

# Advisory Opinion #169

Parties: K. Marie Taylor, Salt Lake City Corporation

Issued: July 14, 2016

**TOPIC CATEGORIES:**  
**Nonconforming Uses**  
**Interpretation of Ordinances**

The property owner did not abandon its right to a legal nonconforming 24-bed rooming house. Under Utah Law a party may establish a rebuttable presumption of abandonment of a nonconforming use by establishing that the structure associated with the use has been vacant for a year. The neighbors requesting this advisory opinion provided sufficient evidence to establish this presumption.

However, once a presumption of abandonment has been established, a property owner may rebut the presumption by presenting factual evidence that he or she engaged in conduct evincing intent not to abandon the use. The property owner presented such evidence, and has therefore overcome the presumption of abandonment and preserved its right to a legal nonconforming 24-bed rooming house.

## DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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### ADVISORY OPINION

Advisory Opinion Requested By: K. Marie Taylor

Local Government Entity: Salt Lake City Corporation

Applicant for Land Use Approval: Lake Fox Investments, LLC

Type of Property: Residential

Date of this Advisory Opinion: July 14, 2016

Opinion Authored By: Jordan S. Cullimore  
Office of the Property Rights Ombudsman

### ISSUE

Did Lake Fox Investments, LLC abandon its nonconforming right to a 24-bed rooming house when it discontinued the use and left the primary structure associated with the use vacant for more than a year?

### SUMMARY OF ADVISORY OPINION

Lake Fox Investments, LLC has not abandoned its right to a legal nonconforming 24-bed rooming house. Under Utah Law a party may establish a rebuttable presumption of abandonment of a nonconforming use by establishing that a use has been discontinued for a period of a year or more, or by showing that the structure associated with the use has been left vacant for a year. The neighbors requesting this advisory opinion provided sufficient evidence to establish this presumption.

However, once a presumption of abandonment has been established, a property owner may rebut the presumption by presenting factual evidence that he or she engaged in conduct evincing intent not to abandon the use. Lake Fox has presented such evidence, and has therefore overcome the presumption of abandonment and preserved its right to a legal nonconforming 24-bed rooming house.

## **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 Marie Taylor, on April 28, 2016. A copy of that request was sent via certified mail to Cindi Mansell, Salt Lake City Recorder, 451 South State Street, Salt Lake City, Utah 84111.

## **EVIDENCE**

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for Advisory Opinion, with attachments and subsequent email submissions, submitted by K. Marie Taylor between April 28, 2016 and June 10, 2016.
2. Response from J. Craig Smith, on behalf of Lake Fox Investments, LLC and its owner, Thomas A. Fox, received June 27, 2016.

## **BACKGROUND**

The Ivy House is a 24-unit legal nonconforming rooming house located at 1076 East 200 South in Salt Lake City. According to the materials submitted, the rooming house was constructed in the 1960s and housed tenants until sometime prior to November 2013. In 1995, Salt Lake City (the "City") rezoned the property to prohibit rooming houses, rendering the use a legal nonconforming use. In both 1994 and 2000 the City issued zoning certificates verifying that the use of the property as a 24-unit rooming house was legal.

On July 16, 2013 the City issued an administrative interpretation to Marion Willey of Ivory House, presumably in anticipation of selling the property. The administrative interpretation found that because of the existing nonconforming right to the 24-unit density, the property could be legally converted from a 24-unit boarding house to a 24-unit multifamily dwelling. The interpretation concluded that "[t]he new use will be a conforming use that is noncomplying with respect to minimum lot area requirements (density) and off-street parking requirements." PLNZAD2013-00451 Administrative Interpretation Letter, July 16, 2013. This decision was never appealed.

The current property owner, Lake Fox Investments, LLC, run by Thomas A. Fox, (collectively "Lake Fox") obtained the property on October 15, 2014, and in December 2013 began

developing a plan to renovate the structure to become a 20-unit multi-family dwelling.<sup>1</sup> Because of factors related to the condition of the building, Lake Fox decided to not house tenants in the building until after the renovations were completed. The submitted materials list in detail various services performed for the project by designers, engineers, and contractors ranging from October 2013 until the time this request for Advisory Opinion was submitted to the Ombudsman's Office. For much of this time, the building sat vacant, although minor demolition, cleanup, and repairs were performed periodically. Much of the activity conducted relative to the renovation project during this period included off-site design, inspection, and financing activities.

Also from November 2013 to present, residents in the surrounding neighborhood observed that the building sat vacant, was in disrepair, and attracted undesirable activities. Consequently, the residents approached the City with the assertion that the boarding house use had been abandoned. The residents assert that since the property has sat vacant for more than a year and the use has been discontinued for the same period the nonconforming right to a 24-unit boarding house has been abandoned and any future use of the property must comply with current zoning requirements related to density, parking, etc., which would not allow the project to be completed at the 20-unit density.

In response to the residents' request for a determination of abandonment, Joel Paterson, Salt Lake City Zoning Administrator, issued a decision on February 29, 2016 that the nonconforming right to the boarding house had not been abandoned because "[t]he property owner has been involved in a continual process leading toward the proposed change in use from the nonconforming rooming house to a multi-family dwelling." Email from Joel Patterson dated February 29, 2016 RE: 1076 E 200 South permit status. Residents Joy Emory and Patrick Watson timely appealed this decision on March 9, 2016. Another resident, K. Marie Taylor, submitted to our office a request for an Advisory Opinion on the question of whether Lake Fox has in fact abandoned its legal nonconforming right to a 24-unit boarding house.

## ANALYSIS

A legal nonconforming use is defined as a legally established use that has subsequently become illegal because of a change in the zoning ordinance governing the property. *See* UTAH CODE § 10-9a-103(33). The neighbors involved in this request for Advisory Opinion do not dispute Lake Fox possessed a nonconforming right to a 24-unit boarding house when it purchased the property. Instead, the neighbors assert that Lake Fox abandoned its legal nonconforming right to the use when it left the boarding house vacant and discontinued the use from November 2013 to the present to pursue renovations and a change of use. We must therefore determine what constitutes abandonment, and whether Lake Fox in fact abandoned its right to a legal nonconforming use, resulting in termination of the right.

### I. The Rebuttable Presumption Standard of Abandonment under Utah Law

Utah law contains a "rebuttable presumption standard" for determining abandonment of a nonconforming use. *Rogers v. West Valley City*, 2006 UT App 302 ¶ 19, 142 P.3d 554. Under this

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<sup>1</sup> At some point in the project's planning stages, the number of units was reduced from 24 units to 20 units by mutual agreement between the City and Lake Fox.

standard “[a]ny party claiming that a nonconforming use has been abandoned shall have the burden of establishing” that abandonment of the use has occurred. UTAH CODE § 10-9a-511(4)(b). A party may create a presumption that a particular use has been abandoned by presenting evidence that any one of three statutorily articulated events has occurred. Utah Code § 10-9a0511(c) states that abandonment of a nonconforming right may be presumed to have occurred if:

- (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.

UTAH CODE § 10-9a-511(4)(c). Once the party claiming abandonment shows that one of these events has occurred, abandonment is presumed and the burden of proof shifts to the owner of the nonconforming use to rebut the presumption<sup>2</sup> by showing that abandonment “has not *in fact* occurred.” UTAH CODE § 10-9a-511(4)(d) (emphasis added). Thus the property owner must present factual evidence that, despite the occurrence of one of the events mentioned above, he or she has not abandoned the nonconforming use.

The neighbors have presented evidence, and Lake Fox does not contend, that the use has been discontinued for a year and that the structure has remained vacant for the same period of time. Consequently, we conclude that the neighbors have met their burden of establishing a presumption of abandonment. The burden therefore shifts to Lake Fox to show that it has not in fact abandoned the use.

The parties in this matter disagree about what evidence a property owner may present to successfully rebut a presumption of abandonment. Lake Fox asserts that it may rebut the presumption by showing evidence that it has not abandoned the use because it has engaged in on- and off-site activities evidencing intent to preserve the nonconforming use, and that such evidence is determinative. This argument comports with the common law rule of abandonment followed by several states, which holds that “a nonconforming use can be abandoned only by acts or omissions indicating an intent to abandon.” Salkin, Patricia E., *American Law of Zoning*, 5<sup>th</sup> Ed. § 12:22.

Conversely, the neighbors claiming that Lake Fox has lost its nonconforming right assert that intent is not a factor in determining whether a use has been abandoned, and that a showing of intent not to abandon does not rebut the presumption of abandonment. The neighbors argue that once a presumption of abandonment has been established the only way to rebut the presumption is to show that the events establishing the presumption did not occur for the prescribed period, or that the abandonment period was somehow tolled. The neighbors support their argument by referring to the prior version of the Salt Lake City Code provision governing abandonment of

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<sup>2</sup> A “rebuttable presumption” is defined as “[a]n inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.” *Rebuttable presumption*, Black’s Law Dictionary (10th ed. 2014).

nonconforming uses, which specifically allowed the consideration of intent. They argue that since intent is not specifically referred to in the City Code provision passed in November 2013, the intent of the City Council was to remove intent from consideration.

This argument aligns with the discontinuance view of abandonment followed by several states, which holds that “intent is irrelevant...and nonuse for the specified period will result in termination of the nonconforming use.” *Id.*

## II. Interpretation of Abandonment under Utah Code § 10-9a-511(4)

While Utah courts have not expressly addressed the question of which of the above rules is followed by current Utah law governing abandonment of nonconforming uses, we conclude that Utah follows the common law rule of abandonment. Accordingly, a property owner may present factual evidence of conduct showing intent not to abandon a nonconforming use to rebut a presumption of abandonment. This conclusion is supported by a proper interpretation of Utah Code § 10-9a-511(4), which is the statute authorizing local governments to terminate a nonconforming use as a result of abandonment.

When interpreting a statute, we begin with an analysis of the plain language of the law. *Carrier* 2004 UT 98 ¶ 30, 104 P.3d 1208. The primary goal of interpretation 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*, 2004 UT 75, ¶ 11, 100 P.3d 1171 (emphasis added). It is presumed that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning. *Selman v. Box Elder County*, 2011 UT 18, ¶ 18, 251 P.3d 804. “When the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed.” *Id.*

Utah Code § 10-9a-511(4) sets the parameters in which municipalities may operate when handling abandonment of nonconforming uses. This statute uses the term, “abandonment,” but does not provide a specific definition of the term. Consequently, the ordinary meaning of the term, read in conjunction with the statute, should be used to determine what fully constitutes abandonment. The Merriam-Webster dictionary defines “abandon” as “to give up with the intent of never again claiming a right or interest in.”<sup>3</sup> *Abandon*, Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/abandon>. This definition clarifies that the term includes an element of intent.

Since the statute does not specifically exclude intent from the definition of abandonment, it is appropriate, even necessary, to consider evidence of intent when determining whether a property owner has *in fact* abandoned a nonconforming use. While discontinuance of a use for a period of a year or more establishes a rebuttable presumption of abandonment, a property owner may rebut this presumption by presenting evidence that he or she has engaged in conduct evincing intent to not abandon the use. If the evidence shows a lack of intent to give up the right, then abandonment has not in fact occurred.

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<sup>3</sup> See also *Abandon*, Black’s Law Dictionary (10th ed. 2014) (defining “abandon” as, “[t]o relinquish or give up with the intention of never again reclaiming one’s right or interest in.”).

This same reasoning applies to the City's ordinance governing abandonment of nonconforming uses. While Salt Lake City Code § 21A.38.040(F) describes in greater detail than the state law from which it derives authority how to calculate discontinuance when establishing a presumption of abandonment, it, like the state statute, does not specifically define abandonment to exclude or include an element of intent. Therefore, the ordinary meaning of the term should be used, leading to the same conclusion.

### **III. Lake Fox has not Abandoned Its Legal Nonconforming Use**

Applying the above standard to the present matter, we conclude that Lake Fox, in the materials submitted to our office, has presented sufficient evidence to rebut the presumption that it has abandoned its nonconforming right to a 24-bed rooming house. Lake Fox's conduct since November 2013 clearly constitutes evidence of an intent to maintain its right to a nonconforming use of the property. The submitted materials show that Lake Fox has engaged in development activity in the form of design, engineering, or renovation work at least every 180 days since November 2013. There was an 8 month period of time in which Lake Fox was negotiating details of the plan with the City. Additionally, Lake Fox has taken reasonable steps to maintain applicable permits or renew them as necessary.

The neighbors assert that after the use was discontinued an "abandonment clock" started running in November 2013 when the City passed an ordinance amendment updating the City Code to adopt the rebuttable presumption standard in state law. As part of this assertion, the neighbors contend that Lake Fox allowed permits to expire more than a year after the clock had started running, and that the expiration of the permits caused Lake Fox to lose its nonconforming right to the use.

Lake Fox and the City assert that Lake Fox never allowed applicable permits to expire in accordance with City policies. Regardless, under the rebuttable presumption standard expired permits do not in and of themselves constitute dispositive evidence of abandonment. Once a presumption of abandonment has been established, an expired permit followed by a year or more of complete inactivity would likely lead to a finding of abandonment. However, that is not the case here. Since November 2013 Lake Fox has taken steps to preserve its nonconforming right through acts evincing intent to preserve its nonconforming use.

### **CONCLUSION**

We conclude that Lake Fox has not abandoned its right to a legal nonconforming 24-bed rooming house. Under Utah Law a party may establish a rebuttable presumption of abandonment of a nonconforming use by establishing that a use has been discontinued for a period of a year or more, or by showing that the structure associated with the use has been left vacant for a year. The neighbors requesting this advisory opinion provided sufficient evidence to establish this presumption.

However, once a presumption of abandonment has been established, a property owner may rebut the presumption by presenting factual evidence that he or she engaged in conduct evincing intent not to abandon the use. Lake Fox has presented such evidence, and has therefore overcome the

presumption of abandonment and preserved its right to a legal nonconforming 24-bed rooming house.

Since we conclude that Lake Fox has presented sufficient evidence to show that it has not abandoned its right to a nonconforming use, it is not necessary to address additional arguments presented by the parties regarding vested rights and estoppel, since these arguments will not have bearing on the outcome of the opinion in light of the conclusions above.

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 Ann. § 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:

Cindi Mansell, City Recorder  
Salt Lake City  
451 So. State Street, RM 415  
Salt Lake City, UT 84114-5515

On this \_\_\_\_\_ Day of \_\_\_\_\_, 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.

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Office of the Property Rights Ombudsman