

1999

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN COLLINS and JUNE COLLINS :

Appellants and Appellants,	:	BRIEF OF APPELLEES
vs.	:	Sandy City Board of Adjustment and Sandy City Corporation

SANDY CITY BOARD OF ADJUSTMENT and SANDY CITY CORPORATION, a municipal corporation,	:	Appellate Case No. 991068-CA
Appellees and Appellees.	:	Oral Argument Priority No. 15

Petition for Review of Decision by the Sandy City Board of Adjustment
Upheld by the Third District Court, the Hon. Timothy R. Hanson, Presiding

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COURT OF APPEALS

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JURISDICTION

The Court of Appeals has appellate jurisdiction over appeals from the district court review of the adjudicative proceedings of agencies of political subdivisions of the State, pursuant to Section 78-2a-2(b)(i), Utah Code Ann.(1996).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue No. 1. Res Judicata. Are the claims of the Property Owners precluded by the collateral estoppel (issue preclusion) branch of res judicata?

Issue No. 2. Nonconforming Use. Is a cease and desist order issued in March 1996 sufficient evidence alone to establish the existence of a prior nonconforming use for the change in ordinance which occurred in 1998?

STANDARD OF REVIEW

The first issue listed above involves legal conclusions of the trial court. On an appeal from a grant of summary judgment, the appellate court reviews the trial court's legal conclusions for correctness and grants them no deference.¹

The standard of review on the second issue, whether the trial court erred in granting summary judgment confirming the determination of the Board of Adjustment on the issue of entitlement to nonconforming use is reviewed for correctness.²

STATEMENT OF THE CASE

The Appellants³ own three homes in residential neighborhoods in Sandy. At

¹ *Petersen v. South Salt Lake City*, 987 P.2d 57, 1999 UT 93, *Workman v. Brighton Properties, Inc.*, 976 2d 1209, 1210 (Utah 1999)

² *Hugoe v. Woods Cross City*, 988 P.2d 456, 1999 Ut.App. 281 ¶20

³ Herein called "Property Owners", "Owners", or the "Collinses"

various times in the last four years 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. Sandy City ordinances prohibit such uses. The Property Owners claim such ordinances should not apply them; they want their properties to be "grandfathered" as nonconforming uses. The Sandy City board of Adjustment and the district court ruled that the Owners have no such right. The Owners have appealed these decisions.⁴

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.⁵

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.⁶

⁴ A fourth property, which was also the subject of the previous litigation is no longer an issue before the court, since the Owners apparently no longer own it: the 1456 E. Longdale Drive home.

⁵ 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.

⁶ 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.

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 Collins' properties as "ski rentals".⁷ After hearing the 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.⁸

⁷ 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);
- (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, 13* R. 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 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.

⁸ 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.

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 Complaint⁹ omitted the property at 9255 South Maison Drive.

5. The district court, Judge Frank G. Noel, granted the City's motion for summary judgment and denied Owners' motion for summary judgment.¹⁰ For reasons of economy, Owners did not appeal the court's decision.¹¹

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*.¹² In that case the court held that Sandy City its 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.

7. The Sandy City Council thereupon adopted an ordinance prohibiting short-term rentals of 30 days or less in all residential districts in Sandy.¹³

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.¹⁴

⁹ Amended Complaint, R. at 174.

¹⁰ Revised Summary Judgment and Order of Dismissal, R. at 210.

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

¹² 957 P.2d 207

¹³ R. at 214, 219, 224.

¹⁴ 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

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 rentals¹⁵, 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.¹⁶

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.¹⁷

had sold the home.

¹⁵ 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.

¹⁶ R. at 240.

¹⁷ R. at 446.

A summary of the procedural history is set out below in table form showing the Owners' four properties.¹⁸

PROCEDURAL HISTORY				
EVENT	1975 E. Alla Panna	472 East 9400 South	1456 E. Longdale Drive¹⁹	9255 S. Maison Drive
Made a Subject of City's March 1996 Cease and Desist Order	✓	✓	✓	No
Subject of the Aug. 1996 Bd. of Adj. Decision	✓	✓	✓	✓
Appealed Bd. of Adj. decision to 3 rd Dist Court	✓	✓	✓	No
Subject of the 1996 3 rd Dist. Court Case	✓	✓	✓	No
Appealed to Utah Court of Appeals (1996 Case)	No	No	No	No
Property Sold to Different Owner			✓	
1998 Bd of Adj. Application for Nonconforming Use	✓	✓	No	✓
Subject of 1998 3 rd Dist. Court Petition for Review	✓	✓	No	✓
Appealed to Utah Court of Appeals	✓	✓	No	✓

SUMMARY OF ARGUMENT

Owners did not appeal the adverse decisions with respect to all three of their properties. They didn't appeal the decision of the Sandy Board of Adjustment in 1996 with respect to the Maison Drive property. Later they did not appeal the 1996 district court

¹⁸ The dark bar indicates the point at which the Petitioners stopped appealing each property.

¹⁹ This property was not the subject of the 1998 Board of Adjustment proceedings, was not appealed to the District Court, and is not involved in this case, as shown by the graying of the column. It is shown here because it was involved in the 1996 Board of Adjustment and district court proceedings.

decision with respect to their other two homes located at 1875 East Alla Panna Way and 472 East 9400South. Collateral estoppel now precludes them from relitigating these cases.

The Property Owners maintain that the 1998 decision of the Utah Court of Appeals in *Brown v. Sandy City Board of Adjustment*,²⁰ another home ski rental case, precludes application of collateral estoppel to them, because it is an intervening change in law. In fact, there was no law established on this interpretation of Sandy's ordinances; *Brown* was a case of first impression. It was not, therefore a change in law, as the Owners claim. The Collinses should have appealed the former district court case if they believed it was incorrect. The rule is well established that where a party has foregone an available appeal, an intervening court decision will not allow the resurrection of the same issue in a subsequent suit. The Property Owners have not cited any authority to the contrary. Any other rule would allow the endless relitigation of cases by dissatisfied parties.

The applicant for a nonconforming use bears the burden of showing he is entitled to it , and that he was using the properties as short-term rentals on the date the zoning ordinance prohibiting such use became effective. There is no evidence of a substantial short-term rental use at any time on any of these parcels at any time, much less in 1998 when the new ordinance became effective. The Property Owners relied solely on the intervening decision in *Brown* argue for the nonconforming use status for their properties, and the Notice and Order from the City's zoning enforcement officer, asserting that these alone are sufficient to establish their use.

²⁰ 957 P.2d 207

The Notice and Order is too slender a thread on which to carry a nonconforming use: it doesn't refer to the Maison Drive property at all. It did refer to the other two properties, but says nothing about the historical inception date, nature, or scope of any such uses sufficient to show any pattern or scope of use prior to the time they stopped using the properties. The rule in most jurisdictions in the United States is that substantial operations are needed to establish a nonconforming use; not only must there have been some actual nonconforming operations, but these must have been substantial in quantity. The Owners expected the Board, the trial court, and now this court to accept their illogical assumption that because a zoning officer believed in 1996 that they were renting some of their homes, that this is sufficient to demonstrate that they would have such a use in 1998 when the zoning ordinances were changed to disallow such use. There was no evidence to support this position.

ARGUMENT

I. THE OWNERS' CLAIMS ARE PRECLUDED BY COLLATERAL ESTOPPEL

Utah recognizes two branches of res judicata, namely claim preclusion and issue preclusion, more properly called collateral estoppel,²¹ each of which promotes the important judicial policy of preventing parties from relitigating a claim or issue.²² In order for the relitigation of an issue to be barred in another action, four requirements must be met:

First, the issue in both cases must be identical. Second, the judgment must be final with respect to that issue. Third, the issue must have been fully, fairly, and

²¹ *Madsen v. Borthick*, 769 P.2d 245 (Utah 1988)

²² *Office of Recovery Serv. v. V.G.P.*, 845 P.2d 944 (Ct. App. 1992)

competently litigated in the first action. Fourth, the party who is precluded from litigating the issue must be either a party to the first action or a privy of a party.²³

A. The Essential Issue in the 1996 Collins District Court Case And The 1998 District Court Case Was the Same.

The central issue in Owners' first (1996) appeal to the Board of Adjustment²⁴, and in the appeal which followed to the district court²⁵ was whether the Property Owners' short-term rentals were lawful.²⁶ The legality of the Owners' short-term rentals was also essential to their subsequent application for legal nonconforming use status in 1998.

The Owners maintain that issues in the 1996 and 1998 cases are different because the issue in the latter case was whether the Owners were entitled to a nonconforming use. They avoid the fact that to qualify for a nonconforming use, the applicant must show that the use was legally established and continued before the enactment or effective date of the restrictive legislation.²⁷ When the Owners failed to appeal the Board of Adjustment and the

²³ *Madsen, id.*, at 247

²⁴ The Application to Bd. of Adj. clearly states that the issue is the alleged error in interpreting the City's ordinances. June 27, 1996 letter from Franklin L. Slauch to Sandy City Bd. of Adj. at 1, R. at 162. *See also* Amended Complaint ¶6, R. at 175.

²⁵ The central issue in the 1996 district court case was the interpretation of the City's ordinances to prohibit short-term rentals. Amended Complaint, ¶¶ 7, 10, R. at 175, 176. Plaintiffs also raised the claim in the appeal to district court that the City's ordinances were unconstitutionally vague, Amended Complaint, ¶8, R. at 175. But, under the "same evidence" test, causes of action asserting different theories of recovery may be considered the same for res judicata purposes if the same operative facts give rise to the assertions. *See American Estate Management Corp. v. International Investment and Development Corp.*, 986 P.2d 765 (Ut. App. 1999) (A claim is an operative set of facts which may give rise to different legal theories.) The assertion of different theories does not prevent the application of res judicata. *Zabel v. Cohn*, 283 Ill. app. 3d, 1043, 1049, 670 N.E.2d 877, 881 (1996)

²⁶ *See* Amended Complaint, ¶¶ 4-7 R. at 175.

²⁷ *See* Young, 1 Anderson's American Law of Zoning (4th ed.) §6.11; *See also* §15-24-2, Rev. Ord. of Sandy City which requires that a use must be lawfully existing at the time

district court decisions, their uses were finally adjudged illegal. The Collinses could not validly come before the Board of Adjustment in 1998 and claim, as they did, that they had a legal nonconforming use when the contrary had already been finally adjudicated with respect to those homes. "The applicability of collateral estoppel does not depend upon whether the claims for relief are the same in both cases: what is critical is whether the issue that was actually litigated in the first suit was essential to resolution of that suit and is the same factual issue as that raised in the second suit."²⁸

B. Finality.

1. 9255 Maison Drive Property. The Board of Adjustment decision in the 1996 case with respect to the 9255 Maison Drive home 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.²⁹ Collateral estoppel applies not only to court decisions, but also to those of administrative bodies.³⁰

2. 1975 E. Alla Panna Way and 472 East 9400 South Homes. The summary judgment issued in the 1996 Third District Court case was final with respect to the 1975 E. Alla Panna Way and 472 East 9400 South homes inasmuch as it ended the controversy

of prohibitive ordinance.

²⁸ *Robertson v. Campbell*, 674 P.2d 1226, 1230 (Utah 1983) (citing *Searle Bros. v. Searle*, 588 P.2d 689, 690-91 (Utah 1978)).

²⁹ §10-9-708(3), U.C.A. (1999) (petition is barred unless filed within 30 days after the Board of Adjustment decision.)

³⁰ *See Career Service Review Board v. Dept. of Corrections*, 942 P.2d 933, 1997 UT 16073 at ¶28 (Utah 1997). "[T]he principles of res judicata apply to enforce repose when an administrative agency has acted in a judicial capacity in an adversary proceeding to resolve a controversy over legal rights and to apply a remedy," *Salt Lake Citizens v. Mountain States*, 846 P.2d 1245, 1251, n.4 (Utah 1992)

between the parties.³¹ The summary judgment became a final order when not appealed within 30 days³²

C. Fully Litigated. Owners were represented by legal counsel, and had an opportunity to raise all issues they wished in the first action.

D. Same Parties are Precluded. John and June Collins were the plaintiffs in all the cases at issue.

All the requirements of issue preclusion are therefore met for each of the three subject properties. A judgment which is not further appealed or remanded becomes a final judgment on the merits.³³ Once the time for appeal ran, the final judgment of the trial court was res judicata.³⁴

³¹ See *Salt Lake City Corp. v. Layton*, 600 P.2d 538 (Utah 1979)

³² Rule 4(a), Utah Rules of Appellate Procedure (notice of appeal from trial court judgment must be filed with the clerk of the trial court within 30 days) after entry of the judgment).

³³ See *Sevy v. Security Title Co. of Southern Utah*, 902 P.2d 629, 1995 Utah LEXIS 50 (Utah 1995) ". . . [T]he court of appeals' decision . . . was a final judgment on the merits. The judgment was not further appealed or remanded, nor was it determined on the basis of an unrelated procedural issue." 1995 Utah LEXIS 50 at 8. (Emphasis supplied.) *Casa Grande Trust Company v. Superior Court for the County of Pinal*, 444 P.2d 521, 8 Ariz. App. 163, 1968 Ariz. App. LEXIS 490 (Appealable trial court judgment is res judicata and conclusive on the parties if no appeal is taken.)

³⁴ C. Wright, Miller, and Cooper, *Federal Practice and Procedure: Jurisdiction* §4433, at 305, citing numerous U.S. Supreme Court and U.S. Court of Appeals cases. "Concededly the judgment in the first suit would have been binding in the subsequent one if an appeal, though available, had not been taken or perfected." *U.S. v. Munsingwear, Inc.*, 71 S. Ct., 104, 106, 340 U.S. 36, 39, 95 L.Ed. 36, 1950 U.S. LEXIS 1410, at 6. A litigant's choice not to continue to assert his rights after an intermediate court has ruled against him concludes the litigation as effectively as if he had proceeded all the way through the highest court available to him. *Angel v. Bullington*, 330 U.S. 183, 67 S.Ct 657, 91 L.Ed. 832 (1947). See *State v. Clark*, 913 P.2d 360 (Utah App. 1996) (Upon failure of criminal defendant to perfect an appeal by filing a brief, or by petition for rehearing, the dismissal of the appeal became an adjudication on the merits which thereafter barred the defendant

E. An Intervening Decision by a Higher Court Does Not Revive a Claim Once Finally Decided Where a Party Made No Effort to Appeal the Earlier Decision

The res judicata consequences of a final unappealed judgment on the merits are not altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.³⁵ The established rule is that preclusion cannot be defeated by electing to forgo an available opportunity to appeal.³⁶ A judgment in a prior suit will be binding in subsequent actions if an available appeal is not taken or perfected.³⁷ In *Ackerman v. U.S.*³⁸, in a case where the petitioner had not appealed a denaturalization judgment against him in his own case because he felt it was not worth the expense, and then later moved to vacate the judgment after the denaturalization judgment of his brother-in-

under the doctrine of res judicata from subsequently challenging his sentence on the same legal basis.) See also *Career Service Review Board v. Utah*, 942 P.2d 933, (Utah 1997) (Dept. of Corrections failed to appeal an order of the Utah Career Service Review Board, by which it became final, thus precluding the district court from considering the issues decided by the Board in its order.)

³⁵ *Federated Dept. Stores v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981); see also *Piacitelli v. Southern Utah State College* (final order is res judicata and binding on parties where not appealed and not reversed on appeal, citing *Federated Dept. Stores*); *Office of Recovery Services v. V.G.P.*, 845 P.2d 946 (Ut. App. 1992)(nonappealed trial court judgment barred by claim preclusion in paternity case); *Copperstate Thrift & Loan v. Bruno*, 735 P.2d 387 (Ut. App. 1987)(issue preclusion prevents relitigation of final order bankruptcy court even though that decision may have been incorrect).

³⁶ C. Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* §4433. "Many cases establish the rule that once the time for appeal has run, a final judgment of a trial court or an intermediate appellate court is res judicata without regard to the fact that appeal might have been taken to a higher court." *Id.*

³⁷ *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950); see also *Angel v. Bullington*, 330 U.S. 183, 189, 67 S.Ct. 657, 661, 91 L.Ed.832 (1947)(failure to continue to assert one's rights after an intermediate appellate court has ruled against a party concludes the litigation as effectively as if he had proceeded with his appeal through the highest court available)

³⁸ 34 U.S. 193, 71 S.Ct. 209, 95 L.Ed.207 (1950)

law was reversed in an identical case, the Supreme Court held that further appeal was barred by res judicata where he had not pursued his own appeal.³⁹

The Property Owners made a choice not to appeal, and they cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong. There must be an end to litigation someday, and a court will not relieve a party from a free calculated, deliberate choice to forego appeal.⁴⁰

A change in the judicial view of applicable law after final judgment is not a sufficient basis for vacating a judgment entered before the change in law by a higher court, where parties neglected to perfect their appeal.⁴¹

Owners' citations of authority in their brief on the issue of whether intervening changes in law act as an exception to issue preclusion where a prior judgment exists are either inapplicable, because they involve change in fact, or intervening legislative changes of law, or a change in an already existing judicial decision. The instant case involved none of these. There were no intervening changes of fact, nor a change in legislation which would have allowed the use in question. Nor was there was a change in judicial decision, because no appellate court had yet ruled on the issue of whether Sandy City's ordinances

³⁹ See also *Ellis v. Whittaker*, 10 Kan.App.2d 676, 709 P.2d 991 (1985) (Motion to set aside judgment because of subsequent change in court decisions properly denied where party chose not to appeal in first case), *Cruickshank & Co. v. Dutuchess Shipping Co., Ltd.*, 805 F.2d 465 (1986)

⁴⁰ *Id.* 34 U.S. at 198, 71 S. Ct. at 211, *Lubben v. Selective Service System Local Bd. No. 27*, 453 F.2d 645, 651, 652 (1st Cir. 1972)

⁴¹ *Title v. U.S.*, 263 F.2d 28, 30, 31 (9th Cir. 1959)

prohibited short-term rentals until *Brown*. This was a matter of first impression when the Owners took it to the district court.

Owners cite dicta from *State Farm Mutual Automobile Insurance Co. v. Duel*,⁴² for the general rule that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or change in law altering the situation. A review of the authorities cited in the case do not support the Owners' position, however.⁴³ *Community Hospital v. Sullivan*⁴⁴, also cited by Owners, involved an intervening legislative change as well as a change in facts, and so is inapplicable to this case on both counts.

The intervening event in *Farrow v. Brown*⁴⁵, was a change in the factual situation underlying the first judgment: the road easement which had been decided in the first action was no longer passable because of a change in the course of creek by which the road ran.

⁴² 1945 S.Ct.178, 324 U.S. 154, 65 S. Ct. 573, 89 L. Ed. 812, reh. den. 324 U.S. 887, 65 S.Ct. 856, 89 L.Ed. 1436

⁴³ The *Duel* case cites a 1925 treatise, *Freeman on Judgments*, §713, which deals only with the effect of intervening legislative acts between the time of the first and second judgments where res judicata is raised as a bar in the second case, and is therefore inapplicable to the present case. A copy of §713 from the treatise is attached hereto as Tab 3. None of the cases cited in *Duel* dealt with a claim of res judicata or collateral estoppel where a party failed to pursue an available appeal in the first case. Those cases deal with intervening changes in fact, or involved appeals of the prior cases, or dealt with intervening state decision involving ongoing income tax obligations, which is a special situation where res judicata concerns arise. Even if they were on point, the later cases of *Ackerman* and other Supreme Court cases cited herein would supercede or overrule the cases cited in *Duel*.

⁴⁴ 986 F.2d 357 (10th Cir.1993).

⁴⁵ 873 S.W.2d 918 (Mo.App. 1994)

The court ruled that such a change in underlying facts after the first judgment would be an appropriate exception to the bar of the issue preclusion.

*Board of Education v. Village of Northbrook*⁴⁶ dealt not with collateral estoppel, for which it is cited in Owner's brief, but with the claim preclusion branch of res judicata, and therefore doesn't support the point they are trying to establish - that collateral estoppel doesn't apply where the facts or law have substantially changed.⁴⁷ The court discussed in the opinion changes of facts and legislation as possibilities that might bar res judicata, but said they didn't apply to that case.⁴⁸ The court pointed out, moreover, that plaintiff-appellant Board of Education did not appeal the trial court's ruling in the first case in affirming the lower court's determination that res judicata barred the second action.⁴⁹

In *Statler v. Catalano*, 293 Ill. App. 3d 483, 691 N.E.2d 384 (1997), cited by the Owners, the court ruled that a change of law by the Illinois Supreme Court after the first judgment was rendered on whether a landowner's right to use a lake partially on his property extended to the entire lake, including that part which is not above his property. But in *Statler I*⁵⁰, the earlier case, the plaintiffs appealed the matter as far as they could to assert their claim on the issue of their right to use the entire lake: they appealed from the trial to the appellate court, and then from the appellate court to the Illinois Supreme Court

⁴⁶ 295 Ill.App.3d 909, 692 N.E.2d 1278, 230 Ill.Dec. 112 (Ill.App. 1998)

⁴⁷ While the case does not use the term "claim preclusion", the language used throughout in discussing the tests and effects of res judicata ("bar", the same evidence and transaction tests, for instance) clearly apply only to that branch of res judicata.

⁴⁸ *Id.* at 1284

⁴⁹ *Id.* at 1281

⁵⁰ 167 Ill.App.3d, 118 Ill. Dec. 283, 521 N.E.2d 565 (1988), *cert den.* 1221 Ill.2d 595

where their appeal was denied. The plaintiffs in that case did not simply let their appeal lapse as have the Collinses in the present case. In *Statler I*, unlike in the present case, there was an existing court decision contrary to plaintiff's position in the first case, so that the intervening decision by the Illinois Supreme Court was a change in existing law which formed the basis for allowing the second case to proceed under that exception to res judicata. There were no written appellate decisions until the plaintiffs in the *Brown* case took up their appeal, and so there was no "change in law" - *Brown* was, of course, the first appellate court decision on the point.⁵¹

The Restatement of Judgments, Second, says, on the changed conditions rule,⁵² which allows, in certain instances, that a judgment be set aside or modified [set out here by footnote the entire Sec. 73],

The rule has been construed as also apply to a situation where a subsequent judicial decision changes the law that was applied in reaching an earlier judgment, but this seems a misinterpretation of the

⁵¹ The Illinois Supreme Court case which changed the law on whether an owner of part of a private lake had a right to the use of the entire lake, *Beacham v. Lake Zurich Property Owners Assn.*, 123 Ill. 2d 227, 527 N.E.2d 154, 122 Ill. Dec. 14 (1988), was the basis for denying the res judicata effect of *Statler I*, Id. In *Beacham* the court said that the issue on the right of a private owner to use the entire lake was one of first impression. The Illinois Supreme Court had, however, denied the appeal of Plaintiffs in *Statler I*, therefore confirming the decision of the Illinois Court of Appeals whose decision was therefore the law of the state on the issue of use of a lake until *Beacham*.

⁵² § 73. Changed Conditions

Subject to the limitations stated in § 74, a judgment may be set aside or modified if:

- (1) The judgment was subject to modification by its own terms or by applicable law, and events have occurred subsequent to the judgment that warrant modification of the contemplated kind; or
- (2) There has been such a substantial change in the circumstances that giving continued effect to the judgment is unjust.

rule and a very unsound policy. If it were adopted it is not clear why all judgments rendered on the basis of a particular interpretation of the law should not be reopened when the interpretation is substantially changed.⁵³

Owners request that the interests in repose and reliance upon judgments be thrown out simply because other litigants who expended the time and effort to pursue an appeal, had the Court of Appeals clarify the law. The Owners' position overlooks the effect that such a change would have on those who have relied upon the decisions at earlier stages on these properties - the homeowner who would have sold to move away from a home where different transient tenants were there every week and might have sold in a favorable market and didn't; or the family which bought a home near one of these ski houses based on the earlier unappealed decisions of the Board of Adjustment and Court of Appeals. As Wright, Miller and Cooper say in their treatise on civil procedure 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."⁵⁴ 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.⁵⁵

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

⁵³ *Restatement of Judgments, Second* §73, Comment (b) at 200

⁵⁴ C.Wright, Miller, and Cooper, *Federal Practice and Procedure*, §4425 at 252.

⁵⁵ When . . . title to real property is at issue, the need for finality is at its apex." *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 Charles Alan Wright, et al., *Federal Practice and Procedure* § 4408, at 65 (1981); C. Wright, Miller and Cooper, *Federal Practice and Procedure* §4425 at 252.

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.⁵⁶ But for such enforcement, the assistance of the courts would not be sought in resolving disputes.⁵⁷ One of the central objectives of our modern system of civil procedure is putting an end to litigation by according finality to judgments.⁵⁸ The established rule is that preclusion cannot be defeated by electing to forgo an available opportunity to appeal.⁵⁹ 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.⁶⁰

II. THE APPELLANTS HAVE NOT SHOWN THAT THEY QUALIFY FOR A NONCONFORMING USE ON ANY OF THE PROPERTIES

Sandy City enacted an ordinance on nonconforming uses under authority granted by the State legislature⁶¹. The ordinance grants authority to the Board of Adjustment to determine nonconforming uses⁶². In order to establish a nonconforming use, the person

⁵⁶ *Southern Pacific R.R. v. U.S.*, 168 U.S. 1, 48, 18 S.Ct. 18, 27, 42 L.Ed. 355 (1897)

⁵⁷ *Id.*

⁵⁸ 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.

⁵⁹ C. Wright, Miller and Cooper, *Federal Practice and Procedure* §4433 at 305

⁶⁰ *Id.*

⁶¹ "The legislative body may provide in any zoning ordinance or amendment for: (a) the establishment, restoration, reconstruction, extension, alteration, expansion, or substitution of nonconforming uses upon the terms and conditions set orth in the zoning ordinance." U.C.A., §10-9-408(2)(a). "The Board of Adjustment shall make determinations regarding the existence, expansion, or modification of a nonconforming use." §15-5-5, Rev. Ord. of Sandy City (R.O.S.C.)

⁶² "The legislative body may provide in any zoning ordinance or amendment for: (a) the establishment, restoration, reconstruction, extension, alteration, expansion, or substitution of nonconforming uses upon the terms and conditions set orth in the zoning ordinance."

applying for a nonconforming use must show that the use existed at the time of the enactment of ordinance prohibiting the activity;⁶³ that the use was in effect on the date of the adoption of the zoning restriction which made the use nonconforming.⁶⁴ The applicant for a nonconforming use must do more than just show that the use at issue existed at some time prior to the enactment of the restrictive ordinance: the use must have existed on the day when the ordinance took effect.⁶⁵ If the use was not in existence on the date in question, then the claimed use is not protected.⁶⁶

The public policy cited in court decisions and in municipal ordinances, whether explicitly stated or not, is to restrict and eventually eliminate nonconforming uses.⁶⁷

U.C.A., §10-9-408(2)(a). "The Board of Adjustment shall make determinations regarding the existence, expansion, or modification of a nonconforming use." §15-5-5, Rev. Ord. of Sandy City (R.O.S.C.)

⁶³ City ordinances define a nonconforming use as a "use which lawfully occupied a building or land at the time this Code became effective and which does not now conform with the use regulations. §15-2-2, R.O.S.C. See Young, *Anderson's American Law of Zoning*, (4th ed.) §6.10. See Williams, *4A American Land Planning Law*, §110.01 (Rev. 1986) and cases cited therein.

⁶⁴ Young, *Anderson's American Law of Zoning*, (4th ed.) §6.10. See Williams, *4A American Land Planning Law*, §110.01 (Rev. 1986) and cases cited therein.

⁶⁵ *Ashley v. Bedford*, 160 Ind. App. 634, 312 NE2d 863 (1974), *Lipsitz v. City of Baltimore*, 150 A.2d 259 (Md. App. 1959) (evidence not sufficient to show that the property had been occupied by five families on the critical date.)

⁶⁶ 1 K. Young, *Anderson's American Law of Zoning*, (4th ed.) §6.10

⁶⁷ "It is the purpose of these regulations to control and gradually eliminate those uses of land or buildings, which although legal at the time of their establishment, do not now conform to the use regulations of the district within which they are situated. . . This Chapter is also established to control and gradually eliminate sites and lots which were legal at the time of their establishment, but no longer meet the regulations of the district within they are located." Section 15-24-1, R.O.S.C. Nonconforming uses should be restricted, decreased, and eventually eliminated. 1. K. Young, *Anderson's American Law of Zoning*, (4th ed.) §6.07 at 501. "The spirit of zoning ordinances always has been and still is to diminish and decrease nonconforming uses. . . and to that end municipalities have employed various approved regulatory methods. . ." *Hoffman v. Kinealy*, 389 S.W.2d 745

Nonconforming uses limit the effectiveness of land use controls and are partially responsible for the blight which has infected many urban areas.⁶⁸ Municipal attorneys,⁶⁹ urban planners,⁷⁰ and law review commentators⁷¹ agree that nonconforming uses imperil the success of community plans and injure property values.

A. There is No Substantial Evidence that a Short-term Use Even Existed.

The Property Owners claim they used the subject properties for short-term rentals in 1996, and discontinued their use only because they were served with a cease and desist order that year.⁷² The Order⁷³ states in pertinent part as follows:

Dear Mr. Collins:

I have determined that you are operating a business, a transitory lodging facility at the above referenced location. This letter is to notify you that doing so is a violation of the Sandy City Business License ordinance Section 5-1-1 and the Land Development code, chapter 15-7. Each day of operation may be a separate violation.

(Mo. 1965). The ultimate purpose of zoning is gradually to eliminate nonconforming uses. *Wilson v. Edgar*, 64 Cal. App. 654, 222 P 623 (1923). "Nonconforming uses are a thorn in the side of proper zoning and should not be perpetuated any longer than necessary. The policy of zoning is to abolish nonconforming uses as speedily as justice will permit." *Windham v. Sprague*, 219 A.2d 548 (Me. 1966).

⁶⁸ 1 K. Young, *Anderson's American Law of Zoning* (4th ed.) §6.02 at 485

⁶⁹ Messer, *Nonconforming Uses, Municipalities and the Law in Action* (1951), at 347.

⁷⁰ Lewis, *A New Zoning Plan for the District of Columbia* (1956), at 12

⁷¹ Young, "Regulation and Removal of Nonconforming Uses," 12 *Western Reserve L. R.* at 681 (1961); Comment, 7 *Baylor L. R.* 73 (1955); Comment, 102 *University of Penn. L.R.* 91 (1953); "Summary of Utah Law: Land Use, Zoning and Eminent Domain," *B.Y.U. J. of Legal Studies*, 151 (1979)

⁷² Brief of Appellant's at 14.

⁷³ Tab no. 1, R. at 155.

The Owners did not introduce any evidence of nonconforming use before the Board of Adjustment, except for the Order.⁷⁴ Rather, the Owners say simply that "it is undisputed that the [Owners] would have continued to use their properties as short-term rental units had the cease and desist order not been served upon them on March 26, 1996."⁷⁵ In fact, the City and the Board do dispute this issue. There is no evidence of a substantial short-term rental use at any time on any of these parcels. The Notice and Order was only directed to two of the three subject homes.⁷⁶

More importantly, the Notice and Order fails to establish the historical inception date, nature, or extent of any prior use of the properties.. The Order only mentioned the properties at 1875 East Alla Panna Way, 472 East 9400 South, and 1456 East Longdale Drive: The property at 9255 South Maison Drive was the address to which the order was

⁷⁴ The City's attorney sent letters to counsel for Appellants before the 1998 Board of Adjustment hearing explaining that they bore the burden of demonstrating that they were entitled to the nonconforming use, and needed to submit evidence that they were entitled to the nonconforming use with respect to each parcel of Letter of November 4, 1998 from Steven C. Osborn to Franklin L. Slaugh. Tab no. 5; R. at 213.; *see also* Letter of September 29, 1998 from Steven C. Osborn to Franklin L. Slaugh. Tab no. 4; R. at 212.

⁷⁵ Brief of Appellants at 15.

⁷⁶ The Notice and Order only refers to the homes at Alla Panna Way and 9400 South. It was sent to John Collins at his address at Maison Drive, but that home was not the subject of the Notice and Order. Appellants admit that the Maison Drive home was not covered by the Cease and Desist Order, but claim that because it was the subject of the (1996) Board of Adjustment hearing along with the other homes, the Board's ruling was intended to apply to it as well. Brief of Appellants at 14. The 1996 Board ruling was on the issue of whether the City's ordinances as written prohibited short-term rentals; it was not a nonconforming use hearing. Even if it had been, Appellant has pointed to no specific evidence adduced at that hearing about actual use of the Maison Drive property as a ski rental.

sent, but was not the subject of the Order.⁷⁷ Appellants have not identified any evidence in the record showing that the Maison Drive property was used for short-term rentals at any time. On the contrary, the Minutes for the Board of Adjustment hearing on November 12, 1998, state as follows: "Paul Harris, 9225 South Maison, lives next to another of the subject houses owned by Mr. Collins. He has lived in his home continuously since Mr. Collins owned the property. To his knowledge, the renters in the house had longer leases, possibly nine months to a year."⁷⁸ This testimony was not rebutted.

The cease and desist order only stated that the zoning officer had determined that the owners were operating a business, a transitory lodging facility, without a license and in violation of the City's business license ordinance and the land development code:⁷⁹ it said nothing about the historical inception date, nature, or scope of any such uses. The rule in most jurisdictions in the United States is that substantial operations are needed to establish a nonconforming use; not only must there have been some actual nonconforming operations, but these must have been substantial in quantity.⁸⁰ Because the Property Owners . failed to

⁷⁷ The Appellants apparently lived at the Maison Drive home when the 1996 Cease and Desist Order was issued, inasmuch as that is where the document was sent. Appellants then sought a Board of Adjustment ruling on the Maison Drive parcel along with the other three homes on the legality of short-term rentals, perhaps hoping they might begin renting that home as a ski rental along with the three others they owned.

⁷⁸ Nov. 12, 1998 Bd. of Adj. Minutes at 6, Tab 7.

⁷⁹ Notice and Order to John Collins from Nolan Isom, March 26, 1996, Tab 1, R. at 155.

⁸⁰ N. Williams, *4A American Land Planning Law* §110.03. *Township of Fruitport v. Baxter*, 6 Mich App 283, 148 NW2d 888 (1967)(moving several truckloads of used auto parts onto premises for storage prior to the ordinance passage was not sufficient), *O'Rourke v. Teeters*, 63 Cal App 2d 349, 146 P.2d 983 (1944) (display room for electrical fixtures and office in residence was not sufficient to establish a nonconforming use), *Paruszewski v. Township of Elsinboro*, 297 NJ Super 5341, 688 A2d 662 (1997)(sporadic aviation activities on farm not enough to establish a nonconforming use for

provide any evidence at either hearing of inception date, length, or nature of the of uses at either hearing, the Board of Adjustment correctly determined that the Notice and Order was insufficient of itself to establish the existence of a lawful prior nonconforming use. The cases cited by the Appellants on the point that some courts have allowed the establishment of a nonconforming use where the use was intermittent or seasonal,⁸¹ provide no support because the record contains no evidence about such use.

The Collinses complain that since at the 1996 Board of Adjustment hearing the short-term rental use of the properties was admitted by the Collins, and because the City had told them to stop such uses of the homes, they should not now be denied their nonconforming use just because they did not put on evidence of such use when they had stopped using the properties as short-term rentals because of the City's Order.⁸² But the purposes of the two hearings was entirely different as the Collinses knew: the first hearing was about the interpretation of an ordinance; the second should have focused on the Owners presenting evidence of the historical inception date, length, and nature of the short-term use, as they were reminded before the hearing. If the Collins were claiming, as they apparently intended, that their use prior to the Cease and Desist Order was sufficient to

airport), *Pearce v. Lorson*, 393 SW2d 851(Mo App 1965) (nonconforming use as medical office not established by treating one patient, putting sign in window, and moving in a chair), *Town of Wallingford v. Roberts*, 145 Conn 682, 146 A2d 588 (1958) (purchase of land for trailer park just before zoning regulation change, with five trailers placed on property, insufficient for nonconforming use).

⁸¹ *Andrew v. King County* 586 P.2d 509 (1978 Wash App), *King County v. High*, 219 P.2d 118 (Wash 1950); *Warner v. Clackamas County*, 111 Ore. App. 11; 824 P.2d 423; (1992 Ore. App.); *Polk County v. Martin* 292 Ore. 69; 636 P.2d 952; *Peacock Township v. Panetta*, 81 Mich. App. 733; 265 N.W.2d 810 (1978 Mich. App.)

⁸² See Brief of Appellants at 14, 15.

establish a nonconforming use, then they should at least have presented evidence about the use before that time. They didn't. The Appellants had the burden of proof on this point, as they were told. They chose instead to rely solely on the existence of the Cease and Desist Order and the *Brown* decision. The Board of Adjustment properly determined that the nonconforming use had not been demonstrated, and denied the application.

**B. The 1996 Cease and Desist Order Doesn't Prove
There Would Have Been a Nonconforming Use in 1998**

The Owners make an illogical jump to assert that a zoning officer finding a violation in 1996 proves that the owners would have been renting the properties when the new ordinance became effective two years later.

The Owners introduced no evidence that they would have been renting the properties in 1998. Specifically, they did not establish (1) the extent of short-term use for each home before the 1996 Cease and Desist Order, such as the dates, frequency and duration of rentals, and the seasons of the year during which the rentals occurred; (2) that the Owners' desired or intended to rent each parcel short-term on to the date of the new ordinance by such evidence as seeking a stay of enforcement from the Board of Adjustment⁸³ or district court,⁸⁴ appealing the district court decision against them, expenditures on improvements and maintenance on the property, leases, etc.


⁸³ §10-9-708((7)(b)(ii), U.C.A (1999), §15-5-10(H), Rev. Ord. of Sandy City

⁸⁴ §10-9-708((7)(b)(iii), U.C.A (1999).

CONCLUSION

The Owners elected not to appeal the adverse decisions of the earlier Board of Adjustment and the trial court, and relitigation is now precluded. Even if issue preclusion did not apply here. The Owners failed to carry their burden to show, by evidence, that they were entitled to a nonconforming use before the Board of Adjustment. Because of the lack of evidence, they cannot show that the trial court erred in its decision. The City and the Board of Adjustment therefore request that the court affirm the decision of the trial court.

RESPECTFULLY SUBMITTED this 28 day of July, 2000.



Steven C. Osborn
Attorney for Appellees

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. Slauch, Attorney at Law, 880 East 9400 South, Suite 103, Sandy Utah 84094, this 28th day of July, 2000.

A handwritten signature in cursive script, appearing to read "J. Alan", is written over a horizontal line.

ADDENDUM

- | | |
|-------|---|
| Tab 1 | Notice and Order to Cease and Desist, March 26, 1996 |
| Tab 2 | Minutes of the Sandy City Board of Adjustment, Aug. 8, 1996 |
| Tab 3 | <i>Freeman on Judgments</i> , §713 |
| Tab 4 | September 29, 1998 letter to Franklin L. Slaugh from Steven C. Osborn |
| Tab 5 | November 4, 1998 letter to Franklin L. Slaugh from Steven C. Osborn |
| Tab 6 | Sandy City Development Code, Chapter 15-24, Nonconforming Uses |
| Tab 7 | Minutes of the November 12, 1998 Board of Adjustment hearing on John and June Collins Nonconforming Use Request |

Tab 1



March 26, 1996

Date served: 3-26-96
Time: 1900

John F. Collins
9255 South Maison Drive
Sandy, Utah 84093-2427

REF: Conducting Business Without A License

LOCATION: 1875 East Alla Panna Way
1456 East Longdale Drive
472 East 9400 South

Sidwell No.28-04-478-004
Sidwell No.28-21-107-001
Sidwell No.28-07-202-006

NOTICE AND ORDER TO CEASE AND DESIST

Dear Mr. Collins:

I have determined that you are operating a business, a transitory lodging facility at the above referenced location. This letter is to notify you that doing so is a violation of the Sandy City Business License ordinance Section 5-1-1 and the Land Development Code, chapter 15-7. Each day of operation may be a separate violation.

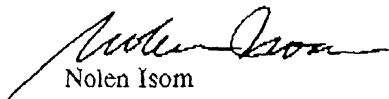
You will need to immediately correct the violation by ceasing all operations **within twenty four (24) hours of receipt of this notice**. A copy of this Notice and Order will be forwarded to the City Attorneys office.

If you do not comply by the above time limit, the City will take further enforcement action against you.

If you have any questions regarding this letter, please contact the Business Licensing Department at 568-7252 or Code Enforcement at 568-6054 and 568-7258.

THIS IS THE ONLY NOTICE THAT YOU WILL RECEIVE.

Sincerely,


Nolen Isom
Code Enforcement Officer

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7. John Collins Alleged Error Request

9255 South Maison Drive

1875 East Alla Panna Way

472 East 9400 South

1456 East Longdale Drive

BOA #96-31

John Collins, who owns or controls property located at 9255 South Maison Drive, 1875 East Alla Panna Way, 472 East 9400 South and 1456 East Longdale Drive, which are all located in R-1 zones, has filed a request that the Board of Adjustment determine that City staff erred in their decision that Mr. Collins' practice of using the homes as places of public accommodation, renting his houses to short-term guests (nightly and weekly), is not allowed in R-1 zones in Sandy City. Mr. Collins is being represented by Franklin Slauch, an attorney, who has set forth the basis for their appeal in a letter dated June 27, 1996, which is included in the Board packet.

Chairman Larry Bowler delegated chairman responsibility for this item to Alan Walsh, who has more experience in legal issues.

Brok Armantrout stated that City staff has determined that using structures built as single family homes as places of public accommodation (i.e., nightly or weekly rentals) is not a use allowed within R-1 zones. According to the Sandy City Development Code and the Utah Code Annotated, it is required that the applicant bear the burden of proof that Sandy City has made an error in their determination. The basis for staff's determination is as follows: 1) the intent of R-1 zones is to provide a residential environment within Sandy City that has a minimum of vehicular traffic and creates a quiet, residential neighborhood favorable to family life; 2) in order to accomplish this purpose, the City Council has designated specific uses which are allowed in residential zones—short-term rentals are not listed as a permitted use in these zones; the City has provided other types of land uses which permit short-term stays in the City (i.e., hotel/motel/ bed and breakfast); 3) provisions and requirements contained in the Development Code are the minimum requirements for each zone which specifically indicate that property may not be used for any other purpose other than that specifically listed as allowed in the Code; 4) short-term rentals are different than a use-as a single-family dwelling as indicated in a variety of statutes and ordinances of both Sandy City and the State of Utah, which state that such use is not considered to be single family dwelling, but rather a place of public accommodation requiring different building standards, life and safety standards, tax implications and business license requirements; 5) it is Sandy City's experience that neighborhoods are affected significantly differently by the use of these structures as short-term rentals as opposed to a single family dwelling (i.e., late night, loud partying on a continual basis; numerous vehicles entering and leaving the neighborhoods; little or no responsibility or accountability by the occupants of the rental units; strangers which are constantly changing; no ability to develop a community relationship with occupants).

Mr. Slauch, the attorney representing Mr. Collins, stated that his client is not suggesting that the City

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cannot regulate short-term rentals and this type of land use in residential zones; clearly that falls within the police power of the City. Mr. Slaugh stated that the intent of his letter to Sandy City was to outline concerns he has with the status of the current regulations. The City is suggesting that short-term rentals fall within the other types of commercial uses--hotel/motel, bed and breakfast facility, or business use--but it seems clear that the type of use being discussed doesn't really fit neatly within any of the definitions. This is not a business use because the occupant doesn't conduct an accessory use. There is no specificity in the current ordinances that give a landlord any real guidance as to what he or she can or cannot do to avoid violating the law. Any time you have this situation, constitutional issues are raised and there is a concern of vagueness and constitutional rights. There is no definition of "short-term rental"--is it less than thirty days?, he asked. Is it one week? Is it overnight? He stated since the definition is not specific and in writing, a person does not know when they are crossing the line and violating the code. Mr. Collins' wish is to know where he stands. The law should be specific enough so that a person could read an ordinance and know what is prohibited and what is allowed. Frank Slaugh said he was unable to respond to the request for more information from his client requested by the Board of Adjustment because he did not think it was needed, and because the law is not clear. He said his client has not heard of specific complaints about misconduct regarding his properties. The Appellant wants to know where he stands. Mr. Slaugh did allow that he didn't think a constitutional taking argument came into play here. The City is saying to my client, "We know what you were told, but it is no longer legal."

Alan Walsh read the definition of "dwelling, single family" from Section 15-2-2 of the Sandy Development Code, as follows:

Dwelling, Single Family. A detached housing unit within a structure with kitchen and sleeping facilities, designed for occupancy by one family

Alan Walsh then asked if the homes of Mr. Collins which are in dispute fall under that definition.

Mr. Slaugh stated that, yes, he thought they did at any given time the people were renting the property. Mr. Slaugh said he was not going to suggest that everyone he rents to during the ski or golf season meets that strict definition. "How do you define a family?," asked Mr. Slaugh.

Allan Walsh said a family was defined in the Sand City Development Code as "An individual or two or more persons related by blood, marriage or adoption, or a group not to exceed four unrelated persons living together as a single housekeeping unit." [Section 15-2-2, Rev. Ord. Sandy City.] He then asked Frank Slaugh if he thought his client's clientele fit that definition.

Frank Slaugh responded that for the week, two weeks, three weeks, or a month that they occupy the properties, he felt they did meet the definition. In many cases they are families, but in some cases they are unrelated.

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Allan Walsh then asked if Collins rented to four more people who were unrelated.

John Collins, 1456 Longdale Drive, and owner of the rental homes, stated that he generally rents to a couple or a person who may ask to have guests while they are renting the home. He added that he does not control the guests that the renters invite to stay with them, whether by the year or by the week. He knows, however, how many guests may be staying in the home; they may have five to eight people staying there during any one rental. He said that they are often related, but not all the time. He added that it is difficult to check on their relationship. Alan Walsh asked Mr. Collins what he did during the off-ski season with his rentals. Mr. Collins replied that sometimes he rented them on either a short- or long-term basis, or sometimes they were vacant. Mike Corrigan asked Mr. Collins if he ever checked on his rental properties while they were being rented. Mr. Collins stated that he drove by the homes nightly during the ski season. Mr. Collins said he didn't rent to more than twenty people. He also said he had never seen a bus at the homes.

Dave Evans asked "What does it mean to keep house?" Dave Evans stated that he felt short-term renters did not meet the definition of "housekeeping".

Frank Slaugh said that he kept house, and that it meant to clean the house, do the dishes, vacuum, shovel the snow. Mr. Slaugh then asked what "keeping a sense of community" meant. He said his concern about his neighbors is not keeping house. As to shoveling snow, John Collins said if the renters want to shovel snow, they can. He said his ski renters do shovel the snow. Frank Slaugh said his client had received no specific complaints about the properties. Mr. Slaugh reiterated that he is not stating that the City cannot regulate rentals, but that they have not done it since they do not have a specific ordinance relating to short- and long-term rentals. Dave Evans asked if the term "short-term rental" needed to be defined in the Code in order to be clear. Mr. Slaugh stated that yes, he felt it needed to be more clearly defined. Alan Walsh asked Mr. Collins if he put limitations on the number of guests that were allowed in the houses he rented. Mr. Collins replied that he did, but it varied, depending on the size of the house. There is also a limitation on how many cars are allowed. This information is spelled out in the rental agreements. Mr. Evans said that he didn't feel the term "short-term rental" needed to be defined because the definitions in the City Code were already addressed adequately in the Code.

Frank Slaugh said that Brok Armantrout told Collins he could rent to short-term tenants. John Collins said he saw fifty ski rentals before 1985, and so he said he wanted to do it too, since the City was not doing anything about it. Salt Lake County said it was OK. Others told him Sandy allowed it. He said someone called Brok Armantrout in 1995 about his rights, and that a person named Michelle Hunt in March at Sandy told Mr. Collins that Sandy was not going after all ski rentals - just the ones that were causing trouble. John Collins said he began doing ski rentals in 1994 - when he called. Everyone is giving out different information at the City, said Mr. Collins, which confused people. He said he owned two properties before he started this type of business in 1994; and he bought the other two since 1990. Dave Evans then asked if all four of the properties were therefore

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purchased before he started doing nightly ski rentals. John Collins said no; he just bought two. Frank Slaugh said that he never said Collins bought the properties based on the representations of the Sandy City employees. But he did start conducting his business of short-term rentals based on the statements of City employees. Frank Slaugh said that because his client would make less on long-term rentals than he could by ski rentals, he would suffer detriment if he was prevented from doing short-term rentals, because the short-term rentals were much more profitable than long-term rentals.

Dave Evans then asked what detriment Collins suffered if he relied on bad advice. If your client made extra money because he rented his properties as short-term ski rentals based on bad advice, how was that to his detriment, if he was allowed to keep the extra money he made, he asked. Once he returns to monthly rentals, he is right back to the status quo - right back to where he was anyway, said Mr. Evans. You are trying to present that this man has been damaged, but I don't see the damage, said Mr. Evans.

Frank Slaugh responded that he supposed there would be no detriment during that period of time; He said his client shouldn't have to guess if he was in violation of the Code.

In response to a question about the role of the Board from Larry Bowler, Steve Osborn said the decision of the Board was to decide if there was a rational basis for the decision of the zoning administrator; whether the zoning administrator had made an error.

John Collins said he bought one of his properties after he got the representations by Brok. Mr. Collins added that he realized that too many people in a house posed problems. He said that he allows the properties to be rented out to the following numbers of individuals:

9255 South Maison Drive - six people
1875 East Alla Panna Way - twelve people
472 East 9400 South - twelve people
1456 East Longdale Drive - eight people

He said he limits the number of cars in the lease to two to three cars per house. Frank Slaugh suggested that his clients' rights might be "grandfathered." When asked about the numbers of people in each rental unit right now, John Collins said he didn't think he needed to respond to that.

Mr. Slaugh then asked to be excused in order to attend to a family medical emergency, which was permitted by the Chairman.

Lowell Brown, 9273 Creponette Drive, spokesman for residents of Montana Rancho Estates, referred to the statement Mr. Collins made about not receiving any complaints. He disagreed with this statement, saying there have been many incidents, one in particular involving a hit and run accident

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at one of the houses by a renter. The residents feel their property values will decrease if this type of rental is allowed to continue. They are concerned about the increase of vehicular traffic and maintenance of the rental properties, and the shoveling of snow at them.

Nancy Nielson, 1946 Alla Pana Way, Montana Ranchos subdivision, read a letter from the residents in support of the City's interpretation of short-term rentals urging the Board to reject the application. She also noted that most apartments or rental homes require a minimum six-month lease agreement. She added that the Collins were violating the restrictive covenants and zoning of the Montana Ranchos subdivisions, citing specific provisions which stated that "no lot shall be used except for residential purposes"; and further states "no building shall be used except for a single family dwelling." She said that use of the homes as a motel, as Mr. Collins had done, was not consistent with these definitions. She said that John Collins was well aware of these covenants, because he had spearheaded a lawsuit based on these same covenants in opposing constructing an LDS chapel in the subdivision. Mr. Collins also signed a petition opposing a day care center in one of the homes of the subdivision based on the restrictive covenants. Alan Walsh told her that the Board of Adjustment does not involve itself in the enforcement of private covenants and restrictions, although the Board is sensitive to the issue.

Joe Galow, 9302 S. Tortellini Drive, resident of Montana Ranchos subdivision, stated that he agreed with the previous two resident speakers. He said that transients do not have any interest in the neighborhood--the property is not taken care of. Transients are not a positive influence on the environment. He said he did not want meth' lab explosions in his neighborhood. He added that they have had some traffic problems [with renters] and some "hot dogs".

Gardner Buchanan, 1749 E. Sunrise Meadow, lives one block west of the rental property located in the Montana Ranchos subdivision. They have a rental home four houses down from them which is owned by Joseph Bowers, not by Mr. Collins, but is used for the same purpose as those owned by Mr. Collins. Mr. Walsh stated that since the issues Mr. Buchanan would be addressing were not regarding a home owned by Mr. Collins, they wouldn't be relevant to this discussion. Mr. Buchanan stated that he was aware of that fact, but felt the problems he had personally witnessed would be the same in any of the ski rental homes. He stated that the home was in an R-1 zone, being used as a commercial enterprise, which is not appropriate for the area. He has personally witnessed instances of nudity involving hot tubs, lack of snow removal, and problems in the summertime with lack of proper care of the yard, which has caused weeds to fly into the Buchanan's yard.

Ronald Robbins, 472 East 9400 South, lives adjacent to Mr. Collins' rental property on 9400 South, which the John Collins purchased about a year and a half ago. He stated that the group of neighbors in that area whom he was representing felt that City staff did not err in their decision [in ruling that rentals of less than 30 days were prohibited]. They have had problems with noise this past winter on almost every weekend. Just last weekend there were noise problems again from the house. The current renters are Spanish-American cement workers employed to work on the Salt Palace.

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Lyle Odendahl, 1769 Sunrise Park Circle, did not have specific complaints about one of the properties, but wanted to make some comments. He felt that anyone who has this type of ski rental home should be thankful that the City and the State Tax Commission have not brought criminal proceedings against them for their failure to meet life safety codes and to pay taxes for their short-term rentals. He believes that failure to meet life-safety codes should be prosecuted criminally. He stated that many other people have been notified of violations and have had to come into compliance even if they were not aware of the violation, and that Mr. Collins should have to do the same. You do not need to be a rocket scientist to determine what the law says, he pointed out; Collins was on constructive notice of the law.

Bill Evans, 1451 E. Longdale Drive, lives directly across the street from Mr. Collins. He stated that the Collins family moved out of the house during the ski season, so they did not know whom to contact with any problems. He stated that the property, both driveway and sidewalks, went for four weeks without snow removal last winter. He said he did not know who to contact about the problem [of snow removal on the sidewalks.] Mike Corrigan asked if there were any other problems at the property. There were two to three out-of-state cars at the house most of the time, which changed frequently, and eight renters were allowed to live there. It is one thing to live in a neighborhood where the renters change every month or so; but it is another to have people living in a house in the neighborhood who change four times as often as that, or who change even more frequently than that. We have invested in this neighborhood. He said that he had not developed any meaningful relationships with any renters. He said he liked the Collins as neighbors, but disliked the short rental use. People know intuitively that this use is incompatible with the neighborhood. He gave staff a petition signed by forty-two residents in the area who are all opposed to the use of the home as a short-term rental.

David Gillette, 1130 Lexington Circle, lives near the Collins rental property on Longdale and stated that he has the same concerns that have already been stated. He said that in gathering the petition signatures in his neighborhood, not one resident opposed the City position (prohibiting rentals of less than 30 days). His other concern is that the entire neighborhood could become short-term rentals since there are several other rental homes in the area. He noted that there were lots of children in the neighborhood. Allowing short-term rentals will increase traffic, and the likelihood of an auto accident involving those children. He stated that the City code adequately defines the purpose and definition of a residential neighborhood other than possibly a better definition of "short-term rental". He stated that in a hotel/motel, which would be more appropriate for this type of rental, there are employees on the site to handle any problems with the abusive guests--there is no one on site at these rental homes to handle this type of situation. Therefore, the neighbors are the ones who have to police the area. We did not move here to become the local police, he added.

Sylvia Brunisholz, 9383 S. Maison, lives four houses from the rental home on Alla Pana and stated that her main concern is for the children in the area. She stated there are twelve to fourteen boys, ranging in age from fourteen to eighteen, who are currently living in the basement of the rental

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home. (Mr. Collins replied from the audience: "not that he knew of"). She said that just last Saturday she saw a number of teenagers on the lawn of the house by a van, and that a neighbor said she saw more than 14 teenagers there. She stated that the least amount of cars she has seen parked at the house has been three and as many as nine. She is concerned that the situation seems rather "mysterious"--drapes are always drawn and she doesn't see the boys except in the morning when she goes to work. She said one of the teenagers said it was a group home; that all were dropouts with no adult living there. Today she said she saw two women there with two babies and two little kids and other children in the front yard of the home. She expressed concern about the three-year old boy who runs around the neighborhood. She said that she knew her neighbors, but this gives her twelve additional kids in the neighborhood that she doesn't know that she has to worry about as a parent.

Jerry Morgan, 9266 Maison Drive, who spoke about one of Collins' homes directly across the street. He stated that a couple of years ago there was a group of girls and boys in their twenties living at the Collins' house across the street who would have as many as five to seven cars at the house. They were a rowdy partying group. One of the girls living at the house at the time rammed my car with hers; we tracked her down to Park City. We could not trust the situation, he said. We had to contact the mother of the girl to get our car repaired. We don't need groups of young kids renting houses in a family neighborhood. I don't mind families renting on a long-term lease.

Mr. Gillette stated that Mr. Collins has led the Board to believe that he knows what is going on in his rental houses, but feels that is not the case.

Steve Osborne asked for more information on the "partying" that Mr. Robbins had mentioned.

Mr. Robbins stated that it was loud music with lots of bass which would vibrate the windows even at 12:00 midnight and later. The music was generally on weekend evenings and would run through midnight. Mr. Robbins did not try to contact anyone because he didn't know who owned the home. He could not address the traffic because the house in question faces 9400 South. Mr. Robbins stated that he didn't know if there were any drugs involved, but there were plenty of beer cans.

Annette Hathenbruck, 1421 Longdale Drive, who lives two houses from the Collins property at 1421 Longdale Drive, stated that many of her neighbors did not receive notice of and did not know about the meeting. She stated that Mr. Collins is living in the house now, but if he moves out, they are worried it will be another rental. She also said that earlier this year two cars raced up the street and then pulled into the driveway of the rental house owned by Collins.

Mr. Collins, owner of the rentals, stated that he did not know about the racing cars. He said the car accident with Karen Morgan which was mentioned, happened with a long-term renter and that he was not notified about it --he found out from a neighbor. He said he did not know his responsibilities as a landlord, but said he would have gladly helped. He said he did remove the people who caused the accident. Alan Walsh asked Mr. Collins what the average length of stay

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would be for renters during the ski season. Mr. Collins replied that it was usually one to two weeks. He said he takes deposits from the renters of less than 30 days, and can evict them more rapidly. In response to the testimony that there had been nine cars at Alla Pana Drive, he asked if a renter had fewer rights than residents.

Mr Collins stated that he would appreciate it if the neighbors would contact him if they have any problems with renters, both short and long term. When he first got into the rental business, he came to Sandy City because he knew other people who were renting and he thought it was OK with Sandy City. He said the City employees read the Code to him. Mr. Collins said he asked them to define the term "family." He said no one told him about the issue of four unrelated people. He said part of the Code was read to him. Mike Corrigan asked Mr. Collins if he asked for a copy of the Code when he contacted Sandy City. Mr. Collins stated that he did not get a copy--he just talked to the City about it. He feels Sandy City needs to be more specific, in writing, how long a person can rent. Mr. Collins asked what the minimum age for a tenant renting a property could be. Bill Roskelley asked Mr. Collins if he had a clause in his contracts addressing drugs. Mr. Collins replied that he did not address drugs specifically, just that the renter must adhere to local laws. Dave Evans asked Mr. Collins about the home which was mentioned that had several young boys living in it. Mr. Collins replied that he thought there were eight related young men who are married--they are a family of builders who have moved here for the summer. He also stated that he did not know if they had other people living there and that he would look into it. Steve Osborne asked Mr. Collins when he purchased each of the four homes in questions. Mr. Collins replied that the home on Maison was approximately 1981; Alla Pana, 1990; 9400 South, 1995; and Longdale 1994 or 1995. He has had them as rentals for a number of years. When asked when he started renting out each of the properties as short-term (less than 30-day) rentals, Collins replied that he could not say. Steve Osborn reminded him that the City had asked for that information earlier from him, to which Collins responded that they should see his attorney.

Dave Evans commented that he felt the intent of the City ordinance relative to residential zones was defined as someone who lives there for housekeeping purposes--becoming part of a neighborhood watch, knowing their neighbors, looking out for and being concerned about each other--and doesn't see how nightly or short-term rentals meets this definition. The staff has interpreted the ordinance to fall within the general intent of a neighborhood and the concern is disregard of accountability.

Bill Roskelley commented that rentals of apartments or homes usually require a six-month to one year lease and that shorter rentals, such as nightly or weekly, were best handled at hotels or motels. He feels staff made the right decision.

John Collins, who owns or controls property located at 9255 South Maison Drive, 1875 East Alla Panna Way, 472 East 9400 South and 1456 East Longdale Drive, which are all located in R-1 zones, has filed a request that the Board of Adjustment determine that City staff erred in their decision that Mr. Collins' practice of using the homes as places of public accommodation, renting his houses to

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short-term guests (nightly and weekly), is not allowed in R-1 zones in Sandy City. Mr. Collins is being represented by Franklin Slauch, an attorney, who has set forth the basis for their appeal in a letter dated June 27, 1996, which is included in the Board packet.

Chairman Larry Bowler delegated chairman responsibility for this item to Alan Walsh, who has more experience in legal issues.

Brok Armantrout stated that City staff has determined that using structures built as single family homes as places of public accommodation (i.e., nightly or weekly rentals) is not a use allowed within R-1 zones. According to the Sandy City Development Code and the Utah Code Annotated, it is required that the applicant bear the burden of proof that Sandy City has made an error in their determination. The basis for staff's determination is as follows: 1) the intent of R-1 zones is to provide a residential environment within Sandy City that has a minimum of vehicular traffic and creates a quiet, residential neighborhood favorable to family life; 2) in order to accomplish this purpose, the City Council has designated specific uses which are allowed in residential zones--short-term rentals are not listed as a permitted use in these zones; the City has provided other types of land uses which permit short-term stays in the City (i.e., hotel/motel/ bed and breakfast); 3) provisions and requirements contained in the Development Code are the minimum requirements for each zone which specifically indicate that property may not be used for any other purpose other than that specifically listed as allowed in the Code; 4) short-term rentals are different than a use as a single-family dwelling as indicated in a variety of statutes and ordinances of both Sandy City and the State of Utah, which state that such use is not considered to be single family dwelling, but rather a place of public accommodation requiring different building standards, life and safety standards, tax implications and business license requirements; 5) it is Sandy City's experience that neighborhoods are affected significantly differently by the use of these structures as short-term rentals as opposed to a single family dwelling (i.e., late night, loud partying on a continual basis; numerous vehicles entering and leaving the neighborhoods; little or no responsibility or accountability by the occupants of the rental units; strangers which are constantly changing; no ability to develop a community relationship with occupants).

Mr. Slauch, attorney representing Mr. Collins, stated that his client is not suggesting that the City cannot regulate short-term rentals and the type of land use in residential zones. The intent of his letter to Sandy City was to highlight concerns he has with the status of the current regulations. The City is suggesting that short-term rentals fall within the other types of commercial uses--hotel/motel, bed and breakfast facility, or business use--but it seems clear that the type of use being discussed doesn't really fit neatly within any of the definitions. There is no specificity in the current ordinances that give a landlord any real guidance as to what he or she can or cannot do to avoid violating the law. Any time you have this situation, constitutional issues are raised and there is a concern of vagueness and constitutional rights. There is no definition of "short-term rental"--is it

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less than sixty days? Is it one week? Is it overnight? He stated since the definition is not specific and in writing, a person does not know when they are crossing the line and violating the code. Mr. Collins' wish is to know where he stands. The law should be specific enough so that a person could read an ordinance and know what they can or cannot do.

Alan Walsh read the definition of "dwelling, single family" and asked if the homes Mr. Collins is renting fall under that definition. Mr. Slaugh stated that, yes, he thought they did for the time the people were renting the property.

John Collins, 1456 Longdale Drive and owner of the rental homes, stated that he generally rents to a couple or a person who may have guests while they are renting the home. Alan Walsh asked Mr. Collins what he did during the off-ski season with his rentals. Mr. Collins replied that sometimes he rented them on either a short- or long-term basis, or sometimes they were vacant. Mike Corrigan asked Mr. Collins if he ever checked on his rental properties while they were being rented. Mr. Collins stated that he drove by nightly during the ski season. Dave Evans stated that he felt short-term renters did not meet the definition of "housekeeping". Mr. Slaugh reiterated that he is not stating that the City cannot regulate rentals, but that they have not done it since they do not have a specific ordinance relating to short- and long-term rentals. Dave Evans asked if the term "short-term rental" needed to be defined in the Code in order to clear. Mr. Slaugh stated that yes, he felt it needed to be more clearly defined. Alan Walsh asked Mr. Collins if he put limitations on the number of guests that were allowed in the houses he rented. Mr. Collins replied that he did, but it varied, depending on the size of the house. There is also a limitation on how many cars are allowed. This information is spelled out in the rental agreements.

Lowell Brown, 9273 Creponette Drive, spokesman for residents of Montana Rancho Estates, referred to the statement Mr. Collins made about not receiving any complaints. He disagreed with this statement, saying there have been many incidents, one in particular involving a hit and run accident at one of the houses involving a renter. The residents feel their property value will decrease if this type of rental is allowed to continue. They are concerned about the increase of vehicular traffic and maintenance of the homes.

Nancy Nielson, 1946 Alla Pana Way, Montana Ranchos subdivision, read a letter from the residents in support of the City's interpretation of short-term rentals. She also noted that most apartments or rental homes require a minimum six-month lease agreement.

Joe Galow, 9302 S. Tortellini Drive, resident of Montana Ranchos subdivision, stated that transients do not have an interest in the neighborhood--the property is not taken care of.

Gardner Buchanan, 1749 E. Sunrise Meadow, lives one block west of the rental property located in the Montana Ranchos subdivision. They have a rental home four houses down from them which is

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not owned by Mr. Collins, but is used for the same purpose as those owned by Mr. Collins. Mr. Walsh stated that since the issues Mr. Buchanan would be addressing were not regarding a home owned by Mr. Collins, they wouldn't be relevant to this discussion. Mr. Buchanan stated that he was aware of that fact, but felt the problems he had personally witnessed would be the same in any of the ski rental homes. He stated that the home was in an R-1 zone, being used as a commercial enterprise, which is not appropriate for the area. He has personally witnessed problems with nudity, lack of snow removal, and problems in the summertime with lack of proper care of the yard.

Ronald Robbins, 472 East 9400 South, lives adjacent to Mr. Collins' rental property on 9400 South, stated that the group he was representing felt that City staff did not err in their decision. They have had problems with noise this past winter on almost every weekend. They have had no problems with the current renters.

Lyle Odenthal, 1769 Sunrise Park Circle, did not have specific complaints about one of the properties, but wanted to make some comments. He felt that anyone who has this type of ski rental home should be thankful that the City and the State Tax Commission have not brought criminal proceedings against them for their failure to meet life safety codes and to pay taxes for their short-term rentals. He stated that many other people have been notified of violations and have had to come into compliance even if they were not aware of the violation, and that Mr. Collins should have to do the same.

Bill Evans, 1451 E. Longdale Drive, lives directly across the street from Mr. Collins. He stated that the Collins family moved out of the house during the ski season, so they did not know who to contact with any problems. He stated that the property, both driveway and sidewalks, went for many weeks without snow removal. Mike Corrigan asked if there were any other problems at the property. Mr. Evans stated that he hadn't really had any problems, but there were two to three out-of-state cars most of the time. He gave staff a petition signed by forty-two residents in the area who are all opposed to the use of the home as a short-term rental.

David Gillette, 1130 Lexington Circle, lives near the rental on Longdale and stated that he has the same concerns that have already been stated. His other concern is that the entire neighborhood could become short-term rentals since there are several other rental homes in the area. He stated that the City code adequately defines the purpose and definition of a residential neighborhood other than possibly a better definition of "short-term rental". He stated that in a hotel/motel, which would be more appropriate for this type of rental, there are employees on the site to handle any problems with the abusive guests--there is no one on site at these rental homes to handle this type of situation. Therefore, the neighbors are the ones who have to police the area.

Sylvia Brunisholz, 9383 S. Maison, lives four houses from the rental home on Alla Pana and stated that her main concern is for the children in the area. She stated there are twelve to fourteen boys, ranging in age from fourteen to eighteen, who are currently living in the basement of the rental

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home. (Mr. Collins replied from the audience: "not that he knew of"). She stated that the least amount of cars she has seen parked at the house has been three and as many as nine. She is concerned that the situation seems rather "mysterious"--drapes are always drawn and the boys are never seen except in the morning.

Jerry Morgan, 9266 Maison Drive, stated that a couple of years ago there was a group of kids in their twenties living at the house who would have as many as five to seven cars at the house. They were a rowdy group, and there was a car accident involving one of the girls living at the house at the time.

Mr. Gillette stated that Mr. Collins has led the Board to believe that he knows what is going on in his rental houses, but feels that is not the case.

Steve Osborne asked for more information on the "partying" that Mr. Robbins had mentioned. Mr. Robbins stated that it was loud music with lots of bass which would vibrate the windows. The music was generally on weekend evenings and would run through midnight. Mr. Robbins did not try to contact anyone because he didn't know who owned the home. He could not address the traffic because the house in question faces 9400 South. Mr. Robbins stated that he didn't know if there were any drugs involved, but there were plenty of beer cans.

Annette Hathenbruck, 1421 Longdale Drive, stated that many of her neighbors were not noticed and did not know about the meeting. She stated that Mr. Collins is living in the house now, but if he moves they are worried it will be another rental.

Mr. Collins, owner of the rentals, stated that the car accident which was mentioned happened with a long-term renter and that he was not notified--he found out from a neighbor. Alan Walsh asked Mr. Collins what the average length of stay would be for renters during the ski season. Mr. Collins replied that it was usually one to two weeks. He stated that he would appreciate it if the neighbors would contact him if they have any problems with renters, both short and long term. When he first got into the rental business, he came to Sandy City because he knew other people who were renting and he thought it was OK with Sandy City. Mike Corrigan asked Mr. Collins if he asked for a copy of the Code when he contacted Sandy City. Mr. Collins stated that he did not get a copy--he just talked to the City about it. He feels Sandy City needs to be more specific, in writing, how long a person can rent. Bill Roskelley asked Mr. Collins if he had a clause in his contracts addressing drugs. Mr. Collins replied that he did not address drugs specifically, just that the renter adhere to local laws. Dave Evans asked Mr. Collins about the home which was mentioned that had several young boys living in it. Mr. Collins replied that he thought there were eight related young men who are married--they are a family of builders who have moved here for the summer. He also stated that he did not know if they had other people living there and that he would look into it. Steve Osborne asked Mr. Collins when he purchased each of the four homes in questions. Mr. Collins replied that the home on Maison was approximately 1981; Alla Pana, 1990; 9400 South, 1995; and Longdale 1994 or 1995. He has had them as rentals for a number of years.

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Dave Evans commented that he felt the intent of the City ordinance relative to residential zones was defined as someone who lives there for housekeeping purposes--becoming part of a neighborhood watch, knowing their neighbors, looking out for and being concerned about each other--and doesn't see how nightly or short-term rentals meets this definition. The staff has interpreted the ordinance to fall within the general intent of a neighborhood and the concern is disregard of accountability.

Bill Roskelley commented that rentals of apartments or homes usually require a six-month to one year lease and that shorter rentals, such as nightly or weekly, were best handled at hotels or motels. He feels staff made the right decision.

Regarding the John Collins Alleged Error request, Bill Roskelley made a motion to uphold the City's interpretation of the Code which does not allow short-term rentals in residential zones. Larry Bowler seconded the motion. The vote was unanimous in favor of upholding the City's decision.

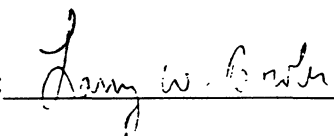
9. Approval of Minutes

Mike Corrigan made a motion to approve the June 13, 1996 minutes as written. Bill Roskelley seconded the motion. The vote was unanimous to approve the June 13 minutes.

Bill Roskelley made a motion to table the July 11, 1996 minutes since there were only three Board members at that meeting and all three of those members were not present to approve the minutes. Alan Walsh seconded the motion. The vote was unanimous to table the July minutes.

Bill Roskelley made a motion to adjourn the meeting. Dave Evans seconded the motion. The vote was unanimous. Meeting adjourned 11:15 p.m.

Respectfully submitted:

_____

Tab 3

make the keeping of such a house a crime.¹⁸ So an adjudication as to the validity of a grant by a city of the privilege of running a lottery, pursuant to a legislative act authorizing such grant, while *res judicata* as to its validity under the law as then existing, does not determine as between the state and those claiming the privilege under the grant, that the state could not by subsequent legislative or constitutional enactment prohibit all lotteries including the one previously thus authorized.¹⁹

§ 714. Subsequently Acquired Title.—Whenever title is put in issue and adjudicated, the judgment is *res judicata* upon this issue in any subsequent action.²⁰ The effect of such an adjudication must, however, be limited to the title or right as it then stood. It is obviously not conclusive as to title and rights subsequently acquired.¹ Thus where the land claimed by plaintiff was held to belong to the state because covered by navigable water, the judgment does not bar a new action after the land has been uncovered by the lowering of the water and has become

18. *Campbell v. Gullo*, 142 La. 1052, L. R. A. 1915D, 251, 78 So. 124.

19. *Douglas v. Commonwealth of Ky.*, 168 U. S. 488, 42 L. Ed. 553, 18 Sup. Ct. Rep. 129.

20. See *infra* § 535 et seq.

1. *Merryman v. Bourne*, 9 Wall. U. S. 392, 19 L. Ed. 683; *Barrows v. Kindred*, 4 Wall. (U. S.) 399, 18 L. Ed. 383; *King v. Davis*, 7 Fed. 222; affirmed *Blankenship v. King*, 157 Fed. 676, 85 C. C. A. 648; *Railroad Co. v. Smith*, 69 Fed. 79, 16 C. C. A. 379; *Graves v. Robinson*, 127 Cal. 499, 58 Pac. 12; *Brown v. Roberts*, 118 Cal. 469, 62 Am. St. Rep. 247, 50 Pac. 689, 51 Pac. 33; *People v. Holladay*, 95 Cal. 241, 27 Am. St. Rep. 136, 29 Pac. 54; *Thrift v. Delaney*, 69 Cal. 188, 10 Pac. 475; *Mann v. Rogers*, 35 Cal. 316; *Wadley v. Leggett*, 82 Ark. 262, 113 Am. St.

Rep. 70, 191 S. W. 169; *Hawley v. Simons*, 192 Ill. 117; *Thorp v. Hanes*, 107 Ind. 324, 6 N. E. 820; *Bryan v. Ulund*, 101 Ind. 477, 1 N. E. 52; *In re Brigham's Estate*, 144 Iowa, 71, 129 N. W. 1934; *Commissioners of Marion County v. Welch*, 49 Kan. 707, 29 Pac. 481; *Frewitt v. Willborn*, 184 Ky. 638, 212 S. W. 442; *Gordon v. Platoon*, 137 La. 156, 67 S. 17; *Case v. Mazonburg*, 109 Mo. 111, 19 S. W. 27; *Sherman v. Lee*, 102 N. W. 21; *Brown v. Roberts*, 11 N. H. 101; *Clatter v. White*, 101 N. C. 24, 12 S. E. 442; *Wood v. Bannock*, 19 Ohio 87, 323; *Gore v. Gore*, 191 Tenn. 629, 49 S. W. 737; *Dird v. Cross*, 123 Tenn. 419, 131 S. W. 974; *B. B. Godley Lumb. Co. v. Slaughter Co.* (Tex. Civ. App.), 202 S. W. 891.

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§ 713. **Change in the Law.**—Though a statute governing rights of action be made in terms retroactive, it does not necessarily deprive a previous judgment, involving the same subject matter, of its *res judicata* effect as between the parties, in the absence of an intent, clearly expressed, so to do. Thus where a plaintiff is denied relief for alleged criminal conversation because the common-law right of action has been abolished by statute, and subsequently a repealing statute restores the right and is expressly made retroactive, the previous judgment is nevertheless a bar to a new action by the plaintiff, there being nothing in the repealing act to indicate an intention to disturb rights adjudicated under the prior law.⁸ Generally, however, a subsequent change in the law applied in arriving at the judgment defeats its operation as *res judicata* so far as dependent upon the continuance of that law.⁹ Thus a denial of the right of a municipal corporation to issue bonds is not conclusive of that right after the law governing the matter has been changed.¹⁰ Where the invalidity of a contract or claim has been cured by legislative act, a prior denial of relief on grounds subsequently removed by the curative act is not a bar to new action on the claim as validated, since it cannot operate against subsequently acquired rights.¹¹ A denial of the right of contingent devisees to take under the will because they were aliens is not *res judicata* as to their rights upon

8. *Lemmon v. Mitchell*, 105 L. T. Rep. 332.

9. See note, L. R. A. 1913D. 221.

10. *Hutchinson v. Patching*, 137 Tex. 497, 129 S. W. 693, 131 S. W. 497; *State v. Clausen*, 100 Wash. 37, 183 Pac. 319 (even though the first judgment was affirmed on appeal after the change in the law).

11. *Beals v. Amador County*, 35 Cal. 624; *State v. Torinus*, 23 Minn. 173, 9 N. W. 725; In this case it appeared that an agent of the state whose authority was conferred by and dependent upon

legislative action, exceeded his authority by selling logs and taking a note in payment instead of cash, and an action on the note was defeated on the ground that the note was therefore without consideration, but the legislature subsequently ratified the contract. It was held that the prior judgment was not a bar to a second action on the note, the buyer having retained and used the logs. While the subject matter of the action was the same, a new right or cause of action was created by the legislative ratification.

the happening of the contingency where their disability has in the meantime been removed by legislation.¹² If the attempt to enforce a contract against a county is defeated because of its invalidity and the legislature passes a curative act, the judgment is not a bar to a new action.¹³ Bonds issued by a county in a territory, which were void because not authorized by act of Congress, may be made valid by a subsequent act of Congress, and a judgment holding such bonds invalid is not *res judicata* as to their validity after they have been subsequently thus validated.¹⁴ If a contract, illegal for usury, is subsequently validated by legislative act to the extent of the principal and lawful interest, a former judgment denying relief upon it on the ground of usury is not a bar to a second action on the contract as thus validated.¹⁵

Where the right to relief is denied because of the absence of any remedy, the judgment does not bar a new action after a change in the law providing a remedy.¹⁶ Thus where relief to one claiming the proceeds of property escheated to the state was denied because a statute providing such relief was prospective in its operation and therefore did not cover the case in question, the judgment does not bar an action under a subsequent statute affording relief.¹⁷ On the other hand, though the validity of a contract may have been adjudicated, in so far as this may depend upon the validity of future performance or action under it the judgment is not *res judicata* when the law has been subsequently so changed that such performance becomes illegal. Thus though a judgment for rent due and to become due for use of premises as a house of prostitution is *res judicata* as to the validity of the contract under the law and the facts as then existing, it is not conclusive on this issue after a change in the law so as to

12. *McGillis v. McGillis*, 154 N. Y. 582, 42 N. E. 115.

13. *Steele County v. Erskine*, 98 Fed. 215, 39 C. C. A. 170; *MacKenzie v. Douglas County*, 91 Or. 275, 178 Pac. 350.

14. *Utter v. Franklin*, 172 U. S.

416, 43 L. Ed. 428, 19 Sup. Ct. Rep. 187.

15. *Wallace v. Goodleb*, 164 Tenn. 670, 58 S. W. 243.

16. See *Miles v. Strong*, 65 Conn. 273, 36 Atl. 55.

17. *In re Pomeroy*, 51 Mont. 113, 151 Pac. 333.

Tab 4



September 29, 1998

BY FAX TODAY TO 572-9259

FRANKLIN L. SLAUGH, P.C.
ATTORNEY AT LAW
880 EAST 9400 SOUTH, SUITE 103
SANDY, UTAH 84094

RE: John and June Collins v. Sandy City Corp.

Dear Frank:

In response to your inquiry about the City's position in respect to your clients' claim that they have a prior non-conforming use and should therefore be able to use their properties for short-term rentals, I believe that the principle of issue preclusion makes the decision in the district court lawsuit final with respect to Mr. Collins' properties, since it wasn't appealed. Please let me know if I misunderstand this, or if you know of any authority contrary to this position.

Anyone who believes he qualifies for short-term rental nonconforming use needs to show that the property at issue had residing there a tenant on a short-term lease of less than 30 days on March 31, 1998, the date that the City moratorium on short-term rentals became effective, pursuant to Section 15-24-2 of our Development Code, which provides that a nonconforming use may be continued if the use was lawfully existing at the time of the enactment or subsequent amendment of this Code. Submissions of evidence in support of a nonconforming use may be directed to the Director of Community Development.

Please let me know if you have any questions about this.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve C. Osborn", written over a horizontal line.

Steven C. Osborn
Assistant City Attorney

Tab 5



November 4, 1998

BY FACSIMILE TODAY TO 972-9259 AND U.S. MAIL

Franklin L. Slauch, P.C.
Attorney at Law
880 East 9400 South, Suite 103
Sandy, Utah 84094

RE: John and June Collins application for nonconforming use

Dear Frank:

I understand that your letter of application for a nonconforming use was recently received by the Board of Adjustment, and has been placed on the Board's agenda for Thursday, November 12, 1998. Although I haven't seen your letter to the Board, I understand it is very brief. I write to remind you that the party requesting a nonconforming use has the burden of demonstrating that he is entitled to such use by the submission of evidence, and where needed, citation of authority. A mere application without more seems unlikely to persuade the Board that a party is entitled to a determination that he qualifies for a nonconforming use. I am enclosing our ordinance on nonconforming uses, Chapter 15-24, Rev. Ord. of Sandy City for your review. Chapter 15-5 referred to herein deals with the Board of Adjustment.

Please let me know if you have any questions about this.

Sincerely,

Steven C. Osborn
Senior City Attorney

Enc.: Chapter 15-24, R.O.S.C. on nonconforming uses

cc: Brok Armantrout

Tab 6

NONCONFORMING USES & STRUCTURES

CHAPTER 15-24 NONCONFORMING USES AND STRUCTURES

- 15-24-1 Purpose of Nonconforming Use Provisions
- 15-24-2 Continuing Existing Uses
- 15-24-3 Construction Approved Prior to Ordinance
- 15-24-4 Nonconforming Uses, Substitution, Extension, Discontinuance, Etc.

15-24-1 Purpose Of Nonconforming Use Provisions

It is the purpose of these regulations to control and gradually eliminate those uses of land or buildings, which although legal at the time of their establishment, do not now conform to the use regulations of the district within which they are situated. Such uses shall be deemed nonconforming uses. Likewise, these regulations are intended to control and gradually eliminate buildings which, although legal at the time of their erection, do not now conform to the height, bulk, and location regulations of the zone district within which they are situated. Such buildings shall be deemed to be nonconforming buildings. Any building or use which was permitted prior to enactment of this Code, but which is designated by this Code as a conditional use, shall not be considered nonconforming and shall not be subject to the provisions of this Chapter. This Chapter is also established to control and gradually eliminate sites and lots which were legal at the time of their establishment, but no longer meet the regulations of the district within which they are located. Such sites and lots shall be designated as nonconforming sites and lots.

15-24-2 Continuing Existing Uses

Except as hereinafter specified, any use, building, or structure, lawfully existing at the time of the enactment or subsequent amendment of this Code, may be continued, even though such use, building, or structure does not conform with the provisions of this Code for the district in which it is located: Except as otherwise provided by law, nothing in this Code shall prevent the strengthening or restoring to a safe condition of any part of any building or structure declared unsafe by proper authority.

15-24-3 Construction Approved Prior To Ordinance

A building, structure, or part thereof which does not conform to the regulations of the district in which it is situated, but for which a building permit was legally issued and construction started prior to the enactment of this Code, may be completed in accordance with such plans providing work has progressed continuously and without delay. Such building or structure shall be deemed to be

nonconforming and shall be subject to the regulations set forth herein.

15-24-4 Nonconforming Uses, Substitution, Extension, Discontinuance, Etc.

Unless otherwise approved by the Board of Adjustment, a nonconforming use shall not be enlarged, extended, or changed unless the use is changed to a use permitted in the district in which it is located, and a nonconforming building shall not be reconstructed or structurally altered unless such alteration shall result in removing those conditions of the building which render it nonconforming, except as follows:

(a) Substitution or Extension.

(1) When authorized by the Board of Adjustment in accordance with this Code, a nonconforming use which is determined to be of a more desirable nature may be substituted for another nonconforming use or more closely meets the standards set forth in this code.

(2) Whenever a nonconforming use has been changed to a conforming use such use shall not thereafter be changed to a nonconforming use.

(3) Repairs and structural alterations may be made to a nonconforming building provided that the floor space of such building is not increased. (Refer also to requirements of Chapter 22, Site Plan Review.)

(4) A building or structure lacking sufficient automobile parking space in connection therewith as required by this ordinance may be altered or enlarged provided additional automobile parking space is supplied to meet the requirements of this ordinance for such alterations or enlargement.

(5) In the event a nonconforming building or structure is damaged or partially destroyed by calamity or act of nature to the extent of not more than one-half ($\frac{1}{2}$) of its market value, the occupancy or use of such building structure or part thereof which existed at the time of such partial destruction may be continued or resumed provided that restoration is started within a period of one year and is diligently pursued to completion. In the event such damage or destruction exceeds one-half ($\frac{1}{2}$) of its market value of such nonconforming building or structure, no repairs or reconstruction shall be made, except in the case of residences or accessory farm buildings, unless every portion of such building or structure is made to conform to all regulations for new buildings in the district in which it is located, as determined by

NONCONFORMING USES & STRUCTURES

the Chief Building Official, and other requirements as may be imposed at site plan review.

(6) Application for substitution, enlargement or extension of a nonconforming use as provided in this Section shall be made and considered in the manner set forth in Chapter 15-5, Board of Adjustment.

(7) A vacant building or structure may be occupied by a use for which the building or structure is designed or intended if so occupied within a period of one year after the use became nonconforming.

(b) Cessation of Use. A use shall be deemed to have ceased when it has been discontinued for a period of one year or more, whether or not the intent is to abandon said use.

(c) Nonconforming Lot. (See Section 15-5-3H)

Tab 7

**Board of Adjustment Minutes
November 12, 1998**

THOSE PRESENT: Larry Bowler, Chairman; Dave Evans, Allan Walsh, Bill Roskelley, Dave Winnie, Members; Mike Corrigan, Laurie Olsen, Alternate Members; Ken Reber, Planning Commission; Dennis Tenney, City Council; Steve Osborn, City Attorney's Office; Brok Armantrout, Lonnie Crowell, Planning Staff; Sandy Ferderber, Secretary

**1. Arnold Stringham Variance Request
1946 East Wasatch Boulevard**

BOA #98-36

Arnold & Martell Stringham, who own or control property located at 946 East Wasatch Boulevard, which is located in the R-1-12 zone, have filed a request with the Sandy City Board of Adjustment for a variance from Section 15-14-6(b)(1) of the Sandy City Development Code. The applicant is requesting to construct a new home upon a slope that exceeds 30%. Ordinance requires that all homes be constructed on slopes less than 30%. This is the last lot within the Hickory Valley Estates #1 Subdivision on Wasatch Boulevard to be built upon that backs onto the Hidden Valley Golf Course.

This item was withdrawn by the applicant and will not come before the Board again.

**2. John and June Collins Non-Conforming Use - Request to Establish Alleged Error Request
9255 South Maison Drive
1875 East Alla Panna Way
472 East 9400 South**

BOA #98-37

BOA #98-38

BOA #98-39

Franklin L. Slauch, 880 East 9400 South, Sandy, is the attorney for John and Joan Collins, who own or control properties located at 9255 South Maison Drive, 1875 East Alla Panna Way and 472 East 9400 South which are located in the standard R-1-(x) zones in Sandy City, filed a request with the Sandy City Board of Adjustment that non-conforming land use status be granted to the above properties to operate the land use defined as "Residential Lease, Short Term". The Revised Ordinances of Sandy City require all requests for determination of non-conforming status be reviewed by the Board of Adjustment. The land use "Residential Lease, Short Term", is also commonly referred to as "Ski Rental", which generally refers to the rental of residential properties for a short term that is less than thirty (30) consecutive days. In July 1996, John and Joan Collins filed an appeal to the Sandy City Board of Adjustment from a staff determination that they were not allowed to rent the above properties and a property located at 1456 East Longdale Drive, in Sandy, as rental units to the public on a nightly or weekly basis. The Sandy Board of Adjustment determined that the staff determination was not in error. The Collins appealed the decision to the Utah Third District Court for Salt Lake County. The court ruled in October, 1997, that the decision of the Board of Adjustment was not an error. The court's decision was not appealed.

Brok Armantrout, Zoning Administrator, presented the staff report. He noted that the applicant is

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requesting a determination that he has a legal right to use these properties for residential short term leases, sometimes referred to as "ski rentals". The legal standard that must be met in order for the properties to be used as ski rentals under Sandy ordinances is that the use must have been legally established and must have been in operation on the date that the use became illegal, and that the use must not have ceased for a period of one year or longer since the date the use became non-conforming. The date the use became illegal was March 27, 1998, confirmed on March 30 with a moratorium, and a subsequent code amendment on September 1, 1998.

Frank Slaugh, , stated that the properties in question had been used as "ski rentals" for some time leading up to a Cease and Desist Order served in March 1996. At that time, the Collins petitioned the Board of Adjustment which upheld the City's position. The Collins then petitioned the District Court, which upheld the Board of Adjustment decision. The Collins' position is that the Cease and Desist order was not lawful and that they were entitled to use the properties as short-term leases at that point in time, and feel that they cannot be legally penalized for having obeyed the Cease and Desist order. Therefore, they had a continuous prior existing use which meets the requirements of Section 15-24-2 of the Sandy Development Code, and feel the Board of Adjustment should allow the use to be grandfathered. Dave Winnie asked Steven Osborn, Senior City Attorney, if it was determined that the Cease and Desist order was unlawful. Mr. Osborn replied that the Court of Appeals had determined in the Brown case that the City's interpretation of its ordinances to prohibit leases of less than 30 days had been ruled unlawful, but the Third District Court decision upholding the Board of Adjustment decision in the Collins case was not appealed, and therefore, it was ruled proper and remains in effect against the Collins.

Mr. Winnie asked if the Brown case set a precedent in the Collins case or if they were separate issues. Mr. Osborn stated that they are the same issue but are separate parties and each party is bound by a final decision of the court. Mr. Slaugh stated that the Court of Appeals decision invalidated Sandy City's interpretation of the ordinance which would apply to the Collins as well as to anyone else--the decision is not limited to the parties in that case. He said his clients are included in the Brown decision. Dave Evans asked Mr. Slaugh when the Collins ceased using the property as a nightly rental. Mr. Slaugh replied it was March 1996 when they were served with a Cease and Desist order. Mr. Evans asked when the Court of Appeals overturned the Third District Court decision in the Brown case. Mr. Slaugh replied that the date was March 26, 1998. Mr. Evans asked when the moratorium date [on rentals of single family homes for periods of less than 30 days] was imposed. That date was March 27, 1998. Mr. Slaugh stated that their position is that this was a valid, prior existing use and that, had it not been for the Cease and Desist order, his client would have continued using the properties as short-term rentals through that date. Mr. Evans asked that since the Collins felt they had a legal right to use the properties as nightly rentals, what steps were taken after the Third District Court decision to enforce that right. Mr. Slaugh replied that they did not file a separate appeal, but elected to wait for the outcome of the Brown appeal, which they felt should also cover the Collins case.

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Allan Walsh asked Mr. Slauch why he had not appealed the District Court's decision. Mr. Slauch stated that he did not appeal since the Brown decision involved the same issues and felt it should cover the Collins case also. There was no point in spending more attorneys fees; the issue was already framed. The Browns had preceded the Collins to the Board of Adjustment. The Collins therefore simply waited for the *Brown* case to be decided. Mr. Walsh asked for a clarification as to when the moratorium was placed. Mr. Armantrout explained that the effective date was actually the day of posting, which was March 27, but the actual Council meeting was March 31. Based on the publication of the agenda, the effective date of the moratorium was retroactive to March 27 under the pending ordinance doctrine. Dave Evans asked what the City's experience had been with a cease and desist order when there is a pending court decision. Mr. Armantrout stated that it would depend on the situation. If there is imminent danger to life, safety or welfare, the City would proceed with prosecution; if it were an issue of no danger, the City would probably hold off on prosecuting. This is the decision of the City prosecutor. Mr. Slauch stated that his client is a licensed realtor and that there could be problems with his license if he violated the law regarding the cease and desist order.

For this reason, he did not violate the order and, therefore, was not renting the homes when the moratorium was put in place, and feels this qualifies him for a legal non-conforming status. He said that he had not filed a petition to hold off on the enforcement of the cease and desist order, but believed, based on conversations with City staff, that it would not have been agreeable to the City to hold off on enforcement. He said his client claims he was legally nonconforming because he was following the law.

Dana Byerly, 1889 East Alla Panna Way, lives directly east of Mr. Collins rental property on Alla Panna Way. Mr. Byerly is a licensed realtor who had just purchased his home in July of 1997 and stated that he met Mr. Collins when he first moved in. Mr. Collins was moving out and Mr. Byerly asked who would be moving into the home. Mr. Collins told him that a couple would be moving in. There were actually four couples who moved into the home. The first week they moved into the home, there was an extremely noisy party on a Wednesday night, which continued until about 5:00 a.m. the next morning and kept the Byerly's awake most of the night with the sound of the subwoofers, which made it difficult for them to get up and go to work the next morning. There is a hot tub in the back yard which was full of young people with a lot of beer, screaming, hollering, and laughing. Mr. Byerly noted that this type of activity happened every Wednesday night. He did not want to be a bad neighbor, and it was hard to contact the renters, but he told the renters that if this type of activity persisted, he would be forced to call the police.

Mr. Byerly stated that the problem next door was that the occupants of the home changed regularly with a constant influx of different individuals living there on nightly rentals. There were a lot of laws being broken-- a lot of under-age children drinking, a lot of people breaking curfew, a lot of noise, and obnoxious behavior. It was difficult for Mr. Byerly to not let his son see what was going on in the hot tub, which was quite provocative. New tenants moved in about three weeks ago. There was a hot tub party the very first night they moved in, and has been one about every other night since then. There are a lot of cars - sometimes ten cars on their narrow street - when there is a hot tub

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party and a lot of noise late into the night. The people who are in the home are there temporarily and are there to party. They are there to ski and party and don't care about the neighborhood. The boom boxes are turned up to full volume. Mr. Byerly said he liked his peace and serenity. This is a party house to them, he added: an animal house. He added that his neighbors across the street have children under five years of age. He said he was worried about allowing the continued short-term rentals because of the thefts, vandalism, etc.; these homes are like motels - or brothels, he said. The neighborhood, Montana Ranchos No. 2 subdivision, has active restrictive covenants which went into effect April 2, 1979, which prohibit noxious activities or nuisances. He stated that Mr. Collins is well aware of the covenants, but has opposed them on a number of occasions. When approached regarding the problems of the rental home, Mr. Collins has stated he would sue rather than comply with the restrictive covenants. Mr. Byerly stated that if nightly rentals are allowed to continue, the permanent residents of the neighborhood will totally lose control over who comes and goes in the neighborhood.

Larry Bowler asked Mr. Byerly if he had any documentation substantiating dates and times of when and how long the homes was rented. Mr. Byerly did not have any documentation, but would be willing to talk to some of the renters and get some documentation. They did not contact the police so they did not have any police documentation. Steve Osborn asked Mr. Byerly when they moved into the home. Mr. Byerly stated they moved in on June 20, 1997. Mr. Osborn asked if anyone lived in the home next to him when they moved in. Mr. Byerly stated that Mr. Collins lived there until November of 1997. Since that time, the home has always been rented out. Mr. Byerly stated that they felt they had been lied to by Mr. Collins since he told the Byerlys a couple was moving into the home. There was actually a number of young men who moved in the same day Mr. Collins moved out, and the girlfriends of the young men came and went. Some of the young men were there for a year, but many moved in and out. Mr. Byerly stated that there were possibly as many as eight different renters in and out of the home through the year, both unmarried young men and women. He said most of the time there were from two to ten people living there, adding that the rentals were very transient. Mr. Byerly read Part B from their restrictive covenants which stated that "no lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached, single family dwelling not to exceed two stories in height, private garage and carport, for no more than three vehicles. All construction to be up to new materials and approved by the Architectural Control Committee." There were more than three vehicles and it was not a single family residential use. Mr. Byerly also read from Section 7 regarding nuisances. "No noxious or offensive activity shall be carried out upon any lot nor shall anything be done thereon which may be or may become an annoyance or a nuisance to the neighbors". Mr. Byerly said that John Collins had sued to enforce the restrictive covenants for that subdivision previously. Frank Slaugh said he was not prepared to meet the issue of the violations of the restrictive covenants. He said he doubted that this was something that the Board of Adjustment should hear in the first instance; rather, that the Third District Court has jurisdiction over that. He suggested a fact finding inquiry before the matter was decided. Mr. Byerly stated that when his son is watching nude women in the hot tub, he considers it an annoyance. The hot tub is not enclosed

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and is clearly visible from Mr. Byerly's yard. There is no fence blocking the view of the hot tub from Byerly's home. The hot tub is about 60 feet from the Byerly home. He said nude men and women often are visible sitting on the edge of the hot tub, or walking from the hot tub to the back door of the home at night. He also noted that the area was lit.

Larry Bowler agreed that the noise, nudity and partying would be very offensive, but asked Mr. Osborn if this would have any bearing on the Board's decision since they were to determine whether or not the homes were legally non-conforming. Mr. Osborn stated that they are not retrying the issue as to whether or not nightly rentals were in violations of ordinance at the time, but the issue Mr. Byerly has raised is that of private covenants, so the Board needs to determine if the covenants were in effect at the time up until March 1998, and if the private covenants were violated. If they were, Mr. Collins cannot establish a non-conforming use, at least not on this particular property on Alla Panna Way. Allan Walsh asked if it is the responsibility of the Board to determine violation of restrictive covenants or whether this was an issue which should go to a court and the Board would then use the court's decision to determine a legal non-conforming use. Mr. Osborn was not certain, but felt that if it were clear that there is violation of the ordinance, the Board probably could make a determination. City Councilman Dennis Tenney stated that his understanding is that the City respects and upholds a neighborhood's restrictive covenants and asked if his understanding was correct. Mr. Armantrout stated that the City respects the covenants, but is not bound by law to enforce them. Mr. Tenney stated that, in his opinion, since the City respects the covenants, the Board would have the right to determine a legal non-conforming use based on violation of those covenants. Discussion followed as to whether violation of restrictive covenants could influence the Board's decision on whether or not the properties were legal non-conforming. Mr. Osborn stated that he was not sure, but felt that the Board would not have to wait for a court decision to make that determination. He noted that if the Board had a court decision, it would be easy for the Board to make a determination, but in the absence of such, he felt the Board could use evidence regarding violation of the covenants and make their decision.

Steve Osborn asked Mr. Byerly for further details about the nuisances. Mr. Byerly stated that they observed nudity and were disturbed by loud noise, loud and vulgar language with frequent use of four-letter obscenities with frequent use of the "f__k" word, which could be heard through closed windows from 10:00 p.m. until about 4:00 in the morning. They could also hear loud music from cars coming and going to the property. There was also loud music coming from the rental home. Mr. Byerly finally went over and told the people they would call the police if the noise didn't stop. Mr. Osborn asked about any other nuisances from the property. Mr. Byerly stated that there is a quarter of an acre back lot which has never been maintained by Mr. Collins. He stated that the only time it was cleaned was when he took his tractor over and cut the weeds because he was afraid of fire. The weeds were thick and about three feet high in the back yard. The yard was never mowed. Finally, Byerly had his son mow the lawn. There is also a broken fence which has never been maintained. Mr. Byerly stated that there were about 200 quaking aspen shoots grew up to five feet tall in the front yard, and the grass in the front yard grew to six or eight inches before matting over

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and dying. The grass along the fence in the front yard was about one and a half feet tall. The yard was not watered. Much of the lawn turned brown, and never looked good. There was a constant worry about fire in the weeds, which could then spread to his wood shed, which sits near the property line near the rental property. All of this is a violation of the covenants. Mr. Buyerly said that last night there was another hot tub party that continued until 1:00 a.m. There were ten cars parked at the house.

Paul Harris, 9225 South Maison, lives next to another of the subject houses owned by Mr. Collins. He has lived in his home continuously since Mr. Collins owned the property. To his knowledge, the renters in the house had longer leases, possibly nine months to a year. If there was ever a problem with the renters and they contacted Mr. Collins, he would not address the problem. Another problem they have is that there are high weeds in the back of the house and next to their property which have never been cut. Mr. Harris noted that when looking at a travel magazine, he noticed an ad about ski houses. When they called about the ad, the phone was answered as "Collins Rental". They called about the ad because they had heard rumors that Mr. Collins was going to rent the house as a ski rental. Mr. Harris stated that they have not had as many problems as the Byerlys have, but felt the potential is there for the same type of problems if the house is used as a ski rental. He said the dogs kept at the property were vicious, were constantly out of the yard, and were terrorized him and his wife. When his wife spoke to the renter, the tenant refused to do anything about the problem. The people in the home have also allegedly been using drugs. The property on Maison is in the same subdivision as the property on Alla Panna and is governed by the same restrictive covenants.

Mr. Slaugh stated that he did not expect the meeting to go as late as it was and apologized that he had to leave for another appointment. Dave Evans commented, for the record, that even if Mr. Slaugh were to leave the meeting, a decision would most likely be made. Mr. Slaugh understood this but had to leave.

Craig Zimmerman, 1876 East Alla Panna Way, lives directly across from Mr. Collins' property on Alla Panna Way. He has six children ranging in age from six to seventeen, and his concern is for the safety of his children since short-term renters do not know who to look for. Steve Osborn asked if he had been kept awake by loud parties. Mr. Zimmerman stated that people were in and out of the house at all hours of the night; they party; and, but he was concerned with the traffic - there are speeding cars.

J. R. Johnson, 1874 Arlen Way, lives north of Mr. Collins property on Alla Panna Way. He stated that he has no problem with the property being rented on a long-term basis, but does not want to see nightly, weekly or monthly rentals which would be totally out of line in a residential neighborhood. Mr. Johnson stated that the lawn was not cared for and the weeds in both of Mr. Collins properties are extremely high. He said Dana Byerly had cut down the weeds because they were a fire hazard.

Dave Evans made a motion that the subject properties do not qualify as legal non-conforming

for the following reasons:

1. It has not been legally established that there were nightly rentals at the subject properties on March 27, 1998, the date on which a moratorium was placed by Sandy City;
2. The applicant already presented to this Board whether or not these properties would qualify for nightly rentals and the Board determined that they did not. That decision was upheld by the Third District Court, and the applicant did not appeal that decision;
3. The applicant also did not seek a stay of the Cease and Desist Order which they claim deprived them of their alleged legal right to have nightly rentals;
4. The counsel that the Board is receiving from their legal counsel is that the *Brown* reversal by the Appellant Court has no bearing on the Collins case and that the applicant does not have the right to dove-tail his case on the appeal of the *Brown* case and reap benefits from such;
5. The Cease and Desist letter does not deny the applicant anything nor does it treat the applicant differently than any other Sandy City resident;
6. In order to grant a legal non-conforming use, the use must be legal at the time the moratorium was put in place, and because of the many complaints of neighbors, the Board has strong reason to believe the use may not be legal;
7. The property was not in operation as a rental of less than 30 days on March 27, 1998.
8. Short-term rentals of the properties ceased for more than a year in any case.

Mr. Evans added that the applicant left the meeting early and by doing so waived his right to present any evidence to rebut.

Bill Roskelley seconded the motion. Steve Osborn stated that it might be better to frame a motion simply on the issue of whether or not the Board believes the applicant qualified for non-conforming use and that findings may not be appropriate for the motion. The motion and second were withdrawn.

Dave Evans made a motion that, based on evidence presented at this meeting, the subject properties are not legal non-conforming uses as short-term rentals since they were not rented on March 27, 1998 and. Mr. Evans also requested that Steve Osborn prepare findings of fact. Dave Winnie seconded the motion. The vote was as follows: Dave Evans, yes; Dave Winnie, yes; Bill Roskelley, yes; Allan Walsh, no; Larry Bowler, yes. Motion passed 4-1.

Allan Walsh explained that even though he does not like the concept of ski rental homes in Sandy, his concern was that the Board was sending a message that a citizen could be legal by not obeying a Cease and Desist order, and also that he does not believe the Board has the jurisdiction to decide whether or not private covenants have been violated. He would have preferred to wait to decide the case.

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Dave Winney commented that the Applicant could have appealed the decision of the Third District Court but didn't for monetary reasons.

Dennis Tenney of the City Council said that he is deeply concerned about these properties.

3. M & M Meats Special Exception Request
9247 South State Street

BOA #98-42

Richard Rose, who is an authorized representative for M & M Meats, who owns or controls property located at 9247 South State Street, which is located in the RC zone, has filed a request with the Sandy City Board of Adjustment for a special exception, as permitted under Section §15-24-4(a)(1) of the Sandy City Development Code. The applicant is requesting to reconstruct and relocate an existing non-conforming pylon sign. To expand or modify the legal non-conforming (grandfathered) sign and replace it with a substitute sign that is more conforming, the applicant is required to obtain a special exception. The sign is legal non-conforming because it is a pole sign. Ordinance limits all signs for similarly situated businesses to be a low-profile (monument) sign with a maximum height of six (6) feet. If the request is granted, the sign will be relocated to the north end of the lot, have a substantial pole cover, and an upgraded cabinet. The overall size or height of the sign will not increase.

Brok Armantrout presented the staff report. Allan Walsh stated that he understood the City's desire to move away from monument signs, but asked if the City would be amenable to a cabinet sign with changeable copy. Mr. Armantrout stated that a variance would be required to have changeable copy mounted to the wall, and that this would be a viable option. Dave Evans asked if a decision for changeable copy could be made at this meeting. Mr. Armantrout stated that the request was noticed for relocation of a pylon sign, so this item would need to be re-noticed. Mr. Walsh asked if the fee could be waived if the item needed to be tabled. Mr. Evans asked if it were true that the front portion of the property had been taken when State Street was widened. Mr. Armantrout stated that it was, but that it was at least ten years ago or more. Larry Bowler asked if a cabinet sign could be placed on both the north and south sides of the building since the applicant was concerned about visibility of the sign to northbound traffic. Mr. Armantrout replied that it could.

Robert Jensen, co-owner of M & M, stated that because of all the trees growing along the canal, no one can see the building until they are on top of the building. He noted that Mr. Armantrout suggested moving the fence, but they can't do that without considerable cost. They also need the turning space for large trucks coming into the store, and moving the fence would reduce the employee parking in order to allow enough room for the trucks. If they were to mount signs on the building, the cost would be doubled. They have been mostly a restaurant supplier, but they are going to appeal more to the general public and would like to be more visible for them. The existing sign looks terrible and they realize they need to make it look better. Larry Bowler asked if any attempt had been made to contact the canal company and have them prune the trees so the building would