

# Advisory Opinion #179

Parties: SannDee Stowell, City of St. George

Issued: January 27, 2017

**TOPIC CATEGORIES:**  
**Nonconforming Uses**

The townhome does not qualify as a legal nonconforming short-term residential rental property. The city's code did not allow the use of the property as a short-term rental when the owner of the townhome began leasing it on a short-term basis in 1995. Consequently, the use never legally existed, which is prerequisite to establishing a legal nonconforming use.

## 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: SannDee Stowell  
Local Government Entity: St. George City  
Applicant for Land Use Approval: SannDee Stowell  
Type of Property: Residential  
Date of this Advisory Opinion: January 27, 2017  
Opinion Authored By: Jordan S. Cullimore  
Office of the Property Rights Ombudsman

### ISSUES

Does Ms. Stowell's property qualify as a legal nonconforming short-term residential rental property under Utah law?

### SUMMARY OF ADVISORY OPINION

Ms. Stowell's townhome does not qualify as a legal nonconforming short-term residential rental property because St. George City Code did not allow the use of the property as a short-term rental when Ms. Stowell began leasing it on a short-term basis in 1995. The use never legally existed, which is prerequisite to establishing a legal nonconforming use.

### 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 SannDee Stowell on March 4, 2016. A copy of that request was sent via certified mail to Christina Fernandez, City Recorder for the City of St. George, at 175 East 200 North, St. George, Utah. According to the return receipt, the City of St. George received the Request on March 10, 2016.

## **EVIDENCE**

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

1. Request for an Advisory Opinion, with attachments, submitted by SannDee Stowell on March 4, 2016.
2. Response from Paula J. Houston, Attorney for St. George City, received March 16, 2016.
3. Reply from Craig A. Hoggan, Attorney for Ms. Stowell, received August 23, 2016.
4. Reply from Shawn M. Guzman, Attorney for St. George City, received September 16, 2016.
5. Reply from Craig A. Hoggan, Attorney for Ms. Stowell, dated September 28, 2016.
6. Reply from Robert C. Keller, Attorney representing St. George City, dated October 20, 2016.
7. Reply from Craig A. Hoggan, Attorney for Ms. Stowell, dated December 16, 2016.
8. Reply from Robert C. Keller, Attorney representing St. George City, dated January 9, 2017.

## **BACKGROUND**

In 1995 SannDee Stowell purchased a 1,200 square foot townhome (the "property") in the Sunny Villa Townhomes subdivision in St. George, Utah. The property is zoned as a residential planned development (PD-R). The development project that includes Ms. Stowell's property was approved in 1984. According to materials submitted by St. George City (the "City"), the only use approved in the development project was "low profile residential townhomes." The City indicates that the zoning for the property has remained the same from 1984 until present day.

After purchasing the townhome in 1995, Ms. Stowell began renting the property to others on a nightly basis, first to family and friends and eventually, starting in December 2014, to anyone who saw her listing on vrbo.com, an online vacation rental marketplace.

It recently came to the City's attention that Ms. Stowell has been renting out the property on a short-term (29 days or fewer) basis. On January 7, 2016, the City sent Ms. Stowell a notice informing her that the City Code does not allow her to lease her property for fewer than 30 days at a time, *see* ST. GEORGE CITY CODE § 10-14-21(D). The notice ordered her to stop leasing the property on a short-term basis immediately. The cited provision of the St. George City Code, section 10-14-21, addresses requirements for short-term residential rentals and was enacted in 2010.

In response to the City's notice, Ms. Stowell sent a letter to the St. George City Manager claiming that the use of her property qualifies as legally nonconforming. Ms. Stowell asserted that she is entitled to continue leasing her property on a nightly basis because she has consistently done so for many years. The City Manager considered the claim and determined, in a letter dated February 17, 2016, that the property did not qualify for legal nonconforming status. According to the City's interpretation of the cited ordinance, the use of the property as a short-term rental was never legal under applicable zoning regulations.

After receiving this determination from the City Manager, Ms. Stowell submitted to this Office a request for an advisory opinion. She asks whether the City properly determined that her use of the property does not qualify as a legal nonconforming use.

### ANALYSIS

A use of land qualifies as a legal nonconforming use if it satisfies the following criteria:

- (a) [The use] legally existed before its current land use designation;
- (b) [the use] 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, [the use] does not conform to the regulations that now govern the use of the land.

UTAH CODE § 10-9a-103(33).

Under Utah law, once a legal nonconforming use is established it may continue until terminated through amortization or abandonment, as provided by the local jurisdiction. *See* UTAH CODE § 10-9a-511(2). Ms. Stowell, in her advisory opinion request, asserted that she legally established the use of the property as a short-term residential rental property<sup>1</sup> in 1995.

She further asserted that the City Code, at that time, did not prohibit the use of her property as a short-term rental. She claimed that, based upon the information provided to her by the City, she was "unaware of any ordinance or other law [existing in 1995] prohibiting her from using her property as a short-term rental." *Reply from Craig A. Hoggan*, dated August 19, 2016. Ms. Stowell also claimed that she has leased the property continuously on a short-term basis from 1995 until the present day. Finally, Ms. Stowell concluded that the property now qualifies as a legal nonconforming use because St. George City Code section 10-14-21, enacted in 2010, no longer allows her property to be leased as a short-term rental, thus satisfying the third criteria.

Since that time, however, the City has produced relevant and dispositive information that prevents Ms. Stowell from establishing the property as a legal nonconforming short-term rental. The current version of the St. George City Code contains a provision establishing a Resort Overlay Zone and restricting short-term residential rentals (for a period of 28 days or less) to

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<sup>1</sup> The term "short term residential rental property" is, as of July 2010, defined in the St. George City Code as "[p]roperty which is used by any person or entity for hostel, hotel, inn, lodging, motel, resort or other transient lodging uses where the term of occupancy, possession or tenancy of the property by the person is for twenty nine (29) consecutive calendar days or less, for direct or indirect remuneration." ST. GEORGE CITY CODE § 10-14-21(C).

areas within the Resort Overlay Zone or commercial zones.<sup>2</sup> See ST. GEORGE CITY CODE CH. 10-13B-3(A) (“Overnight and short term rentals shall be allowed only in commercial zones and approved resort overlay zones”).

Initially, and presumably, neither party addressed this provision because the citations in the ordinance gave the impression that the provision was not enacted until 1998, three years after Ms. Stowell allegedly established the use of her property as a short-term rental. Therefore, the ordinance appeared inapplicable. However, while preparing arguments for this advisory opinion, the City discovered the provision was in fact enacted in 1989 as Chapter 15A of the City Code (the “1989 ordinance”). This was several years prior to Ms. Stowell owning the townhome and leasing it on a short-term basis. The provision was not enacted, but simply recodified to Chapter 10-13B in 1998. Consequently, the provision applied to Ms. Stowell’s property when she started using it as a short-term rental in 1995.

Accordingly, we conclude that Ms. Stowell’s property does not qualify for legal nonconforming status as a short-term rental property. The property has never been in the Resort Overlay Zone. When Ms. Stowell began leasing the property on a short-term basis in 1995 the City Code did not allow her property to be operated as a short-term rental. The use never legally existed, which is prerequisite to establishing a legal nonconforming use. See UTAH CODE § 10-9a-103(33).

Ms. Stowell argues that the 1989 ordinance prohibiting short-term rentals is nonetheless inapplicable to her situation for two reasons. First, the City never cited the 1989 ordinance, or its successor, when it initially cited the short-term rental of the property as a violation of City Code. Second, the 1989 ordinance expressly stated that it did not apply to preexisting planned development zones “with resort rental included as a permitted use.” See *Letter from Robert C. Keller, Exhibit B* (text of the 1989 Ordinance), dated October 20, 2016. Ms. Stowell argues that the subdivision plat and CC&Rs establishing her property were approved in 1984 without a prohibition on short-term rentals. She asserts that this shows that her property has always possessed the right to operate as a short-term rental.

Despite the fact the City did not originally cite the 1989 ordinance or its successor for the basis of the Code violation, the ordinance nonetheless exists, is applicable, and cannot be overlooked. It existed in 1995 when Ms. Stowell began using her property as a short-term rental property, and therefore governs the use.

Regarding the second argument, Ms. Stowell presents no evidence that “resort rental” was included as a permitted use when the planned development including her property was created in 1984. Therefore, her property is not exempt from the requirements of the 1989 ordinance. This conclusion is supported by the fact that the available evidence shows that the sole use approved for the development was “low profile residential townhomes.” No evidence has been submitted to suggest that “resort rental” was included as a permitted use. Consequently, the development,

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<sup>2</sup> All parties agree that Ms. Stowell’s property is not—and never has been—in the Resort Overlay Zone or a commercial zone.

by the plain language<sup>3</sup> of the 1989 ordinance, was not exempted from the ordinance's requirements.

## CONCLUSION

Ms. Stowell's townhome does not qualify for legal nonconforming status as a short-term residential rental property because St. George City Code did not allow the use of the property as a short-term rental when Ms. Stowell began leasing it on a short-term basis in 1995. The use never legally existed, which is prerequisite to establishing a legal nonconforming use.

We acknowledge that the path that led to this conclusion took an unexpected turn when the 1989 ordinance was discovered. In light of this, we encourage the City to pursue resolution of the matter in a manner that does not include litigation or criminal or civil penalties against Ms. Stowell. This approach would produce a fair result since both parties were acting in good faith on reasonable legal interpretations of known and applicable City Code provisions at the time.

Brent N. Bateman, Lead Attorney  
Office of the Property Rights Ombudsman

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<sup>3</sup> The primary goal of ordinance interpretation is "to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the [ordinance] was meant to achieve." *Foutz v. City of South Jordan*, 2004 UT 75, ¶ 11, 100 P.3d 1171.

**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:

Christina Fernandez  
City Recorder, St. George City  
175 East 200 North  
St. George, UT 84770

On this 30th Day of January, 2017, 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