activity renews and extends the permit for another 180 days.
46. Inactivity in construction work between July 2015 and March 9, 2016 was caused by the city's process of review for the building permit application filed by Fox in July of 2015.
47. The property owner could have continued to rent the property to tenants during the relevant time to this dispute, but to do so would have required significant maintenance and repairs.
48. The City would not have prohibited continued rental of the property as a rooming house if relevant rules and regulations were complied with. The building's occupancy remained legal from the time that it was purchased by the current owner and continuing until the present time.
49. The building was vacant because it was the owner's preference that it be vacant, although the reasons not to rent the building are significant and understandable.
50. Fox has delayed commencement of renovations beyond the issuance of renovation permits on March 9, 2016 because of uncertainty created by this appeal.

ANALYSIS:

Since the City's determination that the SRO use was legally equivalent to the rooming house use, the nonconforming rooming house use was preserved by reasonable diligence in creating the SRO use.

The City's code related to the abandonment of a nonconforming use is applicable to this matter, but is superseded or clarified by the state statute, at Utah Code Ann. 10-9a-511, which provides that abandonment may be presumed by one year's vacation of a nonconforming use, but that presumption may be rebutted by the property owner.

Under the provisions of the state code cited, the owner has the right to rebut the presumption of abandonment found in both the state statute and the City Ordinance. This rebuttal may be in the form of demonstrating clear intent to preserve and continue the nonconforming use.

All parties agree that if the proposed renovations for the structure housing a nonconforming use reasonably require that the structure be vacated for a period of more than one year, then the period of abandonment should not run during that period of required vacancy. Appellant Emory stated at the hearing that if a building was not habitable, then the period of vacancy should not constitute abandonment while a building permit is being actively pursued.

The dispute in this case is whether or not the discontinuance of the nonconforming use was abandoned because of the specific circumstances where this building sat vacant for more than two years before the filing of this appeal. It is not clear from the evidence that Fox was required to leave the building vacant while he pursued his renovation plans. He could have rented at least part of the building to tenants if he had wished to and if he had made sufficient repairs and maintenance to allow for that rental. There is substantial evidence in the record, however, supporting a conclusion that it was also not unreasonable for him to do so in light of the deteriorated condition of the premises at the time of his acquisition.

The Appellants claim that Fox's plans to renovate did not constitute sufficient activity to warrant tolling the abandonment period for more than two years. They also note that the exploratory permit in place was anticipated to allow for only \$2000 in work over that time. Those arguments have been well-articulated and are logical and on point. The property owner's activities, although certainly not as intensive as they could have been, were nevertheless sufficient to preserve his nonconforming use.

It is determinative that in this case, based on the City's past procedures as explained by the City's building official, the exploratory building permit issued in 2014 remained valid and in force until the application was filed for the renovation building permit in July of 2015. The specific validation of the permit in April of 2015 is a fundamental factor supporting the decision here.

Therefore it is determined that the actions taken by Fox in this case between October of 2013 and July of 2015, a period of approximately 20 1/2 months sufficiently establish the continued viability of the nonconforming use. Since Fox had a valid building permit for exploratory work and pursued the exploration of the structure in furtherance of his effort to preserve and renovate the structure in a manner sufficient to preserve the building permit, and since the permit was intended to accommodate planning for the SRO use, he clearly intended to pursue the nonconforming use.

Pursuit of the preservation of the use beyond the work completed under the exploratory permit necessitated a building permit for renovations. On July 2, 2015, an application was submitted for that renovation permit. Significant cost was expended in hiring professionals to prepare plans for that work, again indicating a clear intent to continue the use.

Thereafter, the time of abandonment was tolled. The City's extended review of the application for the renovation building permit was caused by the City, and was not the fault of Fox, the owner. Thus not only does the state statute allow evidence of the application for the renovation permit to rebut a presumption of abandonment, but the city ordinance provides that the time of abandonment is tolled if any City action causes a delay in continuing the use. This is not to say that the City is at fault for conducting an appropriate and thorough review of the proposed renovation plans. There is no fault shown in the evidence – no fault by the City and no fault by the property owner. This means that the time which ran while the City reviewed the plans was not the property owner's fault, and thus the time needed to review the building plans tolls the running of the period of abandonment under the provisions of both the state and city codes.

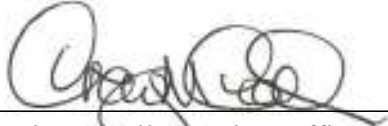
The owner also reasonably relied on the assurances received from City officials during the time of his ownership that his efforts would result in permits to renovate the property. The approval and official permitting by the City of the process of exploration of options for renovations, preparing engineering and architectural plans, and review of the building permit applications by the City at several points in the process is significant.

Conclusion

The rooming house nonconforming use is preserved through the process of exploring, planning, and applying for permits for an SRO facility. Fox's nonconforming use did not expire even though the building was vacant the entire time between October of 2013 and the present. His clear intent to pursue the preservation of his nonconforming use while maintaining valid building permits is sufficient to preserve the nonconforming use for approximately 20 ½ months. The City action, not the fault of Fox, to review his renovation plans and application tolled the running of the abandonment during that review period up and until March 9, 2016, an additional period of some nine months. Reasonable diligence in pursuing the renovations will now preserve the use going forward.

The permits issued are valid and the property owner may proceed with his project. The appeal of the decision by the Zoning Administrator is denied.

Dated this 10th day of June, 2016.



Craig M Call, Hearing Officer