

SALT LAKE CITY LAND USE APPEALS HEARING OFFICER
APPEAL OF ZONING VIOLATION
PLNAPP2021-01027
954 EAST LOWELL AVENUE
PUBLIC HEARING HELD FEBRUARY 2, 2022
DECISION ISSUED FEBRUARY 28, 2022

This matter comes before the Salt Lake City Appeals Authority on Appeal from Pacific Century Development appealing a notice and order finding that the property at 954 East Lowell Avenue was being used as an illegal short term rental and further, that the property had been subdivided to create a separate rental unit in the basement.

On February 2, 2022, a public hearing on this matter was held and appearances were made by the applicant and Salt Lake City. The applicant was represented by Attorney Richard Reeve and the City was represented by Assistant City Attorney Hannah Vickery. The record in this matter consists of the staff report, material submitted by the parties and submissions made during the public hearing.

This appeal arises out of a Notice of Zoning Violation Last Warning issued by Salt Lake City. The notice indicated that the subject property was being used in violation of Salt Lake City Code 21A.33.020 and 21A.62.040 governing short term rentals and use of the property as a duplex without zoning approval.¹ The Notice also cited Salt Lake City Code §21A.40.120.F relating to violations regarding a fence. Appellant does not appeal that part of the Notice.

In issuing the zoning violation, City relied on significant material evidence that the property was being used for short term rentals and as a duplex. The Appellant asserts however, that none of the evidence is admissible because it constitutes hearsay or is not sufficiently reliable to be considered credible. Appellant's attorney also stated that the property was not being used for either short term rentals or as a duplex. On that basis, Appellant asserts that the civil enforcement action cannot stand because it is not supported by admissible evidence.

The evidence presented by the City in its staff report included the record of property visits, complaints from neighbors, interviews with tenants, and online property postings showing the residence being offered for short term rentals. Appellant objects to all evidence provided by the City on the basis that it is not sufficiently reliable to be admitted.

Salt Lake City ordinance provides that the Appeals Hearing Officer "may exclude testimony or evidence that it finds to be irrelevant, immaterial, unduly repetitious, or otherwise inadmissible." The hearing is required to be conducted in a quasi-judicial manner. Utah Code Ann. 10-9a-701(3)(a)(i). Designation as hearsay does not in itself make the City's evidence inadmissible; the question is whether it has sufficient credibility to support the alleged violations. *See e.g.* The Utah Administrative Procedures Act, Utah Code Ann. 63G-4-206(c). And while the technical rules of evidence may be relaxed in quasi-judicial proceedings, the parties' right to due process should include access to the proof being offered against them and the right to conduct

¹ The City issued and withdrew a previous Notice of Zoning violation by agreement of the parties. Upon subsequent complaints and evidence of continued violations, the City reissued the notice.

cross-examination. *DB v. Div. of Occupational Pro. Licensing*, 779 P.2d. 1145, 1146-1147 (Utah App. 1989), In this case, Appellant had access to the staff report and the information gathered indicating violation of the City's zoning rules. And during the public hearing, Appellant had the opportunity to question City staff about the information in the staff report but declined.

Finally, the hearing officer should set aside the enforcement action only if it is arbitrary, capricious or illegal. *Bradley v. Payson City Corp.*, 70 P.3d 47 (Utah 2003). Appellant's argument in this regard is that the decision is arbitrary and illegal because it is not supported by reliable evidence.

In this case, the investigator and the City relied on essentially four categories of evidence. First, the property was listed on the Airbnb website both for short term rentals and as a duplex and those listings included reviews and comments evidencing the unauthorized use of the property. Second, investigators visited the property and observed out of state car license plates. This evidence is similar to reports by complaining neighbors who observed both out of state plates and apparent renters coming and going. Third are interviews by City staff with individuals living in the house who indicated that they were (a) short term renters and (b) renting either the upstairs or the downstairs separately from the rest of the house. Fourth is the appellant's own admission on the Airbnb site in response to a Complaint that the property was divided into separate units so that individuals could rent portions of the property rather than the whole space. All of this evidence is part of the record in the case by way of the staff report or the submissions of the parties either before or during the public hearing. During the public hearing, Appellant had the opportunity to question the City inspector about his log entries, but chose not to do so. There is more than sufficient material, credible evidence to support the findings in support of the City's action and the civil enforcement action is upheld.

The staff report includes a detailed log from City inspectors setting forth their efforts to respond to complaints about the property from neighbors about vehicles and renters coming and going at short intervals. Staff report, Enforcement log, 49-50. The efforts by the City to follow-up on the complaints included site visits and investigation of the Airbnb listing for the property. Those listings allowed for both short term rentals and the option of renting the basement or the upstairs. The material provided in the staff report also includes on-line reviews from renters indicating stays of less than 30 days and frustration with the way the house was divided for multiple rentals. Staff report, online comments on the Airbnb website dated July 2021, September 2021, and October, 2021.

For example, in July 2021, a guest complained "This is not an entire house. It is a duplex, the basement is a separate rental, with a shared door in the kitchen that is not pictured." Staff report, page 22. And in September 2021, a review stated "The basement unit is a bit depressing and barely any natural light...If a tenant is upstairs you can hear everything as if they are in the adjoining room." Staff Report page 21. And in response to that complaint, the property management replied, "The listing clearly states that there is another rental on this property but we've updated our description to better inform future guests."

Site visits included conversations with individuals who indicated they were staying on the property for periods of less than 30 days. Page 51 of the Staff Report describes a conversation

with a tenant from Arizona named Maria Gorios. The entry was made on September 24, 2021. Ms. Gorios indicated that she had been staying on the property for three days and was planning to depart on October 3, a few days later. The inspector also recounted contact with a tenant from California who indicated he was staying in the basement unit “for a couple of days.” And the staff report cited entries from the Airbnb website clearly indicating that the property was available for short term rentals.

Appellant asserts that the Airbnb listings cannot be evidence of short term rentals or use of the property as a duplex. They base their argument on two theories; first, that the Utah legislature prohibits the use of online short-term listings as evidence of zoning violations and second; that such online listings are hearsay and unreliable as evidence.

Contrary to Appellant’s argument, Utah law does not render information from a short term rental website immaterial to this proceeding. The law prevents Salt Lake City from enacting or enforcing an ordinance that prohibits listing a property on a short term rental website or punishing an individual solely for the act of listing a property on a short term website. Utah Code Ann. § 10-8-8.5.4(2). In this case it is not the listings themselves, but the reviews and comments on the website which provide evidence that the prohibition on short term rentals and unauthorized subdivision of property has been violated. Moreover, the law provides that a property owner cannot be cited “solely” for listing the property but nothing prohibits the city from considering those listings along with other evidence to demonstrate the use of the property as a short term rental. In this case, the listings, along with comments and observations by the City’s enforcement officer present substantial evidence of the use of the property as a duplex and the use of the property as a short term rental.

Appellant also argues that online comments are unreliable evidence and might have been posted by people with no connection to the property. There is nothing on the face of the posts to suggest imposters and Appellant has produced no evidence to suggest the occurrence of false postings on short-term rental websites. While hearsay is admissible, Appellant further argues that interviews by the inspector are not sufficiently documented as to constitute credible evidence. In this case, however, the interviews were carried out and documented in the normal course of business and Appellant has offered no suggestion of any basis to indicate that the City inspector had reason to report his interactions less than accurately. And Appellant had the opportunity to question or cross-examine the City with regard to any specific concerns about the evidence gathering process. It declined.

Furthermore, as to the duplex issue, Appellant admits that the property has been divided for rental purposes. “The rooms have internal suite designations to aid tenants in locating the suite(s) in the property that they leased. When suite(s) are leased, PCD will typically lock other rooms in the house to prevent tenant access to suites that are not rented.”

Finally, Appellant has access to all actual rental information for the periods at issue and has failed to produce any documentary evidence in rebuttal to the information gathered by the City. Appellant has marshalled the evidence and argued that it is inadmissible or unreliable but has not countered the evidence with factual proffers of its own, despite being in possession of

records which theoretically could demonstrate its assertion that the property was not subdivided and not rented less than 30 days in violation of Salt Lake City ordinance.

The City produced substantial evidence that the property in question has been used as a short-term rental and as a duplex. And the evidence in question, gathered by city staff in the course of an extensive investigation is credible and consistent. Appellant has not introduced evidence to demonstrate a lack of credibility in the City's investigation or records of a different rental pattern. Appellant had access to the City's staff report well in advance of the hearing and elected not to question City staff during the public hearing. Finally, the Appellant itself admits that the property has been subdivided for rental purposes.

The City's civil enforcement action is upheld and the appeal is denied.

Dated this 28th day of February, 2022,

/s/Mary J. Woodhead

Mary J. Woodhead, Appeals Hearing Officer