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John Collins and June Collins v. Sandy City Board of Adjustment and Sandy City Corporation : Brief of Appellee

Utah Supreme Court

Steven C. Osborn; Attorney for Appellees.
Franklin L. Slaugh; Attorney for Appellants.

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN COLLINS and JUNE COLLINS	:	**BRIEF OF APPELEES**
Plaintiffs and Appellants,	:	
vs.	:	
SANDY CITY BOARD OF ADJUSTMENT and SANDY CITY CORPORATION, a municipal corporation,	:	Sandy City Board of Adjustment and Sandy City Corporation
	:	Case No. 20010144-SC
	:	Oral Argument Priority No. 13
Defendants and Appellees.		

On Writ of Certiorari from a Decision of the Utah Court of Appeals

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JURISDICTION

This court has jurisdiction to review this matter pursuant to §78-2-2(5), Utah Code Ann. (1996) and Rule 46 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

This case presents the question of whether the Utah Court of Appeals correctly adopted the rule in *Federated Dept. Stores v. Moitie*[1] to govern determinations of issues where the law has changed but a party failed to appeal.

Standard of Review

On certiorari, the Utah Supreme Court reviews the decision of the Court of Appeals, not that of the trial court.[2] Whether the Court of Appeals erred in its reliance on a case for its decision is a question of law. The Utah Supreme Court reviews the Court of Appeals's conclusions of law for correctness and affords them no deference.[3]

STATEMENT OF THE CASE

The petitioners[4] own three homes in residential neighborhoods in Sandy City. At various times in the period prior to 1996 they claim to have rented these properties for periods of less than 30 days, which are referred to herein as "short-term" or "ski" rentals.

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[1] 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981)

[2] *Butterfield v. Okubo*, 831 P.2d 97, 101 n.2; *see Lysenko v. Sawaya*, 2000 UT 58, ¶ 15, 7 P.3d 783 (Utah)

[3] *Rackley v. Fairview Care Centers, Inc.*, 2001 UT 32, ¶ 23, 23 P.3d 1022, 1025 (Utah)

[4] Herein called "Property Owners", "Owners", or the "Collinses."

Sandy City ordinances prohibit such uses. The Property Owners appealed a determination by the City's zoning administrator to the Board of Adjustment in 1996 on the issue of whether the City's ordinances prohibited short-term rentals or "ski" rentals (because the homes were allegedly rented for periods of a week at a time to skiers). The Board of Adjustment and District Court ruled in favor of the City. After the Collinses failed to appeal from the adverse district court decision, the Court of Appeals ruled against the City's position in another ski rental case, presenting the same issue, *Brown et al. v. Sandy City Board of Adjustment.*[5] Pursuant to *Brown*, the City adopted an ordinance specifically prohibiting short-term rentals of less than 30 days.

The Owners then returned to the Sandy Board of Adjustment claiming that the intervening *Brown* decision entitled them to rent three of their properties [6] as short-term rentals. The City informed them that they still needed to prove that they were entitled to a nonconforming use, or that the properties were "grandfathered." The Sandy City Board of Adjustment and the district court ruled that the Owners failed to show that they qualified as nonconforming uses, and further, that because a nonconforming use of property must be legal when it commences, the Owners were collaterally estopped by the

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[5] 957 P.2d 207 (1998)

[6] A fourth property, which was the subject of the previous litigation begun in 1996, is no longer an issue before the court, since the Owners apparently no longer own it: the 1456 E. Longdale Drive home.

decision of the 1996 case from bringing the matter a second time. The Owners appealed that decision to the Court of Appeals, which ruled in favor of the City.

STATEMENT OF FACTS

1. On March 26, 1996, a Sandy City zoning code enforcement officer, Nolan Isom, sent a Notice and Order to the property owner, John Collins, directing him to stop operating three homes as transitory lodging facilities in violation of Sandy ordinances.[7]

2. The Property Owners filed an appeal to the Sandy City Board of Adjustment from the determination of the City that the use of the three properties as short-term rental units was prohibited by the Sandy City Development Code. They also included in their appeal an additional property which had not been the subject of the cease and desist order, the property at 9255 South Maison Drive.[8]

3. At the Board of Adjustment hearing, held August 8, 1996, eleven residents from the neighborhoods where the homes were located, testified as to various complaints about the use of the Collinses' properties as "ski rentals".[9] After hearing the

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[7] The subject properties were single family dwellings located at 1875 East Alla Panna Way, 1456 E. Longdale Drive, and 472 East 9400 South, in Sandy, Utah in residential zoning districts A copy of the Notice and Order is attached hereto as Tab No. 1.

[8] R. at 156. The record before the Board of Adjustment in 1996 contains no mention of the fact that the 9255 South Maison Drive property had not actually been the subject of the cease and desist order, which was apparently overlooked by the Board in its decision, which thus applied to that property as well.

[9] Among the complaints expressed about the plaintiffs' use of their properties at the August 1996 Board of Adjustment hearing were the following:

(a) Poor upkeep (Aug. 8, 1996 Bd. of Adj. Minutes at 11, R. at 273);

evidence and arguments from the residents and the Owners, the Board of Adjustment ruled that the City's interpretation of its ordinances was correct and denied the appeal.[10]

4. Owners filed a complaint with the Third District Court appealing the decision of the Sandy Board of Adjustment. The properties listed in the Amended Complaint[11] omitted the property at 9255 South Maison Drive.

5. The district court, Judge Frank G. Noel, granted the City's motion for

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(b) Failure to shovel snow off of sidewalks, in one case for four weeks (1997 Bd of Adj. Minutes at p. 12, R. at 274) about which Mr. Collins responded that if tenants wish, they can shovel snow, and that tenants do shovel snow (*Id. at* 9);

(c) Short-term rentals will lower the property values of the neighborhood (*Id.* at 10, 11) (R. at 273);

(d) Traffic problems (*Id.* at 11), and a fear for the safety of children (Minutes at p. 12, R. at 273);

(e) There was no on-site management of the guests at the rental homes as there would be at a motel (*Id.* at 12, R. at 273);

(f) Partying and loud music on weekends late into the night at properties where many beer cans were viewed (*Id.* at 11, 13R. at 273, 275);

(g) Not knowing whom to contact when there were complaints about the properties (*Id.* at p. 13, R. at 276);

(h) As many as nine cars at one of the Owners' properties (*Id.* at 13, R. at 275), although John Collins stated he limits the number of cars allowed in his rental agreements (*Id.* at p. 9, R. at 271) to only two or three cars at any of the rental homes (*Id.* at P. 10, R. at 272);

(i) Allowing one of the properties to be rented violated restrictive covenants requiring that the buildings be used only for "a single family dwelling" for the subdivision in which it sits, and that the plaintiffs were aware of these covenants, which was supported by a letter signed by many of the residents and read at the hearing (*Id.* at p. 11, R. at 273).

A copy of the minutes of that meeting are attached hereto as Tab no 2.

[10] 1996 Bd. of Adj. Minutes at 14, Tab 2 R. at 276. Findings of fact and conclusions were not adopted by the Board in that proceeding.

[11] Amended Complaint, R. at 174.

summary judgment and denied Owners' motion for summary judgment.[12] The Owners did not appeal the court's decision.[13]

6. On March 26, 1998, the Utah Court of Appeals issued its opinion in another case involving short-term rentals in Sandy, *Brown et al. v. Sandy City Board of Adjustment.*[14] In that case the court held that Sandy City's zoning ordinances did not prohibit rentals of less than 30 days in residential districts, but that the City could prohibit such uses if the it adopted an ordinance specifically forbidding them. The City's petition for certiorari to this court was denied.

7. The Sandy City Council thereupon adopted an ordinance prohibiting short-term rentals of 30 days or less in all residential districts in Sandy.[15]

8. Owners sought to avoid the new ordinance by filing an application for nonconforming use status with the Sandy City Board of Adjustment on October 27, 1998. This application was for three properties located at the following addresses: 1875 East Alla Panna Way, 472 East 9400 South, and 9255 South Maison Drive.[16]

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[12] Revised Summary Judgment and Order of Dismissal, R. at 210.

[13] *See* November 12, 1998 Bd. of Adj. Minutes at 3, Tab 7 ; *see also* Brief of Appellants at 11

[14] 957 P.2d 207

[15] R. at 214, 219, 224.

[16] Record at 132. The property at 1456 E. Longdale Drive was not brought to the Board of Adjustment or subsequently to the district court, apparently because Owners had sold the home.

9. On November 12, 1998 the Sandy City Board of Adjustment held a hearing on the application for nonconforming use status. The Board denied Owners' request for nonconforming use status, finding (1) that the Owners had not used the properties as short-term rentals on the effective date of the new ordinance prohibiting short-term rentals[17], and (2) that the decision in *Brown* did not apply to the Owners inasmuch as they had not appealed the earlier decision of the district court.[18] No evidence was submitted at the hearing on the Owners' nonconforming use as "ski" rentals, e.g., credit card or other receipts, correspondence with renters, purchase price of the properties, improvements made in preparation of their new use, advertizing, income or motel taxes paid.

10. The Owners petitioned the district court for a review of the decision of the Board of Adjustment. On August 16, 1999, the court held a hearing on the parties' cross motions for summary judgment, and on November 18, 1999, Judge Timothy R. Hanson granted summary judgment for the City on both the nonconforming use and the collateral estoppel issues.[19]

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[17] No evidence was submitted by the Owners to show that they were using the properties for short-term rentals when the new ordinance went into effect in 1998. Para. 11, Sandy Bd. of Adj. Findings of Fact and Conclusions, R. at 240.

[18] R. at 240.

[19] R. at 446

11. On appeal from the district court, the Utah Court of Appeals upheld the district court decision on the nonconforming use and collateral estoppel issues,[20] from which this court has granted certiorari.

SUMMARY OF ARGUMENT

I. The Collinses improperly raise a new issue for the first time before this court. The Collinses improperly raise an argument for the first time on certiorari to this court,[21] the argument that the issue preclusion applies against the City in this case because the City lost the case of *Brown et al. v. Sandy City Board of Adjustment*, in what is called nonmutual collateral estoppel. They cite no valid authority for their argument, nor has the applicability of offensive nonmutual collateral estoppel been decided in Utah, nor has the use of nonmutual collateral estoppel against a City been decided.

II. Collinses' Arguments Attacking *Moitie* Are Unsound. The Court of Appeals in its decision below, relied in part upon *Federated Dept. Stores v. Moitie* , 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). The efforts of the Property Owners attempting to differentiate *Moitie* from this case on factual grounds do not hold up.

III. Issue preclusion should apply here under the Rest. 2d Judgments §28(2) balancing test. Courts have stated strong interests in precluding relitigation of cases

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[20] *Collins v. Sandy City Board of Adjustment*, 2000 UT 371, 16 P.3d 1251

[21] *See DeBry v. Noble*, 889 P.2d 428, 444 (Utah 1995) ("Issues not raised in the court of appeals may not be raised on certiorari unless the issue arose for the first time out of the court of appeals' decision."); *see also Harmon v. Ogden City Civil Service Commission,* 917 P.2d 1082 (1996).

which have once been decided on the merits. Even if the Court of Appeals erred in relying on *Moitie* and other claims preclusion cases for its decision, issue preclusion is still appropriate to apply in this case. The Property Owners argue that where there is an intervening appellate decision between the first and second cases which changes the law, issue preclusion, or collateral estoppel, should not preclude relitigation of the issue, citing *Cassidy v. Board of Education*[22] and Restatement (Second) Judgments §28(2).

In collateral estoppel cases where there has been a substantial change of law between the first and second cases, the Restatement and other authorities call for a balancing of the interests in repose against the interest in continuing the second lawsuit. The property interests in reliance and repose of the City's citizens, and particularly the homeowners in the neighborhoods where these three ski rental homes were used, who might now be affected by the rental of these homes from week to week by reopening the issue, outweighs the any interest of the Owners in being treated like other ski owners who won the *Brown* case. The interests of the neighbors are all the more compelling here because the Owners made a deliberate choice not to appeal the first Board of Adjustment decision and district court judgment in this case. The balancing of interests therefore favors the City in this case, and issue preclusion should be applied.

In any event, the Collinses failed to submit any evidence of their nonconforming use to the Sandy City Board of Adjustment when they came before it the second time.

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[22] 316 Md. 50, 557 A.2d 227 (Md. App. 1989) .

Their appeal would therefore fail even if this court corrects the decision of the Court of Appeals.

ARGUMENT

I. THE COLLINSES MAY NOT RAISE THE ISSUE OF NONMUTUAL COLLATERAL ESTOPPEL AGAINST THE CITY AT THIS STAGE

Besides to its being outside the scope of the issue before the court, the Collinses improperly raise the argument that collateral estoppel prevents the City from its position in this action for the first time in their brief to this court.[23] Offensive use of collateral estoppel is generally inappropriate where a party could easily have joined in the litigation it seeks to benefit from by use of the case.[24] The Collinses could have appealed the district court judgment in the first case in this matter, and then have moved for consolidation with Brown, et al. in the appeal on the ski rental issue to the Court of Appeals, thereby avoiding the waste of resources involved in this litigation. Instead, they chose to sit back and wait to see what happened in the Brown case, and now seek to use it to their advantage. Such nonmutual offensive use of collateral estoppel tends to

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[23] *See DeBry v. Noble*, 889 P.2d 428, 444 (Utah 1995) ("Issues not raised in the court of appeals may not be raised on certiorari unless the issue arose for the first time out of the court of appeals' decision.").

[24] *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)

increase litigation, unlike defensive use of collateral estoppel, which tends to reduce litigation, one of the reasons it is disfavored.[25]

The Property Owners rely on *Hill v. Seattle First Nat. Bank*,[26] but that case does not support their assertion of offensive nonmutual collateral estoppel against the City, a doctrine without precedent in Utah.[27]

II. THE ARGUMENTS ATTACKING *MOITIE* ARE UNSOUND.

The Collinses argue that the Court of Appeals erred in relying upon *Moitie* for its decision applying issue preclusion to their second case. They attempt to distinguish *Moitie* from the present case on several grounds. First, these Property Owners argue that in *Moitie*, the precluded parties in that federal antitrust case (plaintiffs Moitie and Brown) were original parties to the decision that resulted in the reversal of the law, whereas in this case, the Collinses were not parties to the suit which changed the law in Brown.[28] In fact, Moitie, Brown, and the other original plaintiffs against Federated Department Stores, the defendant, each brought separate suits which were all assigned to the same federal judge and dismissed at the same time, but were never, apparently,

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[25] *See id.*

[26] 827 P.2d 241 (Utah 1992)

[27] *See Utah v. Clinton Perank*, 858 P.2d 927 (Utah 1992), footnote 3, J. Zimmerman dissenting. *Hill v. Seattle First Nat. Bank*, 827 P.2d 241 (Utah 1992), an opinion by J. Zimmerman, was a defensive use of collateral estoppel.

[28] Collinses' Brief at 8.

consolidated into a single case. This factual distinction is thus without foundation.

The Collinses also argue that the cases are different because in *Moitie*, the original plaintiffs were "forum shopping."[29] Why this should be significant is not explained, if it was the case,[30] nor is it discernable.

The Collinses also distinguish *Moitie* from the present case on the ground that the change in law in *Moitie* was entirely unanticipated, whereas in the first Collins v. Sandy City case, the appeal by Brown was a fully prepared appeal pending before the Utah Court of Appeals when the Collinses elected not to appeal the adverse district court judgment. Collinses' Brief at 7. This distinction is of little consequence since any appeal to an appellate court has the potential of creating a change in law. Surely the parties bringing the appeal in the Moitie case anticipated a change in law; otherwise, they would not likely have gone to the trouble of appealing. To distinguish appellate cases on the basis of which would result in a change in the law can only be practiced in hindsight.

Snyder v. Newcomb Oil Co, Inc.,[31] relied on by the Collinses, is not on point since that case involved claim preclusion and an intervening legislative change, rather than a

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[29] Collinses' Brief at 8.

[30] Moitie, one of the two plaintiffs in the original action in the Supreme Court case, did file its original action against Federated in state court; Brown, the other, filed in federal district court. After removal of Moitie's case to the federal district court, and dismissal, both parties filed in a single suit in state court which Federated again removed to federal district court, where it was dismissed.

[31] 603 N.Y.S.2d 1010 (App. Div. 1993)

change in court precedent, as here. Likewise, *Foley v. Roche,*[32] also cited in the brief of the Collinses, was a case involving overruling the law of the case rather than issue preclusion.

Moitie, cited as support by the Court of Appeals in its decision, while a claims preclusion, and not an issue preclusion case, is nonetheless important for the general rule that courts are unwilling to allow a party to relitigate a case after foregoing an opportunity to appeal in the first instance. Although the context is somewhat different here, the need for finality in judgements is nonetheless an important consideration in this matter.

III. EVEN IF THE COURT OF APPEALS WAS IN ERROR IN RELYING ON *MOITIE*, ISSUE PRECLUSION SHOULD STILL APPLY HERE.

A. Courts favor repose and finality of judgments in reducing redundant litigation

Justice Harlan of the U.S. Supreme Court said that the object for which civil courts have been established in our society is to secure the peace and repose of the community by the settlement of matters which can be determined by judicial administration, and that the enforcement of judgments is essential to the maintenance of social order.[33] But for such enforcement, the assistance of the courts would not be

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[32] 447 N.Y.S.2d 528 (App. Div. 1982)

[33] *Southern Pacific R.R. v. U.S.*, 168 U.S. 1, 48, 18 S.Ct. 18, 27, 42 L.Ed. 355 (1897)

sought in resolving disputes.[34] One of the central objectives of our modern system of civil procedure is putting an end to litigation by according finality to judgments.[35] The established rule is that preclusion cannot be defeated by electing to forgo an available opportunity to appeal.[36] Once the time for appeal has run, a judgment is res judicata without regard to the fact that an appeal might have been taken to a higher court.[37]

Both branches of res judicata, claims preclusion, and issue preclusion, serve the important judicial purpose of protecting litigants from the burden of relitigating the same issue with the same party or his privy.[38] They serve the additional benefit of promoting judicial economy by preventing needless litigation.[39]

The Owners argue that application of issue preclusion is unfair inasmuch as they are "being penalized for pursuing their legal remedy."[40] But it is their decision not to pursue their legal remedy when they could have which created this second unnecessary

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[34] *Id.*

[35] Marcus, Redish, Sherman, *Civil Procedure: A Modern Approach* (2nd ed.) at 1091 Each branch promotes the important judicial policy of preventing parties from relitigating a claim or issue.

[36] Wright, Miller and Cooper, Federal Practice and Procedure: Appeals Foregone, Pending or Unavailable §4433 at 305.

[37] *Id.*

[38] *Penrod v. Nu Creation Creme, Inc.*, 669 P.2d 873, 874-75 (Utah 1983)

[39] *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-329 (1971)

[40] Collinses' brief at 9.

suit. Their failure to appeal the earlier decision of the Board of Adjustment[41] and the district court judgment was unjustified where there was no decision in Utah on the issue being tried, notwithstanding that other property owners had appealed in the Brown, et al. v. Sandy City Board of Adjustment case.[42] The Owners argue that their failure to appeal was in the interest of judicial economy. An appeal to the Court of Appeals and a motion to consolidate their case with the appellants in *Brown*, however, would have served that interest, and these Owners would have also preserved their legal position, thereby avoiding the wastefulness and redundancy of this second lawsuit.

The Owners' position also overlooks the effect that such a change would have on those who have relied upon the Board of Adjustment and district court decisions at earlier stages on these properties: the many homeowners who expressed such opposition and concern about these motel-like commercial uses in their neighborhoods, with different renters coming and going from week to week. Those neighborhood owners

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[41] The Maison Drive property was not listed in the appeal to the district court in the Amended Complaint, R. at 174. The Board of Adjustment decision therefore became final when the Owners did not appeal to the decision on the legality of the short-term rentals as to that property to the Third District Court. §10-9-708(3), Utah Code Ann. (1999) (petition for district court review is barred unless filed within 30 days after the Board of Adjustment decision.)

[42] This case differs from most change of law by court decision cases in this respect. There was no settled rule in Utah before the *Brown* decision on whether a city's ordinances could prohibit a zoning use by exception. The decision of these Property Owners not to appeal was therefore not done in reliance upon anything other than the district court determination. If they felt that this ruling was wrong, they should have sought to correct it appeal.

may have relied upon the decision of the Board and the judgment of the district court, but for which they might have sold their homes and moved away to other neighborhoods. After the passage of time, the market conditions for such a sale may be less favorable. In a similar position are those families which may have purchased homes near one of these ski houses based on the earlier unappealed judgments. As Wright, Miller and Cooper say on the problems of expanding the exceptions to res judicata based on intervening changes of law or fact, "If issue preclusion is to mean anything, such reliance should be protected."[43]

Property rights are one of the areas where the interests in reliance and repose are particularly compelling, and where the protections of issue preclusion should be maintained. When . . . title to real property is at issue, the need for finality is at its apex."[44] "Just as broad public interests may ease the way to reconsideration, so important private interests of repose or reliance may require that preclusion apply despite the clearest changes of the legal climate," citing, as examples, pension benefits won, and title to property as deserving the same protection. *id.* at 263.[45] Wright, et al., conclude

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[43] Wright, Miller, and Cooper, *Federal Practice and Procedure* : Issue Preclusion - Questions of Law and Law Application §4425, at 252. This treatise may hereinafter be referred to as 18 Wright §___.

[44] *American Estate Management Corp. v. International Investment and Development Corp.*, 986 P.2d 765 (Ut. App. 1999); *See Farrell v. Brown*, 729 P.2d 1090, 1093 (Idaho Ct. App. 1986); 18 Wright, §4408, at 65 (1981).

[45] 18 Wright §4425 at 252.

by arguing for a balancing test where there has been a change of law, and where there are offsetting interests in reliance and repose. "A balance must be struck between the clarity of the change, special needs presented by specific areas of the law, and particularly strong needs to preserve the values of preclusion."[46]

The Restatement (Second) Judgments also acknowledges the need for a balancing between the importance of stability in the legal relationship between the immediate parties and problems of disparate legal treatment.[47]

B. The balancing of interests here favors applying issue preclusion.

The balancing of interests for and against preclusion in this case must weigh on one side of the scale the Owners' need for equal treatment with other similarly situated owners, and on the other side, their calculated determination to forego an available appeal on a point of law which had not been decided by any appellate court in Utah, and the interests of families living in the neighborhoods affected by the Owners' short-term rentals. These neighbors may have relied upon the unappealed judgment in the earlier case. While the Owners declined to submit evidence on such issues as the

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[46] *Id.* at 264.

[47] Rest. 2d Judgments §28 Comment c at 278. The reference therein to the legal relationships between the "immediate parties" should apply to the City in this case, where the City's enforcement of its ordinances is on behalf of the residents of the neighborhoods where these short-term rentals occurred. *See State v. Bishop,* 717 P.2d 261 (Utah 1986) (Individuals have an interest in being free from harm, and government has an obligation to protect individuals who are otherwise defenseless.)

purchase price they paid for the homes which they turned into rental units or any improvements they may have made to them, one can suppose that they paid a fair residential market value for the properties and their subsequent sale or use as long-term rentals, allowed by City ordinances, is a reasonable rate of return on those properties. A balancing of these interests in this instance clearly favors the application of preclusion in this case.[48]

The case of *Marsland v. International Society of Krishna Consciousness* ,[49] cited in *Cassidy v. Board of Education,*[50] relied on by the Collinses, is instructive in this regard. The International Society of Krishna Consciousness (Society) leased a large home in a residential zone in the city of Honolulu where it held religious services and gatherings, and also had more than 30 people live, more than five of whom were unrelated. The city brought a criminal case against the Society for violating its ordinances prohibiting more than five unrelated individuals from living in a residence. The Society defended in district court claiming they were a church, which is an allowed use in a residential zone. Honolulu then brought an action for injunctive and declaratory relief against the Society to prohibit it from continuing to use the home as a residence for

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[48] Although exceptions to collateral estoppel present less danger to interests of repose and reliance than do exceptions to claims preclusion, *see* 18 Wright §4415, *Esslinger v. Baltimore City*, 95 Md. App. 607, 622 A.2d 774 (Md.Sp.App. 1993), footnote 5, the balancing is still required in issue preclusion cases as provided in the Rest. 2d and Wright.

[49] 66 Haw. 119, 657 P.2d 1035 (1983)

[50] 316 Md. 50, 557 A.2d 227 (1989)

more than five unrelated persons. The Society raised collateral estoppel. The court, applying Rest. 2d §28(2), determined that fairness to all others in the city required it to refuse preclusion in this case. "In applying the doctrine of res judicata as [the Society] would have us do, we wold be permitting it to continue to violate the ordinance without fear of governmental sanctions while at the same time warning other parties that the same ordinance would be enforced against them. This would be an absurd and unreasonable application of the doctrine."[51]

In support of its decision, the Hawaii Supreme Court quoted the following passage on the issue of whether a city can apply for an injunction even after an acquittal of a criminal charge, ". . . [T]he rights of other property owners in the zoning district where the violations occurred must necessarily be considered. Only by injunction could these property rights be protected and the objectives of the ordinance promoted." [52] The rights of the property owners in the affected neighborhoods in Sandy need this Court's protection of their rights against similar intrusive property uses.

Of course, the Collinses may claim that *Marsland* only supports their argument that even in a zoning case, collateral estoppel will be overridden. But the language of the opinion suggests that the property interest of the larger community is preeminent.[53] The

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[51] 66 Haw. at 125

[52] 66 Haw. at 126, quoting *City of New Orleans v. Lafon*, 61 So.2d 270 (La. App. 1952)

[53] The opinion cites other jurisdictions where similar decisions were reached in favor of zoning ordinances when balanced against the interest of the private property owner in a

Collinses argue that they are unfairly treated because other property owners are allowed to rent their homes as short-term rentals pursuant to the *Brown* decision, but they alone are not. *Marsland* makes clear that it is not just the interest of the individual property owner which is weighed in these equities. The entire community must follow the zoning ordinances to make a city liveable.[54]

C. *Cassidy* is distinguishable from this case

The Property Owners cite *Cassidy v. Board of Education*[55] in support of their position. In that case the plaintiffs' complaint for an assault and rape suffered on the grounds of the public school was dismissed for a failure of proper notice to the school board. The plaintiffs did not have an opportunity to litigate the case fully on its merits in

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criminal issue preclusion context.

[54] Where a party claims that the strict application of the zoning ordinances is unreasonable, or unfair, such as in cases involving prior nonconforming uses, variances, and special exceptions, zoning codes, including Sandy City's normally provide for a relief valve through the board of adjustment. The purpose of the board of adjustment, composed of members of the community familiar with its values, needs, and the zoning ordinances, is to make these fact-intensive determinations in applying the zoning ordinances. The Collinses, like others, had an opportunity to come before the Board and present evidence showing that their properties qualified as nonconforming, but put on no evidence in their support, and so the short-term rental use was not allowed. Of course, they are still allowed to do long-term rentals.

[55] 316 Md. 50, 557 A.2d 227 (1989)

the first instance because the case was dismissed before an answer was even filed;[56] whereas the Collinses had a full opportunity to litigate.

Collateral estoppel applies when a case is actually litigated and determined by a valid and final judgment.[57] The reliance on an equitable remedy called for in Restatement (Second) Judgments §28(2)(b)[58] is appropriate in *Cassidy*, but here the counterbalancing interests in repose are much stronger. The availability of appellate review as a reassurance of the correctness of a lower court decision is a critical factor in applying the preclusion doctrine[59] and in the specific application of Rest. 2d Judgments §28(2)(b).[60] Where that appellate review was readily available and foregone, the need to

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[56] "As a general rule, dismissal for failure to satisfy a precondition is 'not an adjudication on the merits that would bar assertion of the same claim after satisfying the precondition. . . , but it should preclude relitigation of the same precondition issue.'" *Cassidy* at 233.

[57] Restatement (Second) Judgments §27

[58] §28(2)(b) provides "Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

"(2) The issue is one of law and . . . (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws. . . "

[59] *See* 18 Wright §4433at 315, Rest. Second of Judgments §28, comment a. *See also* 18 Wright §4434 at320, 321 (Application of issue preclusion does not depend on absence of appeal alone, but on quality of the first tribunal, and special factors which explain the lack of appellate review.)

[60] Dorsey v. Solomon, 435 F.Supp. 725, 741-742 (D.C.Md. 1977), remanded and modified on other grounds 604 F.2d 271 (4th Cir. 1979)

review the decision again is greatly reduced, and weighs against the Owners in the balancing of their interests. The property owners here have demonstrated no adverse impact to the public generally of applying issue preclusion in this case, a significant concern to courts in applying Rest. 2d §28(2)(b).[61] On the contrary, as discussed above, applying preclusion in this case is in the public interest inasmuch as it preserves the health, safety and welfare of the neighborhood by supporting the zoning plan enacted by the City.

CONCLUSION

The important role of preclusion in preventing the burden of relitigation of issues already decided after a full and fair hearing on the merits, should not be set aside in this case where the petitioners, the Collinses, elected to forego an available appeal. This, in addition to the strong need for repose given the interests of property owners who may have relied on the first judgment between these parties, and the public generally, favor the application of issue preclusion here. If, in correcting the decision of the Court of Appeals, the court determines that collateral estoppel should not apply in this situation, the refusal of the Property Owners to present evidence supporting their application of nonconforming use would in any event obviate the need for the expenditure of further judicial resources on this case.

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[61] *See Rutherford v. California,* 188 Cal. App. 3d 1267, 1284, 233 Cal. Rptr. 781 (1987)

DATED this 9th day of January, 2002.

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CERTIFICATE OF MAILING

I hereby certify that I caused a true copy of the foregoing Brief of Appellees to be deposited in the U.S. Mail, postage prepaid, or to be hand delivered, addressed to Franklin L. Slaugh, Attorney at Law, 880 East 9400 South, Suite 103, Sandy Utah 84094, this 9th day of January, 2002.