

2006

M andS Cox Investments, LC a Utah limited liability company. Mervyn Cox and Sue Cox v. Provo City Corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

M&S COX INVESTMENTS, LC a Utah
limited liability company, MERVYN COX
and SUE COX.

Plaintiffs/Appellants,

vs.

PROVO CITY CORPORATION,

Defendant/Appellee.

**BRIEF OF APPELLEE PROVO
CITY CORPORATION**

Case No. 20060386-CA

APPEAL FROM A DECISION OF THE
FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY
THE HONORABLE STEVEN L. HANSEN, DISTRICT COURT JUDGE

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UTAH COURT OF APPEALS
FILED

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STATEMENT OF JURISDICTION

The Court of Appeals has appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Was the trial court correct in determining that the City's interpretation and application of the nonconforming use amortization provisions of its ordinance was not arbitrary, capricious or illegal.

Standard of review: This court reviews decisions of local administrative officials as though the decision came directly to it rather than on appeal from the trial court and addresses only whether the decision was arbitrary, capricious or illegal. *E.g., Rogers v. West Valley City*, 2006 UT App 302, ¶ 12, 142 P.3d 554, 556; Utah Code Ann. § 10-9a-801(3). The City's interpretation of its ordinances is reviewed for correctness, affording "some level of non-binding deference to the interpretation advanced by the local agency." *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 28, 104 P.3d 1208, 126 (rejecting non-deferential standard in *Brown v. Sandy City Bd. of Adjustment*, 957 P.2d 207 (Utah App. 1998)). The standard for arbitrary or capricious is the substantial evidence standard. *Bradley v. Payson City Corp.*, 2003 UT 16, ¶ 13, 70 P.3d 47, 57. Preservation: This issue was preserved in the City's memorandum in support of its motion for summary judgment. (R. 540-548.)

2. Did the trial court properly conclude that all of the issues raised by M&S, in this consolidated action, which had not otherwise been rendered moot, were appropriately resolved by the City's motion for summary judgment?

Standard of review: The trial court's ruling was based upon review of the applicable procedural posture of the case, the relevant undisputed facts, and application of the law to those facts. Under that situation, considerable deference and discretion are afforded to the trial court. *Menzies v. Galetka*, 2006 UT 81, ¶ 58, ____ P.3d ____.

Preservation: The issue was raised in M&S's opposition to Provo City's proposed summary judgment order. The City responded to that objection. (R. 1155-1161.) The trial court denied M&S's objection by Memorandum Decision dated April 4, 2006 (R. 1198-1202).

3. Did the trial court abuse its discretion in granting leave to intervene in the matter below?

Standard of review: A trial court's order granting intervention is reviewed only for "a clear abuse of discretion." State ex rel. Dept. of Soc. Servs. v. Succi, 924 P.2d 882, 887 (Utah 1996).

Preservation: The City did not oppose the intervention. M&S has preserved that issue for appeal and the City feels obliged to respond to its arguments.

PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES AND RULES

Provo City Code § 14.30.090. Termination of Nonconforming Uses - Recovery of Investment.

(1) The Community Development Director or his designee shall grant an owner of property affected by Subsection 14.30.080(2) of this Chapter an extension of the time required to conform with such section if:

(a) the owner:

- (i) by August 4, 2000 files a notice of intent to apply for a time extension as provided in this section; and
- (ii) by April 4, 2001 files a complete application for an extension of time as provided in this section.

(b) the owner's application for an extension of time demonstrates by a preponderance of evidence that:

- (i) the nonconforming use which is the subject of the application was legally established; and
- (ii) subject to the formula in Subsection (2) of this section, the owner is unable to recover prior to April 4, 2003 the amount of the owner's investment in the property.

(2) (a) The time period during which an owner may recover the amount of his investment in property affected by Section 14.30.080(2) of this Chapter shall be determined by dividing the residual value of the property by the average monthly net income from the property. The resulting figure is the number of months which the owner shall have to recover his investment in the property.

(b) For the purposes of this subsection, the following definitions shall apply:

(i) "Amount of the owner's investment" means the adjusted present value of the property as of April 4, 2000.

(ii) "Adjusted present value" means a property's original purchase price plus any capital improvements and less depreciation and net income from the property, all as adjusted for inflation to April 4, 2000.

(iii) "Compliance value" means the appraised value of the property on April 4, 2000 based upon compliance with the requirements of this Chapter.

(iv) "Residual value" means the difference between a property's adjusted present value and its compliance value as of April 4, 2000.

(c) The time period determined under subsection (a) of this section shall apply to the property for which the owner made an application for extension and to the owner's successors, if any, until such time period has run.

(3) Any person aggrieved by a decision of the Community Development Director or his designee applying this section may appeal such decision to the Board of Adjustment as provided in Chapter 14.05 of this Title.

(4) The Community Development Director may adopt reasonable regulations to carry out the purpose of this section.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This matter arises from the City's legislative enactment of a text amendment to its zoning ordinances affecting properties owned by the appellants (collectively "M&S"). The amendment changed portions of the City's Supplemental Residential ("S") Overlay zoning provisions to permit accessory apartments in single family residential zones subject to a requirement that the primary portion of the dwelling be occupied by the property owner. Prior to the amendment, there had been no owner occupancy requirement. M&S filed this action in which it asserted facial and as-applied challenges to that text amendment.

Along with the text amendment, the City enacted an amortization period exempting for a fixed period of time application of the owner occupancy requirement to allow opportunity to recoup investments in the affected properties. M&S applied for an

amortization determination, arguing that it was entitled to an infinite period of amortization. Not satisfied with the City's decision on amortization, M&S filed a second lawsuit seeking judicial review of the City's decision. Those two cases were eventually consolidated by stipulation of the parties.

B. COURSE OF PROCEEDINGS

M&S brought a facial and as-applied challenge to the City's text amendments to its S Overlay provisions. The City responded by filing a motion for summary judgment arguing that the facial challenge failed as a matter of law and that M&S had not sought nor obtained a ruling on the amortization of its investment in the properties, thereby failing to exhaust its administrative remedies for an as-applied challenge. A facial challenge to the amendments had also been advanced in a separate lawsuit filed by another party, and while the City's summary judgment motion was pending, had been appealed to the Supreme Court. The parties therefore agreed to stay these proceedings pending appellate resolution of the facial challenge.

In Anderson v. Provo City Corp., 2005 UT 5, 108 P.3d 701, the Supreme Court upheld the City's enactment of the text amendment requiring owner occupancy for the accessory use. In addition, it rejected the constitutional challenges also asserted by M&S.

During the interim, M&S sought an amortization determination from the City. Evaluating the information submitted by M&S, the City granted it a 22-year 3-month period for amortization of its investment, exempting it from the owner occupancy requirement for that period. M&S challenged that decision before the City's Board of Adjustment which affirmed the amortization determination. M&S then filed the second action which presented a petition for review pursuant to Utah Code Ann. § 10-9-708.¹ The trial court consolidated the two cases based upon agreement of the parties that the

¹The statutory review has been repealed and reenacted as Utah Code Ann. § 10-9a-801. The reenacted statute has retrospective application as a matter of law. See B.A.M. Dev., L.L.C. v. Salt Lake County, 2006 UT 2, ¶ 21, 128 P.3d 1161, 1166-1167 (addressing Utah Code Ann. § 17-27a-801 which contains identical language).

two cases had common facts and issues of law. While all of this was going on, neighbors in the area filed a motion to intervene which the court granted.

After consolidation, the City filed a motion for summary judgment with the understanding that “all that remains in this consolidated action is the as-applied challenge which has been distilled into the issue of whether the City’s amortization determination was arbitrary, capricious or illegal.” (R. 560.) M&S subsequently filed a cross-motion for summary judgment. (R. 573.) After hearing oral arguments, the court entered a memorandum decision on January 30, 2006. (R. 1141-1143.) The court concluded that the amortization ordinance use of “time period” did not allow it to be construed to permit an indefinite amortization period. (R. 1145.) The Court then held that the City’s approach to amortization yielding the 22-year 3-month amortization “is reasonable because it allows a sufficient period for Plaintiffs [sic] to recoup its investment in the property while satisfying the purpose of the Ordinance of eventually ending all nonconforming uses.” (R. 1144.)

Per instruction from the court, the City prepared a summary judgment and order of dismissal. Consistent with the City’s understanding and that of the trial court that all issues were addressed by the application of the amortization provisions, the Order dismissed all claims of M&S in the consolidated matter. M&S objected, arguing that it had remaining as-applied challenges which had not been addressed by the Court. The City responded, arguing that the issues had been distilled into the amortization determination and that the law applicable to the as-applied claims would dictate judgment against M&S on those as-applied challenges.

On April 4, 2006, the court entered its Memorandum Decision overruling M&S’s objections to the proposed order, noting that “M&S’s facial and as-applied challenges have already been adjudicated by this Court when this Court granted summary judgment in favor of the City. There is nothing left for this Court to decide in the matter.” (R. 1201-02.) The court also noted that M&S had sufficient opportunity to advance any other

claims it thought it had and that the court had ruled on the basis that the claims had been consolidated, that the sole issue remaining for decision was the amortization issue and that M&S had failed to argue any other issues in its memoranda or at oral argument. (R. 1200-01.) M&S did not seek post-judgment relief under either Rule 59 or Rule 60, Utah R.Civ.P.

C. STATEMENT OF FACTS

On April 4, 2000, the City adopted Ordinance 2000-15 which implemented a text amendment to its zoning ordinance by imposing a restriction on accessory apartment uses within the S Overlay zone requiring owner occupancy of the primary part of the dwelling. Ordinance 2000-15 also provided for an exemption from the owner occupancy requirement during an amortization period. The amortization provisions are contained in the Provo City Code as § 14.30.090.

M&S formally submitted an application for determination of the application period applicable to its property on March 26, 2002. (R. 0509-0537.) In its application, M&S relied on its net rental incomes, after depreciation, to conclude that the net rental income will always be a negative value and therefore requested that it should be entitled to an "infinite number of months to recover its investment . . ." (R. 0534.)

Using values supplied by M&S before depreciation and adjusting them for inflation to April 4, 2000, the City calculated the amortization period under § 14.30.090 as being 22.11 years. (R.0503-0507.) Community Development Director Gary McGinn advised M&S of the amortization results by letter dated March 9, 2004. In that letter, he advised that the amortization period was 22 years and 3 months and noted that M&S had already benefitted from three years of recoupment from April 4, 2000, to April 4, 2003. (R. 0501.)

M&S disagreed with the amortization determination and filed an appeal with the Board of Adjustment on March 18, 2004. (R. 499.) On appeal, M&S argued that though § 14.30.090 uses the term "net income," it does not define that term. It further argued

that the City used two inconsistent definitions of "net income" in its amortization analysis. M&S concluded that had its actual income for the period through April 4, 2000, been used, application of the formula established by § 14.30.090 would have yielded an infinite amortization period. (R. 485-497.)

The City's memorandum to the Board addressed the legal issues of statutory construction and reasonableness of the City's amortization determination. It pointed out that the Board's decision must be made based on whether substantial evidence existed to support the amortization decision. (R. 477-483.) The City discussed the City Council's legislative intent to eventually eliminate non-owner occupied appurtenant apartment uses in the S Overlay zone and to provide amortization as relief to those who had substantial investment in the preexisting apartment uses. It pointed out that amortization, by definition, cannot be infinite. It also discussed the basis for the underlying decision not to rely on income figures during the period when the property was in major reconstruction and the other considerations given in support of M&S's valuation and income figures. (*Id.*) The City then discussed the issue of "net income" with regard to the choice by M&S not to charge fair rental value for the apartments.

In our case, to allow M&S to avoid the application of the ordinance because it charges little or no actual rent is inconsistent with the clear intent of the city council to encourage owner occupied homes. The term average net income can be easily interpreted to mean a fair rental value for the property.

(R. 478.)

The M&S appeal came before the Board of Adjustment on May 20, 2004. (R. 450-475.) After the hearing, the Board entered findings of fact including:

5. M&S Investments LLC, made a timely application for an extension of time. However, M&S Investments LLC, did not request a specific amount of time to come into compliance with the owner occupancy; it requested infinity.
6. The Community Development Director determined that an extension of 22 years and 3 months was warranted. This determination was made based on the assumption of an average monthly net rental income at fair market value.

7. 14.30 does not define average monthly net rental income.

8. 14.30.090(4) allows the Community Development Director to adopt reasonable regulations in determining the length of an extension of time to come into compliance.

9. Since average monthly net rental income is not defined, it was reasonable for the Community Development Director to interpret average monthly net rental income as being fair market value.

(R. 446-448.) The Board denied the appeal and affirmed the amortization decision of the Community Development Director. (*Id.*)

SUMMARY OF ARGUMENT

It is important at the outset to dispel any impression that the City and M&S had reached a settlement agreement. The alleged settlement is not relevant or material to any of the issues before the Court and appears to be bandied about solely for purposes of portraying the City as somehow having acted in bad faith in its dealings with M&S. It is well established law that a settlement may be entered into only after approval by the municipality's governing body. The record establishes that (1) the City's legal counsel lacked authority to enter into a binding settlement agreement; and (2) the settlement discussions were just that, discussions. This was made clear to counsel for M&S in terms nobody could misunderstand. It is significant that M&S took no steps to enforce the alleged settlement. The reason is clear: there was no settlement agreement.

The Board of Adjustment decision is reviewed to determine whether it is arbitrary, capricious or illegal, with a statutory presumption of validity. The arbitrary or capricious standard simply requires substantial evidence. It does not, as argued by M&S before the trial court, require a preponderance of the evidence. Substantial evidence is simply that quantum of evidence necessary to convince a reasonable person to support a conclusion. The law affords the Board considerable deference and prohibits a reviewing court from substituting its judgment for that of the Board or independently weighing the evidence before the Board.

Here, the evidence is contained in the record and was largely supplied by M&S. The Board carefully weighed and considered the evidence before concluding that the City's application of the ordinance was reasonable and was supported by substantial evidence in the record before it. Applying the correct standard of review, the trial court agreed.

The arguments advanced by M&S before the City, the trial court and here suffer from several fundamental flaws. Two are particularly obvious. First, by definition, an amortization period for a nonconforming use cannot be infinite. M&S is not challenging the difference between a 20-year amortization and a 30-year or 40-year amortization. It stridently insists it is entitled to perpetually avoid the clear legislative intent to establish owner occupancy in single family residential dwellings with appurtenant apartments. Closely related is M&S's continued insistence that it is entitled to first claim depreciation for tax purposes and use that depreciated number for amortization purposes. This ignores the fact that depreciation and amortization are roughly equivalent terms. To permit M&S to recoup its investment by way of depreciation over a fixed period and yet have an infinite amortization period also for recoupment of its investment ignores the underlying purpose of the amortization provisions of the ordinance, which is the eventual elimination of the nonconforming use. Simply stated, the City has attempted to reach a reasonable result while M&S insists on the unreasonable.

It is clear from the record that both the City and the trial court reasonably believed that all issues in this consolidated action had been distilled into the amortization question and could be disposed of on cross motions for summary judgment. It is difficult to determine from the record how M&S can now assert that it has somehow preserved any other as-applied challenges. The trial court appropriately ruled on that as-applied challenge in favor of the City and brought the matter to a close. M&S should be estopped from claiming that those claims continue.

The challenge to the court's order granting intervention serves no real purpose. The trial court has considerable discretion in deciding whether to permit a party to intervene and that discretion is reviewable only for clear abuse of discretion. M&S has not demonstrated any such clear abuse. Moreover, M&S's arguments are based upon the nonexistent settlement agreement. While settlement negotiations terminated after the intervention, that is not a sufficient basis for finding an abuse of discretion in granting the motion to intervene. If an enforceable settlement agreement had been reached, intervention would have been meaningless and it would have been error to grant it. That is not the case here. The matter had not been settled. Even if there were an error in granting intervention, there is no legal prejudice to M&S, and the error would be harmless. While this Court is free to evaluate the challenge to intervention, there is no relief it can grant which has any significance.

The decisions by the Board of Adjustment and the trial court which underlie this appeal were valid and correct as a matter of law. It is appropriate for this Court to affirm those decisions.

ARGUMENT

I. THERE WAS NO SETTLEMENT AGREEMENT BETWEEN THE PARTIES.

M&S insinuates the alleged settlement issue into many of the issues, facts and arguments throughout its brief. This could easily be viewed as or interpreted as a transparent attempt to prejudice this Court by introducing bias against the City or finding injury based upon the trial court's decision to grant the motion to intervene. M&S makes no effort to recognize the extent or nature of the settlement negotiations, it boldly treats the negotiations as a final and binding settlement agreement. There are many such statements throughout the brief, but a few will suffice to illustrate. In its second issue for review, M&S questions whether the trial court erred "in granting Intervenors Motion to Intervene, thereby overriding the settlement agreement agreed to between the Coxes and Provo City?" (Apl't's Brief p. 1.) In its statement of facts it states that "M&S and Provo

City agreed to the terms of a settlement . . .” (Aplt’s Brief ¶ 12, p. 6.) In its summary of its argument, M&S states that “[a]fter retracting from its agreed-upon settlement the City then misapplied its owner occupant ordinance.” (Aplt’s Brief, p. 17.) These and other statements go beyond mere advocacy; they brazenly misstate the facts.

It is interesting to note that, despite its position that the City entered into an agreement with M&S, it made no effort at any time to enforce the alleged settlement agreement. This is because M&S knew there was no settlement agreement.

When settlement negotiations began in November of 2002, the City’s counsel sent to counsel for M&S a “Confidential Rule 408 Settlement Communication.” (Letter from Jody K Burnett to Keith A. Call, dated November 26, 2002, R. 920-922, copy enclosed at Addendum 1.) The conditional nature of the negotiations was emphasized in that letter.

In furtherance of that [negotiated resolution] effort, I am forwarding on behalf of Provo City an outline of the conceptual framework for a settlement agreement. It is important to bear in mind that at this point this is largely my work product. As you are undoubtedly aware, any binding agreement must ultimately be approved through appropriate channels by Provo City. However, in my experience, the only realistic way to achieve that goal is to try and negotiate the terms of a mutually acceptable tentative agreement subject to formal approval.

(R. 922, emphasis added).

In April of 2003, M&S insisted that “the material terms of our settlement have already been agreed upon, and will be enforceable in court.” (R. 901.) That position is simply contrary to Utah law. *See Patterson v. American Fork City*, 2003 UT 7, ¶ 13, 67 P.3d 466, 470-71. In *Patterson*, a developer had arguably negotiated a settlement with the city’s Mayor. The court held that whatever agreement there may have been with the Mayor simply was not enough. *Id.*

Nothing in the record suggests that the American Fork City Council ever voted on or approved a binding settlement agreement. Though Pattersons may have engaged in lengthy negotiations with Mayor Barratt, the Mayor does not have the authority to bind the City Council . . . At most, Pattersons have shown that they attempted to reach a conciliation with the City through the Mayor’s office, but this alone does not create a binding contract.

Patterson ¶ 13 at 470-71 (emphasis added).

Nor should M&S and their counsel have continued to believe there was an enforceable settlement. Counsel for the City responded to the April letter on May 7, 2003, emphasizing the lack of an agreement.

This response is intended to both set the record straight with respect to our position on the status of negotiations and seek clarification of your client's position and intended course of action.

As I have repeatedly advised you, both orally and in writing, while we have appreciated you and your client's willingness to engage in a constructive dialogue intended to explore a possible settlement of this case, we have not reached a settlement agreement as of this time. The cursory analysis in your letter of April 24, 2003, conveniently omits reference to my letter of November 26, 2002 . . . in which I specifically advised you that "any binding agreement must ultimately be approved through appropriate channels by Provo City." . . .

. . . Unlike the case citations you provided in your letter of April 24, 2003, there are no written communications between counsel agreeing to the material terms of settlement in this case. Quite to the contrary, that continues to be the specific focus of our discussion. Moreover, the more complicated decision making process and statutory authority to bind local government requires a completely different analysis than in the case of private parties.

(Letter from Jody K. Burnett to Keith A. Call, dated May 7, 2003, R. 898-899, copy enclosed as Addendum 2.)

M&S maintained its position that there had been a settlement through the hearing before the trial court. The City's counsel was again forced to explain.

A lot of that information isn't, not only is not relevant or material but frankly some of it alludes to Rule 408 settlement negotiations. And if you actually read those letters, I didn't bother to move to strike them, but you'll see certainly in my letters the usual caveat or qualifier that it ain't a deal until it's voted on by the city council in an open and public meeting. And I don't purport to have that authority and nobody voted me as a representative of the Provo City counsel [sic]. I'm just the attorney trying to advocate their interests in this case. So I'm sure the court is not persuaded by the notion that there was sort of tentative negotiations not ever approved by the council in open and public meeting.

(R. 1214, T. 14:6-19.)

The law is clear on this point. There is no enforceable settlement agreement.

II. THE BOARD OF ADJUSTMENT'S DECISION ON THE AMORTIZATION RULING BY THE CITY WAS NOT ARBITRARY, CAPRICIOUS OR ILLEGAL.

A. THE CORRECT STANDARD OF REVIEW IS MORE DEFERENTIAL THAN M&S ARGUES.

M&S argued insistently to the trial court that the standard applicable to the arbitrary and capricious determination was a preponderance of evidence standard. (R. 1214, T. 10-12.) In its reply argument, M&S advanced the standard as one solely of illegality in which the court affords the City no deference to the interpretation of the ordinance. (R. 1214, T. 22-24.) As recognized by the trial court, neither is correct. (R. 1146.)

All administrative and quasi-judicial decisions on zoning law involve the application of ordinances to specific facts. It is this application of ordinances, as in the amortization decision at issue here, which is subject to the arbitrary and capricious standard of review. In that review, courts afford board of adjustment decisions substantial deference. Patterson v. Utah County Bd. of Adjustment, 893 P.2d 602, 603 (Utah App. 1995). *See also* Cottonwood Heights Citizens Ass'n v. Bd. of Comm'rs, 593 P.2d 138, 140 (Utah 1979) (stating that in zoning decisions local administrative bodies "should be allowed a comparatively wide latitude of discretion.") Courts also do not substitute their judgment for that of the local board of adjustment. Patterson at 604.

It does not matter whether the court agrees or disagrees with the rationale of the Board or the policy grounds upon which a decision is based. It does not lie within the prerogative of the court to substitute its judgment for that of the Board. Thus, courts will not consider the wisdom, necessity, or advisability of the Board's determination.

Patterson at 604 n. 5 (punctuation, citations omitted).

Whether the Board's decision was arbitrary or capricious turns on whether there is substantial evidence in the record to support that decision. Bradley v. Payson City Corp., 2003 UT 16, ¶ 13, 70 P.3d 47, 57 (quasi-judicial decisions are subject to the substantial evidence standard for arbitrariness or capriciousness).

Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. It is more than a mere scintilla of evidence though something less than the weight of the evidence.

Patterson at 604 n.6 (punctuation, citations omitted). Courts “simply determine, in light of the evidence before the Board, whether a reasonable mind could reach the same conclusion as the Board. It is not our prerogative to weigh the evidence anew.” Patterson at 604 (citation omitted).

To the extent that interpretation of an ordinance is involved, the City is also afforded some degree of deference in its interpretation. The Supreme Court has pronounced that local interpretations of ordinances should be reviewed for correctness while affording “some level of non-binding deference to the interpretation advanced by the local agency.” Carrier v. Salt Lake County, 2004 UT 98, ¶ 28, 104 P.3d 1208, 1216.

M&S also argues here that the amortization ordinance should be strictly construed against the City and in its favor. That is inconsistent with the deference afforded by the Carrier court. That strict construction also does not apply to construction of ordinances related to nonconforming uses.

[T]his rule of construction favoring the free use of land should not be applied where common sense indicates the result would be contrived, unreasonable, or absurd in view of the manifest object and purpose of the ordinance.

1 Ziegler, Rathkopf's the Law of Zoning and Planning 94th ed. 1996) § 514 at 5-34 (emphasis added). The reason for this approach with respect to nonconforming uses is that the goal is to eventually eliminate those uses.

Consistent with this policy of restriction and eventual elimination, the courts have ruled that the right of nonconforming use should be strictly construed. Such use should be restricted, decreased, and finally eliminated.

1 Young, Anderson's American Law of Zoning (4 ed. 1996) § 6.07 at 500-01.

Consistent with these authorities, the Arizona Supreme Court concluded that “regulations governing nonconforming uses are excepted from the general rule that

zoning ordinances should be strictly construed in favor of the property owner.” Outdoor Systems, Inc. v. City of Mesa, 819 P.2d 44, 50 (Ariz. 1991).

In summary, the appropriate review here is to determine if there is substantial evidence supporting the City’s amortization determination, affording some deference to the City’s interpretation of its ordinances and keeping in mind the clear legislative objective to eventually terminate the nonconforming use.

B. M&S’S INTERPRETATION OF THE ORDINANCE IS UNWORKABLE AND NOT SUPPORTED BY THE RULES OF STATUTORY CONSTRUCTION.

The threshold problem presented by M&S’s arguments – here, before the trial court and at the Board of Adjustment – is their insistence on an infinite period of amortization. An infinite amortization period is not an amortization at all, but rather a permanent exemption from the owner occupancy requirements of the ordinance as a nonconforming use. This is not contemplated by the City’s legislative decision, the applicable Utah statutes or any legal definition of the amortization procedure as applied to nonconforming uses. M&S’s interpretation of the amortization ordinance would make it a nullity as applied to its properties. An interpretation and application of the ordinance which renders all or part of it ineffective is contrary to the rules of statutory construction.

It is important to keep in mind that the amortization provisions at issue here were part of an ordinance enacted to eliminate non-owner occupied appurtenant property uses. Permitting an infinite amortization would, on its face, undermine the ultimate public policy goal and purpose of the ordinance.

By definition, amortization of a nonconforming use contemplates the eventual termination of the nonconforming use at an identified point in time.

An amortization ordinance is one which allows a specified use a period of permitted nonconformity but requires that it be terminated at the end of such period.

1 Young, Anderson’s American Law of Zoning (4 ed. 1996) § 6.71 at 697.

Amortization secures the eventual but certain termination of nonconforming uses and structures by a provision in a zoning

ordinance which requires that, after the lapse of a specified time, all or some specific nonconforming uses must be discontinued. The time period may either run from the date the use was established or, as is often the case, from the date the ordinance becomes effective. The time period is intended to give the nonconforming owner or operator an opportunity to amortize his investment in the nonconforming use and, to the extent that the structures used therein cannot be used for a conforming purpose, the investment in the structures.

4 Ziegler, Rathkopf's the Law of Zoning and Planning (4 ed. 1996, supp. 2001) § 74.14 at 74-53 (emphasis added).

The City's authority to enact an amortization ordinance for nonconforming uses at the time came from the Utah Legislature.

The legislative body may provide for:

(b) the termination of all nonconforming uses, except billboards, by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of his investment in the nonconforming use, if any . . .

Utah Code Ann. § 10-9-408(b) (2001) (emphasis added).²

Both the statutory language and the common definitions of amortization of a nonconforming use embody two principles: (1) The nonconforming use will come to an end after a specific period. (2) the property owner will have a reasonable opportunity to recoup the investment in the property. This is consistent with § 14.30.090(2)(a) of the City's ordinance recognizing the amortization period as one in which "an owner may recover the amount of his investment in property." (emphasis added).

It is important to recognize that amortization affords a property owner only the opportunity to recoup its investment. If, as is the case here, the property owner chooses not to charge market rents or any rent at all for the nonconforming apartments, that is its choice to forego the opportunity to recoup its investment. That conscious choice by the property owner cannot preclude the City from imposing a reasonable amortization period for the nonconforming use in which the opportunity exists for recoupment.

²Currently Utah Code Ann. § 10-9a-511(2)(b).

Whether the 22-year 3-month amortization period is reasonable turns on statutory construction and application of § 14.30.090. The principles of statutory construction apply equally to statutes and ordinances. *E.g.*, Bennion v. Sundance Dev. Corp., 897 P.2d 1232, 1235 (Utah App. 1995). The primary goal in interpreting legislative acts is to give effect to the legislative intent. *E.g.*, Anderson Dev. Co. v. Tobias, 2005 UT 36, ¶ 40, 116 P.3d 323, 336. In determining legislative intent, the court evaluates the language “in light of the purpose the [ordinance] was meant to achieve.” Nixon v. Salt Lake City Corp., 898 P.2d 265, 268 (Utah 1995). In the event the ordinance language is ambiguous, the courts may look to the legislative history and other policy considerations in construing the language. Anderson ¶ 40 at 336; Nelson v. Salt Lake County, 905 P.2d 872, 875 (Utah 1995).

Courts avoid construing a legislative enactment in a way which would make it inoperable. *E.g.*, Young Electric Sign Co., Inc. v. Dept. of Transp., 2005 UT App 169, ¶ 7, 110 P.3d 1118, 1120 (rejecting interpretation which would render statute “meaningless.”) Similarly, construction of an ordinance should not be in contravention of its express purpose. Perrine v. Kennecott Mining Corp., 911 P.2d 1290, 1292 (Utah 1996). Nor do courts “construe a statute in such a way as to render certain viable parts meaningless and void.” Nelson at 876.

M&S’s proposed construction of the amortization ordinance runs afoul of these well-settled principles. There is no question that the legislative intent of the City Council was to bring an eventual end to accessory apartments in single family residential zones covered by the S Overlay provisions in dwellings which were not owner occupied. This means the eventual end of any nonconforming use falling within this category. There is also no question that the legislative intent included providing owners the opportunity to recoup their investments by way of a reasonable amortization period which would apply to the circumstances of each particular property. M&S’s construction of the City’s ordinance would allow it, at its sole discretion, to avoid collecting rents or any significant

rents and thereby create a perpetual nonconforming use in violation of the clear legislative intent of the City Council, therefore rendering the amortization provisions meaningless.

Admittedly, the ordinance does not specifically define “net income” for purposes of calculating the applicable amortization period. It is apparent that the City and M&S interpret “net income” differently, leading to an ambiguity in the ordinance. This ambiguity requires the Court to give meaning and effect to the public policy goals and objectives underlying the amortization ordinance in order to yield both a reasonable period for potentially recouping investment while eventually bringing an end to the nonconforming use. This is what the Community Development Department did in its initial evaluation of the amortization period and what the Board of Adjustment relied upon in affirming that decision. This is also the analysis which guided the trial court’s decision. It is appropriate for this Court to uphold those determinations.

C. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE 22-YEAR 3-MONTH AMORTIZATION DECISION.

This Court set forth the appropriate standards for review of a board of adjustment decision in Save Our Canyons v. Bd. of Adjustment of Salt Lake County, 2005 UT App 285, 116 P.3d 978.

We will consider the Board’s decision arbitrary or capricious only if it is not supported by substantial evidence in the record. In determining whether substantial evidence supports the Board’s decision we will consider all the evidence in the record, both favorable and contrary and determine whether a reasonable mind could reach the same conclusion as the Board. It is not our prerogative to weigh the evidence anew. However, whether or not the Board’s decision violates a statute, ordinance, or existing law, is reviewed for correctness, but we also afford some level of non-binding deference to the interpretation advanced by the Board.

Save Our Canyons ¶ 12 at 982-83 (citations, punctuation omitted). The Supreme Court has, consistent with the reviewing statutes, instructed that courts are to presume the Board of Adjustment decision to be valid. Carrier, *supra* ¶ 25 at 1214.

The central question here is whether, as required under Utah Code Ann. § 10-9-408(2),³ the 22-year 3-month amortization period is a reasonable period in which M&S may recover its investment, should it choose to do so. The infinite amortization period insisted on by M&S is not "reasonable" in the sense of eventually bringing an end to the nonconforming use, the intent of the City's legislative action. It is important to keep in mind that though M&S or the Court might reach different conclusions based upon the figures which form the underlying facts of this matter, those conclusions are immaterial to the issue of whether the City's analysis and conclusion are reasonable and supported by substantial evidence.

The facts behind M&S's argument for infinite amortization were compiled and presented in its application for amortization determination. (R. 507-537.) The City compiled and analyzed this information in determining the amortization period. (R. 503-507.) The City has never disputed the base figures with respect to acquisition and capital costs or rents actually received by M&S.

There is a discrepancy in the figures representing purchase price and other capital costs as adjusted for inflation. This discrepancy appears to result from M&S's application of a full year's worth of depreciation in 2000 while § 14.30.090 expressly provides for depreciation adjustment only through April 4, 2000. The City's figures reflect this shorter period for depreciation adjustment.

The serious point of contention between the parties is what net income figure to apply to the amortization formula. Here also there is a discrepancy. M&S would use net income after depreciation, while the City used net income prior to depreciation. The difference is significant because allowing both depreciation and amortization allows two measures of recoupment to be applied simultaneously to the same investment.

To "amortize" is to liquidate or extinguish, especially by periodic payment to a creditor or sinking fund. It is submitted that the

³Now § 10-9a-511(2)(b).

concept permitting a nonconforming user to recover the value of his property right over a period of time is more analogous to depreciation for tax purposes, depreciation being a decrease in value due to wear and tear. Actually, amortization within a specified period merely means that a nonconforming user has that period in which to phase out his operation in a manner which will involve the least loss.

4 Ziegler, § 74.14 n. 3 at 74-53. The reality is that the amount of depreciation claimed in any given tax year is a means of recoupment of investment in the property. To avoid a double recovery to M&S, it is reasonable to use income before depreciation to calculate the amortization period which similarly provides for recoupment of investment.⁴

The second disagreement between the parties is whether the net income figures during years prior to final completion of improvements which are intended to be amortized, when the residence was under-occupied and undergoing major construction, should be used in the amortization analysis. M&S insists that the income, actually losses, from those periods is required as part of the analysis, primarily because it supports their claim to infinite amortization. The purpose of average past rental incomes, however, is to give an indication of the actual rental value of the property for prospective application toward recovery of investment. The Community Development Department concluded that under the circumstances here, "the rental income from periods prior to 1999 would not be an accurate reflection of expected future rental." (R. 505.)

M&S argues that the Council did not expressly intend to rely on future rental values, but limited the consideration to actual historic income and losses. This is not evident from the language of the ordinance. Moreover, this construction would yield a result in this case which the Council clearly intended to eliminate, a permanent nonconforming use. The City's use of actual rental income for the fully completed

⁴M&S argues that the City used two inconsistent values for net income in the calculations in R. 503-507. In reality, however, the City merely recognized M&S's values reflecting the \$27,000 net loss for the five-year period and used its own analysis to arrive at the net income figure applicable to the amortization analysis. The City is using only one net income figure.

dwelling is a reasonable interpretation of the ordinance. To this end, the rental income from 1999 and 2000 are a reasonable basis for determining average monthly net income.

In its analysis, the Community Development Department used M&S's stated 1999 income, before depreciation, \$14,406. It used the 2000 figure for the first six months, before depreciation, of \$2,919 and adjusted that 2000 figure by adding in 5,749.03 of legal expenses which M&S had deducted which were not actual operating expenses for the apartments, reaching a 6-month total of \$8,668.03. It then doubled that amount to reach a 2000 figure of \$17,336.06. The 1999 figure and the 2000 figure were added together and divided by 24 months to get the average monthly net income figure of \$1,322.59. (R. 506.)

It is worth noting that the appraisal provided by M&S indicated that the fair market rental value of the units was more than twice this figure, \$2,950. (R. 528.) Had the City used the fair market value established by M&S's appraiser, which could also be reasonable, the amortization time would have been just under 10 years. By comparison, the 22-year 3-month period is extremely generous and certainly reasonable.

The Board was concerned over the effect of permitting a property owner to avoid the amortization of the nonconforming use by charging less than market value for its rentals.

Mr. MacKay: I assume that what that they are holding here is that they come up with a lesser value for rental to the property because they had people in there that they were not charging, their relatives and so forth like that. Does that really play? Can they take that off, because to me if you are figuring the rental of the property you are figuring what it could be. If I let somebody go in there free, then that's my responsibility and not a part of it.

Mr. Dixon: That was Gary's [the Community Development Director] position in saying that you could use the appraised market value of the rent, is because a person could essentially violate the ordinance indefinitely by simply not charging to rent to family. And then you've got all these singles in this neighborhood. And that was not the intent of the city council.

And I think the way that we have approached this gives them a very significant period of time. Twenty-two years is a long time. They may not actually recoup it in 22 years because of what you're

indicating, they are charging if they continue to charge significantly below market rent. But 22 years is not based on market rent so it's based basically on the rental they received over the last 18 months prior to their submittal.

(R. 471.)

Board members also expressed concern about giving meaning and effect to the ordinance by providing a reasonable time for amortization, recognizing that infinity is not reasonable in light of the purposes of the ordinance. (Illustratively, see R. 459.)

M&S's arguments to the Board focused on three core issues: (1) The ordinance does not define "net income." (2) The ordinance does not expressly grant the Development Director the discretion to make ad hoc determinations of net income for application of the amortization formula. (3) Though the ordinance grants the Community Development Director the discretion to adopt reasonable regulations to carry out the purposes of the amortization provisions, he did not formally do so.

With respect to (1) and (2), it is important to recognize that the language of the ordinance does not support M&S's conclusion that only actual historical rents of the property can be "average monthly net income." Net income is equally as undefined for M&S as it is for the City.

The issue then is which formulation produces a reasonable time for amortization while giving meaning and effect to the legislative intent to eventually terminate the nonconforming use. The Development Director's use of the 18-month rentals after completion of the property improvements, extending those figures to 24 months, more reasonably reflects the actual income which M&S received, or would receive, based upon those improvements, and is a reasonable means of reaching the rental income figure. The use of rental figures from periods preceding the expenditures for capital improvements bases the rents on a completely different valuation, that of the original, unimproved structure. Likewise, the use of rental figures from the construction period does not reflect the potential rental value based upon the completed improvements. The purpose of the amortization ordinance is to permit recoupment of the capital expenditures, implicitly

based upon the value of those expenditures, as reflected in rents received after the completion of the improvements. Use of the 1999 and 2000 post-construction rental income is not an ad hoc determination of rental income, but simply a reasonable determination of rental income used to reach a reasonable amortization period.

It is true that the Community Development Director had not promulgated regulations applicable to the amortization analysis. This lack of regulations, however, does not make the Director's decision with respect to net income unreasonable. What the ordinance provision reflects, as was recognized by the Board of Adjustment, is the legislative determination that implementation of the amortization process be (1) reasonable, and (2) "carry out the purpose of this section." § 14.030.090(4). As discussed herein, the determination of net income was reasonable and the resultant amortization period was reasonable. Most importantly, the legislative purpose of the ordinance was accomplished. M&S was afforded a reasonable time for recoupment of its investment, should it choose to do so, while ultimately putting an end to the nonconforming use. The legislative intent of the City was accomplished in a reasonable manner.

There is substantial evidence in the record to support the decision of the Community Development Director. The Board of Adjustment properly affirmed that decision. The decision is therefore not arbitrary or capricious. There is no evidence of any violation of statute, ordinance or common law in the City's actions. Hence, they are not illegal as a matter of law. Based upon the record before the Board of Adjustment and the satisfaction of the applicable legal standards, it is appropriate for this Court to affirm the decision of the Board of Adjustment as affirmed by the trial court.

III. THE TRIAL COURT PROPERLY ENTERED JUDGMENT AND DISMISSED ALL OF M&S'S REMAINING CLAIMS.

M&S asserts in its argument in support of its other as-applied challenges:

At the hearing on January 27, 2006, the first statement to the Court by Plaintiffs' counsel was to identify the two main issues remaining in the lawsuit, i.e., "as-applied" and "amortization," and to advise the

Court that only the amortization issues, and not the as-applied issues, were before the Court.

(Aplt's Brf. p. 29.) There are several problems with this statement. M&S fails to point to anything in the record to support that claimed statement. It is also unsupported by the transcript of the hearing on January 27. Nowhere in that transcript does anything come close to the statement allegedly made.⁵ It is obvious that neither the trial court nor counsel for the City understood that M&S was claiming that any additional as-applied challenges continued to exist. M&S's argument that "Provo City raised no objection to Plaintiffs' statement of the issues," (Aplt's Brf. p. 29), would support the conclusion that the City did not hear such an explicit statement of reservation of other as-applied challenges.

Moreover, M&S's position is belied by other facts surrounding the cross motions. In its summary judgment motion, the City sought judgment "on all of the claims asserted in this consolidated action." (R. 445.) Similarly, in its memorandum, the City recognized the amortization issue as the only one remaining.

Because the Anderson decision dealt with M&S's facial challenges to the text amendment in both actions, all that remains in this consolidated action is the as-applied challenge which has been distilled into the issue of whether the City's amortization determination was arbitrary, capricious or illegal.

(R. 560.) During oral argument, counsel for the City twice pointed out that the sole issue for resolving the matter was the review of the amortization decision.

[F]rom our vantage point we're here on a very narrow basis with respect to the as applied challenge to the ordinance to the specific facts and circumstances presented by the M&S Investment property . . .

(R. 1214, T. 14.)

And the parties are in agreement, as the court noted at the outset, that this is a case that can and should be resolved on the basis of the record of proceedings before the board of adjustment.

⁵Admittedly, the transcript is somewhat incomplete, noting "beginning not recorded." (R. 1214, T. 3.)

(R. 1214, T. 15.) In his oral argument, counsel for M&S did not object to either of these statements. Nor did M&S attempt to affirm their claim to any other as-applied challenges.

It is also interesting to look at the pleadings filed by M&S. M&S's cross motion was a motion for summary judgment, not a motion for partial summary judgment. (R. 0573.) All of their memoranda and related filings state "summary judgment." Not one is captioned "partial summary judgment." Nor do they use the phrase partial summary judgment in any of their arguments. There was simply nothing to give notice to the Court or the City that M&S disagreed that all of the other issues were subsumed into a review of the City's amortization decision to determine if it was arbitrary, capricious or illegal, and therefore could and should appropriately be decided on cross motions.

Having lost on its amortization challenge, M&S was forced to revive its other as-applied claims to keep the litigation alive. It did so by objection to the order drafted by the City. In response, the City confirmed that it understood that the parties intended to resolve the case on cross motions. Even so, the City discussed the legal merits of M&S's as-applied claims as identified in their objection. (R. 1155-1161.)

The trial court overruled M&S's objections, noting that it believed that the sole issue was the amortization issue and that M&S did nothing to put the court on notice otherwise.

The City had moved for summary judgment on all claims asserted in the consolidated action. After reviewing both Plaintiff's and Defendant's Motions for Summary Judgment, their responses, and having heard oral arguments by both parties, this Court was persuaded by Defendant that the sole issue to decide was whether the amortization provisions of the ordinance applied to the M&S property were valid As noted above, M&S had responded to the City's Motion for summary judgment and has had ample opportunity to argue all of their claims in both its memoranda and at oral arguments before this Court on January 2, 2006 [sic].

(R. 1200.)

The issue here is not really whether the trial court erred in its ruling. The issue is whether M&S carried its burden to preserve and prosecute its claims. There is nothing in

the record to explain why the City believed the parties had agreed to resolve the litigation on cross motions. It is clear that it had that belief and stated it in open court where M&S was represented by counsel. (R. 1214, T. 15.) Apparently, the Court also had that same understanding. (*Id.*) M&S allowed the City and the Court to believe there was only one issue necessary to resolve the entire matter. It did nothing to make it clear that it was reserving additional claims in the event it did not prevail on its cross motion. This Court should decline to reward a party in this fashion.

The trial court was in the best position to evaluate the facts related to M&S's objection. As such, it is afforded considerable discretion in applying the law to those facts. The court did not abuse that discretion and its ruling should be affirmed.

IV. THE TRIAL COURT COMMITTED NO CLEAR ABUSE OF DISCRETION IN GRANTING THE MOTION TO INTERVENE.

It is important to note that M&S's challenge to the intervention of neighboring property owners can result in no meaningful remedy from this Court. The intervenors did not participate in the briefing or argument of the issues before the trial court. There has also been absolutely no legal prejudice to M&S by their intervention. It is unclear what M&S wishes to accomplish by challenging the intervention.

M&S misunderstands several elements of its arguments. First, it alleges that the intervenors lack standing to intervene. The Utah Supreme Court, however, has stated that intervention "is the act by which a third party obtains standing to become a party in a suit." *In re E.H.*, 2006 UT 36, ¶ 51, 137 P.3d 809, 820 (emphasis added). The closest thing to a standing issue is the showing which an intervenor must make.

To justify intervention, the party seeking intervention must demonstrate a direct interest in the subject matter of the litigation such that the intervenor's rights may be affected, for good or for ill. The requisite interest necessary to permit intervention may arise from the intervenor's status or her circumstances.

In re E.H., ¶ 51 at 820. Utah appellate courts have never addressed the issue of whether neighboring property owners have sufficient property interest to intervene in this type of litigation. Courts which have addressed that question have generally permitted

intervention. *E.g.*, Larock v. Sugarloaf Township Zoning Hearing Bd., 740 A.2d 308, 313 (Pa.Cmwlth. 1999) (“owners of property in the immediate vicinity of property involved in zoning litigation have the requisite interest and status to become intervenors”); Freese, Inc. v. County of McLean, 659 N.E.2d 411, 415 (Ill.App. 1995) (permitting landowner intervention); Mobil Oil Corp. v. Zoning Bd. of Appeals of City of Bridgeport, 644 A.2d 401, 404 (Conn.App. 1994) (“because of this cognizable interest, the intervening defendants have standing in this controversy”).

The reliance M&S places on Perper v. Pima County, 600 P.2d 52 (Ariz. App. 1979) is misplaced. In Perper, a settlement had been reached and judgment had been entered on that settlement. The Perper holding is consistent with the general rules of intervention. Ostler v. Buhler, 1999 UT 99, ¶ 9 n. 3, 989 P.2d 1073, 1077 (“The general rule is that intervention is not to be permitted after entry of judgment.”); Millard County v. Utah State Tax Comm’n, 833 P.2d 459, 461 (Utah 1991) (“The general rule under the rules of civil procedure is that final settlement of all issues by parties to a controversy renders a permissive intervenor’s motion to intervene moot.”) Neither condition was present here. As discussed above, there was no settlement agreement. Nor had judgment been entered at the time of intervention. The Perper case provides no support for M&S’s position in this case.

The purpose of intervention is to eliminate unnecessary duplication of litigation. Centurian Corp. v. Cripps, 577 P.2d 955, 957 (Utah 1978). “The policy in the law is, and should be, to simplify and expedite procedure and to avoid a multiplicity of lawsuits.” Bartholomew v. Bartholomew, 548 P.2d 238, 241 (Utah 1976) (finding joinder justifiable). There is no question that the neighboring owners would have commenced separate litigation had they not been permitted to intervene in this matter. The real considerations in evaluating a motion to intervene are “whether the party’s intervention would unduly delay a pending action or if permitting him to intervene would unduly

complicate issues.” Interstate Land Corp. v. Patterson, 797 P.2d 1101, 1108 (Utah App. 1990). Neither situation was present here.

The argument that the intervenors’ motion was untimely similarly lacks merit. An individual may only intervene once he knows that his interest in litigation may diverge from those of the parties and that he may not be adequately represented by those parties. *See Freesen, Inc., supra*, (“when a government entity is involved, interested parties legitimately may assume that their elected officials will adequately represent their interests as members of the general public. Only when the interests of the general public diverge from those of the individual is the private party obligated to take action to protect his interests.”) The triggering event for these intervenors was receipt of information that the parties might be settling the litigation in a manner potentially adverse to their interests. Only when they became aware of that did they seek to intervene. Their motion was not untimely.

M&S also makes extensive argument as to why the intervenors had no right to intervene under Rule 24(a). It ignores the fact that the intervenors also sought leave to intervene under the permissive standards of Rule 24(b). The scope of Rule 24(b) is fairly broad, permitting a party to intervene “when an applicant’s claim or defense and the main action have a question of law or fact in common.” Rule 24(b), Utah R.Civ.P. Also broad is the discretion afforded to the court. “A trial court’s grant of intervention pursuant to Rule 24(b) involves the discretion of the trial court and we will not overturn its ruling absent a clear abuse of discretion” State v. Succi, 924 P.2d 882, 887 (Utah 1996). M&S has failed to show a clear abuse of discretion in this case.

CONCLUSION

The amortization determination, as affirmed by the Board of Adjustment, was not arbitrary, capricious or illegal. Rather, it afforded a reasonable period for M&S to recoup its investment, should it choose to do so, while giving effect to the legislative intent to eventually terminate the nonconforming use.

The record indicates that M&S had at least acquiesced to having the cross-motions for summary judgment be dispositive of all issues in this matter. Having permitted both the City and the trial court to believe that to be the case, it should be estopped from now asserting its alleged as-applied challenges, especially in light of the legal weakness of those challenges. The trial court did not err in entering judgment as to all of the claims in the consolidated matter.

The intervention issue has no substantive merit here. There is no relief which this Court can grant which would be meaningful. Moreover, M&S has failed to demonstrate that granting intervention was a clear abuse of discretion as required by the applicable standard.

The decisions of the Board of Appeals and the trial court were valid and correct as a matter of law. The City therefore respectfully requests that this Court affirm those decisions.

DATED this 31st day of January, 2007.

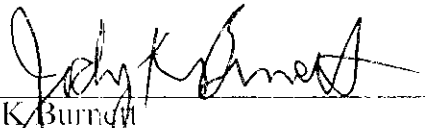
WILLIAMS & HUNT

By Jody K. Burnett
Jody K. Burnett
Attorneys for Defendant/Appellee
Provo City Corporation

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January, 2007, two (2) true and correct copies of the foregoing **Brief of Appellee Provo City Corporation** were mailed postage prepaid thereon, by first class mail in the United States mail, to the following:

Counsel for Plaintiffs/Appellants
Reed L. Martineau
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P. O. Box 45000
Salt Lake City, UT 84145



Jody K. Burnett

132857.1

ADDENDUM

1. Letter from Jody K Burnett to Keith A. Call, dated November 26, 2002
2. Letter from Jody K Burnett to Keith A. Call, dated May 7, 2003
3. Memorandum Decision, filed in Fourth Judicial District Court on January 31, 2006
4. Summary Judgment and Order of Dismissal, filed in Fourth Judicial District Court on April 4, 2006
5. Memorandum Decision, filed in Fourth Judicial District Court on April 4, 2006

ADDENDUM 1

LAW OFFICES OF
WILLIAMS & HUNT
A PROFESSIONAL CORPORATION

257 EAST 200 SOUTH, SUITE 500
P.O. BOX 45678
SALT LAKE CITY, UTAH 84115-5678

RECEIVED
11/26/02

JODY K BURNETT

TELEPHONE (801) 521-5678
FAX (801) 364-4567
E-MAIL jburnett@willhunt.com

November 26, 2002

CONFIDENTIAL RULE 408 SETTLEMENT COMMUNICATION

SENT VIA FACSIMILE (363.0400) & U.S. MAIL

Keith A. Call
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P. O. Box 45000
Salt Lake City, UT 84145

Re: *M&S Investments, LLC, et al v. Provo City*
Civil No. 000403654
Our File No. 1140.0012

Dear Keith:

We have appreciated the opportunity of engaging in a constructive dialogue with you in an attempt to explore the possibility of a negotiated resolution of this case. That includes your cooperation in submitting an application for amortization pursuant to the provisions of Provo City Code § 14.30.090 for the property located at 1310 North 900 East.

In furtherance of that effort, I am forwarding on behalf of Provo City an outline of the conceptual framework for a settlement agreement. It is important to bear in mind that at this point this is largely my work product. As you are undoubtedly aware, any binding agreement must ultimately be approved through appropriate channels by Provo City. However, in my experience, the only realistic way to achieve that goal is to try and negotiate the terms of a mutually acceptable tentative agreement subject to formal approval.

The type of agreement I have in mind, if we are successful in concluding these negotiations, would be in the form of a relatively simply stipulation, motion and order to

be submitted to the Court. It would start with a recitation of the intent of the parties to fully and completely resolve all claims and disputes between them relating to this litigation. That would include dismissal of the case with prejudice and a general release of all historical claims. Although the parties may very well identify additional issues that need to be resolved as part of the agreement, at a minimum, the following issues should be addressed:

1. 1310 HOME

As part of any such agreement, Provo City would recognize and approve the continuing nonconforming use of the home located at 1310 North 900 East (the "1310 Home"), granting the owner of the property an indefinite extension of time exempting the property from complying with the so-called "owner occupancy" requirements adopted in Ordinance 2000-15 in order to allow the owner to recover the amount of their investment in the property under provisions of § 14.30.090 of the Provo City Code. The owner would be required to comply with all other applicable requirements of the Provo City Code, including the definitions and rules with respect to occupancy in § 14.30.030, which predated your client's acquisition of the 1310 Home.

2. 1410 HOME

We understand that your client also purchased a home at 1410 North 900 East in Provo City in 1999 (the "1410 Home"), which does not have an accessory apartment and therefore does not trigger the provisions of the overlay zone regarding the definition and rules with respect to occupancy. However, the 1410 Home would be required to comply with the provisions and rules with respect to occupancy that apply to all single-family dwellings in Provo City, including the definition of family which, again, predates your client's acquisition of the property in question.

As I mentioned previously, while there may very well be other issues that need to be addressed in the agreement, this basically encompasses the conceptual framework we have agreed to in principle and can therefore be used as the basis for the preparation of the pleadings necessary to implement the agreement which can then be submitted to the Court.

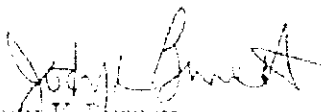
November 26, 2002

We look forward to hearing from you once you have had a chance to review and discuss these issues with your clients. I will take the laboring oar in preparing a formal draft of the settlement pleadings encompassing the agreement outlined above.

Thank you for your anticipated cooperation and assistance in attempting to conclude a settlement agreement resolving this dispute.

Very truly yours,

WILLIAMS & HUNT


Jody K. Barnett

JKB/jrs

cc: Gary A. McGinn (via facsimile & mail)
David C. Dixon
Neil A. Lindberg

cc:ps

ADDENDUM 2

LAW OFFICES OF
WILLIAMS & HUNT
A PROFESSIONAL CORPORATION

257 EAST 200 SOUTH, SUITE 500
P.O. BOX 45678
SALT LAKE CITY, UTAH 84145-0678

RECEIVED
5/8/03

JODY K BURNETT

TELEPHONE (801) 521-5678
FAX (801) 364-4568
E-MAIL jburnett@willhnt.com

May 7, 2003

CONFIDENTIAL RULE 408 SETTLEMENT COMMUNICATION

Keith A. Call
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P. O. Box 45000
Salt Lake City, UT 84145

VIA FACSIMILE AND U.S. MAIL

Re: *M&S Investments, LLC, et al v. Provo City*
Civil No. 000403654
Our File No. 1140.0012

Dear Keith:

I acknowledge receipt of your letter of April 24, 2003, and have had an opportunity to review it with representatives of Provo City.

This response is intended to both set the record straight with respect to our position on the status of negotiations and seek clarification of your client's position and intended course of action.

As I have repeatedly advised you, both orally and in writing, while we have appreciated you and your client's willingness to engage in a constructive dialogue intended to explore a possible settlement of this case, we have not reached a settlement agreement as of this time. The cursory analysis in your letter of April 24, 2003, conveniently omits reference to my letter of November 26, 2002, a copy of which is enclosed for your convenience and reference, in which I specifically advised you that "any binding agreement must ultimately be approved through appropriate channels by Provo City." My letter went on to suggest a possible framework for settlement.

May 7, 2003

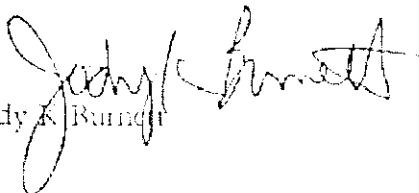
In response, you forwarded to us what you candidly acknowledged to be "a proposed settlement agreement." Unlike the case citations you provided in your letter of April 24, 2003, there are no written communications between counsel agreeing to the material terms of settlement in this case. Quite to the contrary, that continues to be the specific focus of our discussion. Moreover, the more complicated decision making process and statutory authority to bind local government requires a completely different analysis than in the case of private parties.

Having said that, Provo City certainly "stands by" its commitment to try to reach a settlement in this case, which was the specific intent of my letter of April 22, 2003, and the request for additional information. However, the information is substantively important for the City's review in responding to your settlement proposal and is not simply window dressing to "politically help the City."

We would encourage you to reconsider your position and respond by providing the information requested. I am still of the view that with the benefit of that information, we can reach a mutually acceptable settlement of this dispute. As always, we are more than willing to meet to discuss these issues and try to move that process forward.

Very truly yours,

WILLIAMS & HUNT


Jody K. Burnett

JKB:bap
Enclosure

cc: Gary A. McGinn
David C. Dixon

000000

000000

ADDENDUM 3

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

M&S INVESTMENTS, L.L.C., a Utah
limited Liability company, MERVYN
COX AND SUSAN COX,

Plaintiff,

v.

PROVO CITY CORPORATION.

Defendant.

MEMORANDUM DECISION

Case No. 000403654

Judge Steven L. Hansen

This matter was brought before the Court on Plaintiff's and Defendant's Motion for Summary Judgment filed on November 30, 2005 and October 3, 2005, respectively and argued before the Court for on January 27, 2006. The Court, having heard oral argument, and having reviewed the respective memoranda of the parties, hereby denies Plaintiff's Motion of Summary Judgment and grants Defendant's Motion of Summary Judgment.

Statement of Facts

The following facts are not in dispute.

This case arises out of a 2000 Provo City zoning ordinance, the S Overlay (the "Ordinance"). The Ordinance provides that a home must be owner occupied if the home owner

wishes to rent their accessory apartment. The effect of the Ordinance is to maintain the residential atmosphere of the neighborhood while accommodating the need for off campus housing for BYU students. The Ordinance allowed a non-resident owner of affected property to apply to the Provo City Community Development Director (the "Director") for an extension of time in which to bring its property into compliance. The Director uses a mathematical formula provided in the Ordinance to find an appropriate amortization period for the affected property.

Plaintiff purchased a home in 1996 when there was no owner occupancy requirement. They subsequently spent over \$500,000.00 remodeling the home. After the Ordinance passed, Plaintiff applied to the City for relief. Based on the information submitted by Plaintiff, the City granted a twenty-two year, three month period for Plaintiff to recoup its investment.

Plaintiff now seeks summary judgment on the basis that the City's application of Provo City Ordinance 2000-15 was inconsistent and therefore arbitrary, illegal or capricious. Plaintiff argues that an indefinite period of amortization is possible under the Ordinance and that they should be granted an indefinite period of amortization. Defendant seeks summary judgment on the basis that the purpose and intent of the ordinance is satisfied with the City's decision to grant a 22 year, 3 month amortization period and that an indefinite period of amortization would be inconsistent with the rules of statutory construction.

Analysis

As the parties have stipulated in this matter, summary judgment is proper and shall be rendered forthwith because there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); *Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993). Summary judgment is a harsh measure and opposing party's contentions are to be considered in a light most favorable to him. *Toomb v. Hepworth*, 737 P.2d 657 (Utah Ct. App. 987).

It is appropriate to give "some level of non-binding deference" to a local board of adjustment's interpretation of an ordinance. *Carrier v. Salt Lake County*, 2004 UT 93. "This intermediate approach provides a proper balance by affording respect to the local agency's specialized knowledge while ensuring that the interpretation of ordinances and statutes remains firmly within the province of the courts." *Id.* This standard shall be applied here.

The issue in this case is whether the Board of Adjustments correctly interpreted and applied the Ordinance when using the formula to calculate Plaintiff's amortization period. Plaintiff argues that the City's application of the amortization formula in the ordinance was illegal. A finding of illegality requires that this court determine that the City's "decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was

made or the ordinance or regulation adopted.” Utah Code Ann. § 10-9a-801(3)(d) (2005). This Court finds no such violation.

Plaintiff also claims that the City’s application of the amortization formula in the ordinance was arbitrary or capricious. The standard of review for this claim is “substantial evidence.” Applying this standard of review, the issue becomes whether substantial evidence supports the City’s amortization determination.

This Court finds that the City does have a substantial factual basis for the alleged discrepancies in the figures. The Board of Adjustment record provides substantial evidence in support of the City’s amortization decision. The City considered the evidence provided by M&S regarding a reasonable amortization period. The decision, therefore, was not arbitrary or capricious. The purpose of an amortization ordinance is to terminate nonconforming use. Plaintiff argued that the phrase “time period” in the ordinance is broad enough to extend to infinity. This Court agrees with the City’s interpretation that “time period” is a definite period of time, not indefinite. This is inherent in the purpose of the statute.

One of the methods that government can use to terminate a nonconforming use is amortization. Under amortization, the government grants a grace period for the nonconforming use to come into conformance with the new regulations. An amortization period which does not ultimately terminate the nonconforming use fails to fulfill its essential purpose and undermines

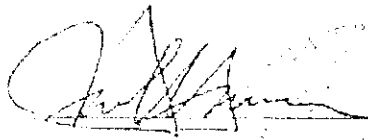
the purpose and effect of local zoning ordinances. Therefore, decisions regarding the status of a nonconforming use should be viewed narrowly with most doubt resolved in favor of the eventual elimination of the nonconforming use. *See Humphrey v. Robertson*, 709 So.2d 333, 337 (La. Ct. App. 1993).

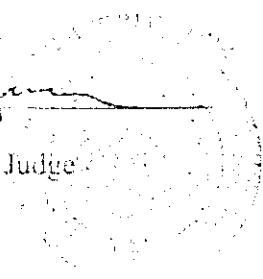
To determine reasonableness, courts generally balance the public gain against the individual loss. *See KOB-TV, L.L.C. v. City of Albuquerque*, 11 P.3d 708 (N.M.App. 2005). This Court recognizes the substantial amount of repairs that plaintiff has made to their property, approximately \$500,000.00, and that these improvements were made so that the plaintiff could rent out both portions of the house. However, Plaintiff purchased the house in 1996 and the use had been in existence less than four years before the ordinance had passed. The public's interest in maintaining a residential atmosphere must also be weighed. The benefit to the public by requiring eventual termination of the nonconforming use can only be met with a reasonable amortization period. The City's approach to calculating the amortization period for Plaintiff's property and their determination of the twenty-two years, three months amortization period is reasonable because it allows a sufficient period for Plaintiffs to recoup its investment in the property while satisfying the purpose of the Ordinance of eventually ending all nonconforming uses.

CONCLUSION

As a matter of law, the Court awards summary judgment to Defendant Provo City Corporation and affirms the Board of Adjustment decision applying the twenty-two year, three month amortization period to the M&S property. The Court requests that defendant prepare the appropriate order consistent with this decision within twenty (20) days.

DATED this 30 day of January, 2006.


Steven L. Hansen, Judge



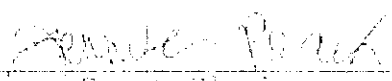
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 000403684 by the method and on the date specified.

METHOD	NAME
Mail	DAVID L ARMOND INTERVENOR 1250 Cedar Avenue Provo, UT 84604
Mail	RAYMOND V CHRISTENSEN INTERVENOR 1146 Old Willow Lane Provo UT 84604
Mail	STEPHEN D CLARK INTERVENOR unknown UT 84604
Mail	JODY K BURNETT ATTORNEY DEF 157 E 200 S #517 POB 45678 SALT LAKE CITY UT 84145-6678
Mail	KEITH A CALL ATTORNEY PLA 10 EXCHANGE PLACE 11TH FLE POB 45000 SALT LAKE CITY UT 84145-5000
Mail	REED L MARTINEZ ATTORNEY PLA PO BOX 45000 SALT LAKE CITY UT 84145-5000
Mail	GARY A MCGINN ATTORNEY DEF POB 1849 PROVO UT 84603

Dated this 31 day of Sept, 2006.

Case No: 000403554
Date: Jan 31, 2006


Deputy Court Clerk

FILED
Fourth Judicial District Court
of Utah County, State of Utah

JODY K BURNETT (A0499)
WILLIAMS & HUNT
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, UT 84145-5678
Phone: (801) 521-5678
Fax: (801) 364-4500

4-4-06 Deputy

DAVID C. DIXON (0890)
ASSISTANT CITY ATTORNEY
PROVO CITY
351 West Center Street
Provo, UT 84601
Phone: (801) 852-6141
Fax: (801) 852-6150

Attorneys for Defendant

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

M&S INVESTMENTS, L.L.C., a Utah limited	:	
Liability company, MERVYN COX AND	:	SUMMARY JUDGMENT AND
SUSAN COX,	:	ORDER OF DISMISSAL
	:	
Plaintiffs,	:	
	:	
v.	:	Consolidated
	:	Civil No. 000403654
PROVO CITY CORPORATION,	:	
	:	Judge Steven L. Hansen
Defendant,	:	

This matter came before the above-entitled Court, the Honorable Steven L. Hansen presiding, for consideration of cross-motions for summary judgment on all of the claims asserted in this consolidated action. A hearing on the motions was held before the Court on January 27, 2006. The plaintiffs were represented by Reed L. Martineau and Ryan B. Bell. Defendant was represented by Jody K Burnett and David C. Dixon.

Following the conclusion of the hearing, the Court took the matter under advisement, and having reviewed the legal memoranda and exhibits submitted by the parties and having considered the arguments of counsel, issued its Memorandum Decision dated January 30, 2006, granting defendant Provo City's Motion for Summary Judgment and denying plaintiff's Motion for Summary Judgment. Pursuant to that Memorandum Decision, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant Provo City's Motion for Summary Judgment is hereby granted on the basis that there are no genuine issues of material fact and the Board of Adjustment's decision was not arbitrary, capricious or illegal and was supported by substantial evidence in the record as more fully set forth in the Memorandum Decision of January 30, 2006.

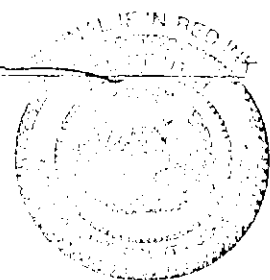
2. Plaintiffs M&S Investments, L.L.C., Mervyn Cox and Sue Cox's Motion for Summary Judgment is hereby denied for the reasons more fully set forth in the Memorandum Decision of January 30, 2006.

3. Based on the foregoing orders and for the reasons more fully set forth above, the plaintiff's Complaint, together with all claims and theories asserted therein in this consolidated action, is hereby dismissed, with prejudice and upon the merits. All parties are to bear their own respective costs and attorney's fees.

DATED this 3 day of April, 2006.

BY THE COURT


Steven L. Hansen
District Court Judge



FILED
Fourth Judicial District Court
of Utah County, State of Utah
4-11-06 [Signature] Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH**

M&S INVESTMENTS, L.L.C., a Utah
limited Liability company, MERVYN
COX AND SUSAN COX,

Plaintiff,

PROVO CITY CORPORATION,

Defendant.

MEMORANDUM DECISION

Case No. 000403654

Judge Steven L. Hansen

This matter was brought before the Court on Plaintiffs' Objection to its Proposed Summary Judgement and Order of Dismissal, filed on February 16, 2006. The Court, having reviewed the respective memoranda of the parties, hereby overrules Plaintiff's Objection to its Proposed Summary Judgment.

Analysis

Plaintiffs ("M&S") filed an objection to the City's proposed summary judgment and order of dismissal on the grounds that their facial and as-applied challenges to the Provo City zoning ordinance from their original complaint still survive and have not been adjudicated. M&S's

facial and as-applied challenges have already been adjudicated by this Court when this Court granted summary judgment in favor of the City. There is nothing left for this Court to decide in this matter.

First, the Defendants facial challenge has been resolved in Anderson v. Provo City Corp., 2005 UT 5, 108 P.3d 701. In Anderson, the Utah Supreme Court resolved all facial challenges to the S Overlay text amendments when they held that the City acted within its legislative authority in enacting the amendments and that the amendments were reasonably related to legitimate legislative objectives. Id., ¶¶ 16 and 27. Because the amendments were found to be facially valid, the S Overlay text amendments are not subject to any additional facial challenges.


Second, there is no basis for M&S's "as applied" challenges. M&S argues that their "as applied" challenges "have never been litigated, have never been briefed for the Court, have never been argued to the Court, and have never been addressed or decided." (Plaintiff's Objection at 3). M&S alleges that they have unresolved claims from Case No. 040402050. This action, however, was consolidated in August 2005 when counsel for M&S prepared a Joint Motion for Order Consolidating Cases and obtained signatures from opposing counsel. The Court consolidated M&S's cases based in part on M&S's representation that their motion was made "for the reason that both cases involve common questions of law and fact." (Joint Motion for Order Consolidating Cases).

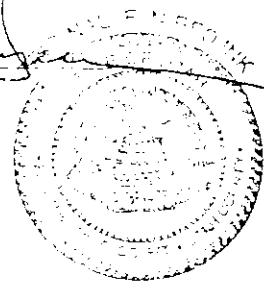
The City had moved for summary judgment on all claims asserted in the consolidated action. After reviewing both Plaintiff's and Defendant's Motions for Summary Judgment, their responses, and having heard oral arguments by both parties, this Court was persuaded by Defendant that the sole issue to decide was whether the amortization provisions of the ordinance as applied to the M&S property were valid. Procedural due process has been met in this case. As noted above, M&S had responded to the City's Motion for summary judgment and has had ample opportunity to argue all of their claims in both its memoranda and at oral arguments before this Court on January 2, 2006. This Court has summarily dismissed other claims raised by M&S. Other "as-applied" challenges to dispute the City's right to summary judgment alluded to in M&S's Objection are now moot.

CONCLUSION

As a matter of law, the Court now enters the order which the City has drafted. M&S's objection is overruled.

DATED this 4th day of April, 2006.


Steven L. Hansen, Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 000403654 by the method and on the date specified.

METHOD	NAME
Mail	DAVID L. ARMOND INTERVENOR 1250 Cedar Avenue Provo, UT 84604
Mail	RAYMOND V CHRISTENSEN INTERVENOR 1146 Old Willow Lane Provo UT 84604
Mail	STEPHEN D CLARK INTERVENOR unknown UT 84604
Mail	JODY K BURNETT ATTORNEY DEF 257 E 200 S #500 POB 45678 SALT LAKE CITY UT 84145-5678
Mail	KEITH A CALL ATTORNEY PLA 10 EXCHANGE PLACE 11TH FLR POB 45000 SALT LAKE CITY UT 84145-5000
Mail	REED L MARTINEAU ATTORNEY PLA PO BOX 45000 SALT LAKE CITY UT 84145-5000
Mail	GARY A MCGINN ATTORNEY DEF POB 1849 PROVO UT 84603

Dated this 14 day of April, 2010

Case No: 001403654

Date: Apr 04, 2006

Shirley L. Tracy
Deputy Court Clerk

Heidi E. Galt Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH**

M&S INVESTMENTS, L.L.C., a Utah
limited liability company, MERVYN
COX AND SUSAN COX,

Plaintiff,

PROVO CITY CORPORATION,

Defendant.

MEMORANDUM DECISION

Case No. 000403654

Judge Steven L. Hansen

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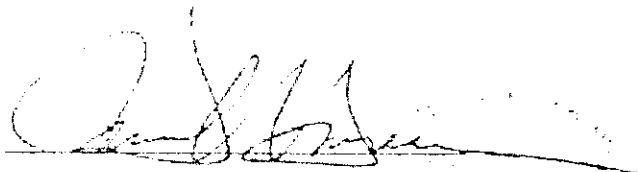
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CONCLUSION

As a matter of law, the Court now enters the order which the City has drafted. M&S's objection is overruled.

DATED this 4th day of April, 2006.


Steven L. Hansen, Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 000403654 by the method and on the date specified.

METHOD	NAME
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Mail	REED L MARTINEAU ATTORNEY PLA PO BOX 45000 SALT LAKE CITY UT 84145-5000
Mail	GARY A MCGINN ATTORNEY DEF POB 1849 PROVO UT 84603

Dated this 11 day of April, 2006

Case No: 000403554
Date: Apr 04, 2006


Deputy Court Clerk