

1999

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

Utah Court of Appeals

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Franklin L. Slauch; Attorney for Appellants.

Steven C. Osborn; Attorney for Appellees.

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IN THE UTAH COURT OF APPEALS

Appeal No. 991068-CA

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JOHN COLLINS AND JUNE COLLINS,

Petitioners and Appellants,

v.

THE SANDY CITY BOARD OF ADJUSTMENT AND  
SANDY CITY CORPORATION, A MUNICIPAL CORPORATION,

Respondents and Appellees

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**BRIEF OF APPELLANTS**

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Appeal from a final order of the Third Judicial  
District Court for Salt Lake County, Judge Timothy R. Hanson

District No. 980912601

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Oral Argument Priority Classification No. 10

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Steven C. Osborn  
10000 Centennial Parkway  
Sandy, Utah 84070  
Attorney for Respondents  
Tel. (801) 568-7170

Franklin L. Slauch  
880 East 9400 South, Suite 103  
Sandy, Utah 84094  
Attorney for Appellants  
Tel. (801) 572-4412

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## **JURISDICTION**

This appeal is an appeal from the district court review of an adjudicative proceeding of a political subdivision of the state and the Court of Appeals has appellate jurisdiction pursuant to Utah Code Ann. §78-2a-3(b)(1).

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Is the 1996 District Court case *res judicata* with respect to the issues presented in the 1998 District Court case brought by the Petitioners against the Respondent?

**Standard of Review:** This issue presents a question of law, and is therefore reviewable for correction of error. *Winegar v. Froerer Corp.*, 813 P. 2d 104, 107-08 (Utah 1991).

This issue was preserved for appeal in the memoranda and argument presented at the hearing of the cross motions for summary judgment (R. 17-139; 142-246; 247-257; 258-281 ).

2. Are the Petitioners entitled to non-conforming use status with respect to their real properties utilized as short-term rentals prior to the issuance of a cease and desist order by the Respondent Sandy City Corporation in 1996?

**Standard of Review:** This is a challenge to a summary judgment presenting for review conclusions of law only and the appellate court reviews those conclusions for correctness, without according deference to the trial court's legal conclusions.

*Bonham v. Morgan*, 788 P. 2d 497 (Utah 1989).

This issue was preserved for appeal in the memoranda and argument presented at the hearing of the cross motions for summary judgment. (R. 17-139; 142-246; 247-257; 258-281 ).

### **DETERMINATIVE PROVISIONS OF LAW**

The following provisions of law may be determinative of the issues herein, and are set out in their entirety in the addendum:

Chapter 15-24 Sandy City Development Code

### **STATEMENT OF THE CASE**

This is an action by John Collins and June Collins against the Sandy City Board of Adjustment and Sandy City Corporation for review of a decision by the Sandy City Board of Adjustment denying non-conforming use status for certain real properties located in Sandy City owned by John and June Collins that had been utilized as short-term rentals prior to the enactment by Sandy City of an ordinance prohibiting such short-term rentals.

On October 27, 1998 the Petitioners John and June Collins filed an application for non-conforming use status with the Sandy City Board of Adjustment. This application was denied on November 12, 1998. The Petitioners filed a Petition for Review on December 11, 1998. (R. 1-6) Cross motions for summary judgment were subsequently filed (R. 15-16; 140-141) and the Motions were argued on August 16, 1999. (R. 431 )



The District Court granted the Respondent's Motion for Summary Judgment and denied the Petitioners' Motion. (R. 446-448; Add. 1-3 ) Petitioners filed this appeal on December 16, 1999. (R. 449-450 ).

### **STATEMENT OF FACTS**

Petitioners are the owners of certain real properties located within the boundaries of Sandy City. For a lengthy period of time prior to March, 1996, the Petitioners utilized the properties as short-term rental properties, sometimes referred to as "ski rentals". In March, 1996 the respondent Sandy City Corporation issued a cease and desist order requiring the petitioners to cease using the properties for that purpose. (R. 28 ) Sandy City did not at that time pass an ordinance prohibiting short-term rentals but relied instead on the existing ordinance, arguing that such use was already prohibited.

The Petitioners filed an appeal to the respondent Sandy City Board of Adjustment in 1996, which upheld Sandy City's interpretation of the Sandy zoning ordinances to preclude such use by the petitioners. Petitioners appealed that decision to the Third District Court and the District Court upheld the decision of the Sandy City Board of Adjustment. [Third District Court Case No. 960905929CV] (R. 210 )

On March 26, 1998 the Utah Court of Appeals rendered a decision in a case involving precisely the same issues as those presented by the Petitioners herein in the above-referenced 1996 case which was pending at the same time as the petitioners' case, in *Brown, et. al. vs. Sandy City Board of Adjustment; and Sandy, a political subdivision of Utah*, 957 P. 2d 207 (Utah App. 1998). That case, decided March 26, 1998, held that

Sandy City's interpretation of the Sandy City Development Code to prohibit leases of less than thirty days in residential zones was not a correct interpretation, i.e., Sandy City had no valid ordinance prohibiting short-term leases in Sandy City. The respondent Sandy City then imposed a temporary moratorium on short-term rentals effective March 27, 1998 and subsequently enacted ordinances prohibiting short-term leases. (R. 36-45)

On or about October 27, 1998, the petitioners filed an application for determination of non-conforming status on their properties with the Sandy City Board of Adjustment. (R. 50) That application was heard by the Board on November 12, 1998. The Sandy City Board of Adjustment denied the petitioners' application for determination of non-conforming use status on the petitioners' properties, apparently relying on the 1996 District Court decision which denied the Motion for Summary Judgment filed by John and June Collins and granted the Motion for Summary Judgment filed by Sandy City Corporation. (R. 446-448) Petitioners filed a Petition for Review of that decision in Case No. 980912601 in the Third District Court. On cross motions for summary judgment the District Court ruled that because the Petitioners/Appellants had not appealed the prior order in Third District Court Case No. 960905929CV, that case was *res judicata* in the present case (Case No. 980912601) and precluded the Petitioners/Appellants from obtaining non-conforming use status on the subject properties. The District Court further ruled that the Petitioners had not demonstrated that they were in fact using the

subject properties as short-term rentals on the date that Sandy City enacted its ordinance prohibiting such use. (R 446-448; Add. 1-3 ).

### **SUMMARY OF ARGUMENT**

1. The decision of the District Court in the 1996 case does not constitute a bar under principles of *res judicata* with respect to the Petitioners' application for non-conforming use status because the issues involved in the 1996 case and the 1998 case are not identical, and there was an intervening change in the law that occurred when the Court of Appeals decided *Brown, et. al. vs. Sandy City Board of Adjustment; and Sandy, a political subdivision of Utah*, 957 P. 2d 207 (Utah App. 1998). This case became the controlling law of the case and effectively established that Sandy City Corporation had no valid ordinance prohibiting short-term rental properties when it issued a cease and desist order requiring the Petitioners to terminate using their real properties located in Sandy City for such purpose.

2. The Petitioners are entitled to non-conforming use status for the properties owned by them in Sandy City and used as short-term rentals prior to the date of the cease and desist order issued by Sandy City Corporation, regardless of the fact that they were not using those properties as short-term rentals on the date Sandy City enacted a moratorium or ordinance prohibiting such use. Mr. and Mrs. Collins complied with the cease and desist order in good faith and should not be penalized for not violating that order.

## **ARGUMENT**

A summary judgment may be affirmed only when there is no genuine issue of material fact and the prevailing party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). In reviewing the judgment, this Court must “accept the facts and inferences in the light most favorable to the losing party” and “may reconsider the trial court’s legal conclusions.” *Winegar v. Froerer Corp.*, 813 P.2d 104, 107 (Utah 1991).

### **POINT I: THE DECISION OF THE DISTRICT COURT IN THE 1996 CASE IS NOT *RES JUDICATA* WITH RESPECT TO THE ISSUES RAISED IN THE PETITIONERS’ 1998 DISTRICT COURT CASE.**

#### **A. The Issues in the 1996 Case and the 1998 Case Are Not Identical.**

The doctrine of *res judicata* embraces both the law of claim preclusion and the doctrine of collateral estoppel or “issue preclusion.” *In re Rights to Use of All Water*, 982 P. 2d 65 (Utah 1999); *Madsen vs. Borthick*, 769 P. 2d 245, 247 (Utah 1988). A party invoking the doctrine of collateral estoppel or issue preclusion must demonstrate that the issue involved is identical to the issue decided in a previous action, that the issue was decided in final judgment on the merits, that the issue was competently, fully, and fairly litigated in the first action, and that the party against whom the doctrine is invoked was either a party to the first action or in privity with a party to the first action. *Hill v. Seattle First Nat. Bank*, 827 P. 2d 241 (Utah 1992). If any one of these requirements is not satisfied, there can be no issue preclusion. *Baxter v. Department of Transp.*, 705 P.2d 1167,1168 (Utah 1985); *Wilde v. Mid-Century Ins. Co.*, 635 P. 2d 417,419 (Utah 1981).

In the instant case, while the latter three requirements are met, the issue is not precisely the same as the issue in the 1996 case. In the 1996 case, the issue was whether or not the Sandy City ordinances, as then constituted, prohibited leases of dwellings within the boundaries of Sandy City for terms of less than thirty days. In the 1998 case, the issue presented was whether the Petitioners were entitled to recognition of non-conforming use status of their properties, based upon the fact that Petitioners were in fact utilizing their properties as “ski rentals” prior to the enactment of the Sandy City ordinance in March, 1998. These are not identical issues and principles of issue preclusion do not apply.

**B. The Doctrine of Collateral Estoppel Does Not Apply in This Case.**

Even if the Court were to apply the principles of collateral estoppel or issue preclusion to this case, examination of the issue does not end with the analysis set forth in *Hill v. Seattle First Nat. Bank*, *supra*. In the case of *Norman v. Murray First Thrift & Loan Company*, 596 P. 2d 1028 (Utah 1979), the Utah Supreme Court stated:

“To determine whether it is appropriate to apply collateral estoppel necessitates three further inquiries: First, whether the issues presented in the current litigation are in substance the same as resolved in the prior litigation; second, *whether the controlling facts or legal principles have changed significantly since the prior judgment* [emphasis added]; third, whether other special circumstances warrant an exception to the normal rules of preclusion.” At 1032.

The analysis enunciated in *Norman v. Murray First Thrift & Loan Company*, *supra*, follows the general rule in the United States. In *State Farm Mut. Auto Ins. Co. v. Duel*, 324 U.S. 154 (1945), the U.S. Supreme Court stated, “...[I]t is ...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 a change in the law creating an altered situation. 2 *Freeman on Judgments* (5<sup>th</sup> ed. 1925).” At 162. Where the facts or the law have substantially changed between the first judgment and the second judgment, collateral estoppel is inapplicable. *Statler v. Catalano*, 293 Ill. App. 3d 483, 691 N.E.2d 384 (Ill. App. 1997); *Community Hospital vs. Sullivan*, 986 F. 2d 357, 360 (10<sup>th</sup> Cir. 1993); *Board of Education vs. Village of Northbrook*, 692 N.E. 2d 1278 (Ill. App. 1 Dist. 1998); *Farrow vs. Brown*, 873 S.W. 2d 918 (Mo. App. 1994).

The Respondent maintains that because the Third District Court in the 1996 case granted summary judgment for Sandy City against John and June Collins, essentially ruling that there was no issue as to any material fact and that Sandy City’s zoning ordinances, as then written, prohibited the leasing of property for terms less than thirty days, as argued and advanced by Sandy City, that this precludes the Petitioners from making application for non-conforming use status, notwithstanding the fact that the Utah Court of Appeals ruled in *Brown, et. al. vs. Sandy City Board of Adjustment; and Sandy, a political subdivision of Utah*, 957 P. 2d 207 (Utah App. 1998) that Sandy City’s interpretation of the Sandy City Development Code to prohibit leases of less than thirty days in residential zones was erroneous and not a correct interpretation of that Code. What *Brown* effectively held was that Sandy City had no ordinance in effect that prohibited short-term leases, and that, therefore, such leases were a valid use.

Taking the Respondent’s position to its logical conclusion, this would mean that the ordinances in question in the *Brown* case and in Petitioners’ 1996 case could

not be relied upon by Sandy City to preclude any other property owner in Sandy City from leasing their property for less than thirty days ( prior to the enactment of a legal ordinance prohibiting such leases), except the Petitioners in this case, because Mr. and Mrs. Collins chose to await the outcome of the *Brown* case, supra, rather than to appeal. This is an illogical and incongruous result, and is not supported by the case law. In *Heslop v. Bank of Utah*, 839 P.2d 828 (Utah 1992), the Court stated:

“In the vast majority of cases, the stated law of a decision is effective both prospectively and retrospectively, even a decision which overrules prior law.” At 835.

In the instant case, a change in the intervening case law altered the situation between the time of the first suit by petitioners in 1996 and the present case, undertaken in 1998. *Brown*, supra, held that Sandy City could not prohibit short term rentals pursuant to general language in its then existing development code regarding the use of single family dwellings in residential zones in the city of Sandy. This altered the law with respect to John and June Collins as well as any other property owner living within the limits of Sandy City. In response to the decision in *Brown*, supra, Sandy City passed a moratorium on short-term leases and ultimately passed an ordinance prohibiting such leases within Sandy City. However, John and June Collins were legally entitled to use their properties as short-term rentals prior to the passing of that ordinance and that was the basis for their application for non-conforming use status in November, 1998.

**POINT II: THE PETITIONERS ARE ENTITLED TO A GRANT OF NON-CONFORMING USE STATUS FOR THEIR PROPERTIES USED AS SHORT-TERM RENTALS PRIOR TO THE ISSUANCE OF THE CEASE AND DESIST ORDER ISSUED BY RESPONDENT IN MARCH OF 1996.**

**A. The Petitioners Were Using Their Properties for a Valid Use at the Time They Were Ordered to Discontinue Such Use by Sandy City.**

A nonconforming land use is commonly defined as a lawful use maintained after the effective date of a zoning ordinance prohibiting such use in the applicable district. See 1 R. Anderson, *American Law of Zoning 3d*, §6.01, at 446-447 n. 2 (1986). The doctrine of vested nonconforming uses is based on the reluctance of courts to apply zoning ordinances retroactively, thus destroying vested property rights. *Rotter v. Coconino County*, 818 P. 2d 704 (Ariz. 1991). Any ordinance that eliminates nonconforming uses solely by virtue of its enactment is generally held unconstitutional as a taking of property without due process of law. *O'Connor v. City of Moscow*, 202 P. 2d 401, 403-04 (Idaho 1949); *Bergford v. Clackamas County*, 515 P. 2d 1345, 1347 (Or. App. 1973); *Allen v. City of Corpus Christi*, 247 S.W. 2d 130 (Tex. Civ. App. 1952 ). Because zoning ordinances “are in derogation of a property owner’s common law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner.” *Brown v. Sandy City Board of Adjustment*, 957 P. 2d 207, 210 (Utah App. 1998) (*quoting Patterson v. Utah County Board of Adjustment*, 893 P. 2d 602, 606 (Utah App. 1995)). Further, the



right of a property owner to the continued existence of uses and structures which lawfully existed prior to the effective date of a zoning restriction is grounded in constitutional law. 8A McQuillin Municipal Corporations Sec. 25.180-25-180.20, at 8-9 (3d ed. 1994) The Fifth Amendment of the United States Constitution and Article I Section 7 of the Constitution of Utah provide that no person shall be deprived of life, liberty or property without due process of law. Therefore, due process principles protect a property owner from having his or her vested property rights interfered with, and preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate. 8A McQuillan Municipal Corporations Sec 15.180.20, at 10.

As a general rule, a landowner acquires no advantage from a nonconforming use previously enjoyed where it appears that such use was surreptitiously and fraudulently effected, or was unlawful at the time the zoning regulation took effect. *Prospect Gardens Convalescent Home, Inc. v. City of Norwalk*, 347 A. 2d 637 (Conn. 1975 ); *Dalton v. Van Dien*, 339 N.Y.S. 2d 378 (N.Y. 1972 ). However, violations of law committed by patrons of the landowner are not chargeable to him or to his use of the land. *Ratcliffe v. Morrison*, 123 N.Y.S. 2d 831 (1952, Sup.).

Technical irregularities or violations of non-land use related ordinances are irrelevant to the question of whether a property should be accorded nonconforming use status. *Hugoe vs. Woods Cross City*, 379 Utah Adv. Rep. 15 (Utah App. 1999); *Waikiki Marketplace Investment Company vs. Zoning Board of Appeals of the City and County of Honolulu*, 949 P. 2d 183 (Hawaii App. 1997); *Mellow v. Board of Adjustment*, 565 A. 2d

947 (Del. Super. Ct. 1988), *aff'd* 567 A. 2d 422 (Del. Supr. Ct. 1989); *City of Middlesboro Planning Com'n vs. Howard*, 551 S.W. 2d 556 (Ky. 1977). “Lawful use refers to compliance with previous zoning laws, not to the building codes or other legal requirements.” *Waikiki Marketplace Investment Company, supra*, at p. 196.

In March, 1996 the Petitioners owned and were using their properties located at 9255 South Maison Drive, 1875 East Alla Panna Way, 472 East 9400 South and 1456 East Longdale Drive, in Sandy City, as short-term rentals (rentals for periods of time less than thirty days). The Petitioners discontinued using these properties for that purpose only because they were served with a Cease and Desist Order on March 26, 1996. (R. 28)

Even though the Cease and Desist Order only purported to prohibit the use of three of the above-described properties (9255 South Maison Drive was not included in the Order), the Sandy City Board of Adjustment considered all of the properties when the issue was brought before it and its ruling was clearly intended to apply to all of the properties. (R. 269)

The issue in the 1996 Board of Adjustment hearing was the *admitted* use by the Petitioners of the above-described properties as short-term rentals. Mr. and Mrs. Collins did not assert that they were not in fact using the properties for that purpose. Sandy City had made it very clear to Mr. and Mrs. Collins that such use would not be permitted in Sandy City. (R. 269) Now, however, Sandy City seeks to assert that Mr. and Mrs. Collins are precluded from asserting a valid non-conforming use for their properties because they were not actually using the properties as short-term rentals in

1998 when, following the decision of the Utah Court of Appeals in *Brown*, supra, Sandy City enacted a moratorium prohibiting short-term rental properties in R-1 zones in Sandy City.

**B. The Petitioners Are Not Required to Show That They Were Actually Using Their Properties as Short-Term Rentals on the Date That Sandy City Enacted an Ordinance Prohibiting Such Use.**

Section 15-24-2 of the Sandy City Development Code (Add. 4 -5) provides in pertinent part that:

“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.” . . .

The foregoing section of the Sandy City Development Code is in conformity with the Utah Code sec. 10-9-408 (1996) which declares that “a nonconforming use or structure may be continued.”

It is undisputed that the Petitioners, John Collins and June Collins, 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. As a general rule, cessation of a prior non-conforming use due to circumstances beyond the control of the property owner does not operate as discontinuance or abandonment of such nonconforming use. See e.g., *Ocean Beach vs. Stein*, 488 N.Y.S. 2d 239 (N.Y. App. Div. 1985); *Andrew vs. King County*, 586 P. 2d 509 (Wash. App. 1978); *King County vs. High*, 219 P. 2d 118 (Wash. 1950). These cases hold that unauthorized conduct by a municipality or regulations temporarily preventing the particular use cannot be

construed as an abandonment of the use by the owner. Whether a party discontinues or abandons a particular use depends upon the intention of the party affected. *King County vs. High*, at 119.

Sandy City cannot arguably require a property owner to break the law in order to establish a nonconforming use. In fact, the ordinance itself (Sec. 15-24-2) provides that in order to establish a nonconforming use, the use *cannot* be illegal. (Add. 4 -5 ) The Plaintiffs in this case were clearly entitled to cease using the properties, as ordered, until the law was clarified by judicial process. The Petitioners' use of their properties (as alleged by Sandy City and as admitted by John and June Collins in 1996) as short-term rentals prior to the issuance of the Cease and Desist Order by Sandy City in March, 1996 is sufficient to establish the uses as valid, nonconforming uses. *Warner vs. Clackamas County*, 824 P. 2d 423, 424 (Or. App. 1992); *Polk County vs. Martin*, 636 P.2d 952, 957 (Or. 1981); *Township of Peacock vs. Panetta*, 265 N.W. 2d 810, 813 (Mich App. 1978).

The test for the existence of a nonconforming use is whether the use was lawful at the time the preclusive legislation took effect. *Warner*, *supra*, at 424. The Utah Court of Appeals in *Brown*, *supra*, held that short-term rental use was a lawful use, not prohibited by the zoning ordinances in effect at the time. 957 P. 2d at 212-213. The properties in question in this case were adapted for the specific use of short-term rentals. They were furnished and equipped by the Petitioners for this particular purpose and, until ordered to cease by the Respondent, Sandy City, they were used for this purpose. This use was discontinued temporarily by plaintiffs only

because they were served with a cease and desist order by the defendant Sandy City Corporation. The use of the properties as short-term rentals by the Petitioners prior to the issuance of the Cease and Desist Order (R. 28) was clearly an existing, legal nonconforming use and the plaintiffs are entitled to have the properties granted prior nonconforming use status.

### **CONCLUSION**

Based on the foregoing, this Court should reverse the Order of the District Court and order that the Petitioners, John Collins and June Collins, had established a valid, existing, non-conforming use for their real properties located in Sandy City prior to the enactment of prohibitive ordinances by Sandy City and that the Petitioners are allowed to continue the pre-existing, non-conforming use.

Dated this \_\_\_\_ day of May, 2000.

Respectfully submitted,

---

Franklin L. Slaugh  
Attorney for Petitioners-Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that two true and correct copies of the foregoing Brief of Appellant were mailed, first class postage prepaid, this \_\_\_\_ day of \_\_\_\_\_, 2000 to the following:

Steven C. Osborn  
Sandy City Attorney  
10000 Centennial Parkway  
Sandy, UT 84070

\_\_\_\_\_

## **ADDENDUM**

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Steven C. Osborn (3669)  
Kathleen R. Jeffery (1652)  
Attorneys for Respondents  
10,000 Centennial Parkway  
Sandy, Utah 84070  
Telephone: (801) 568-7170

**FILED DISTRICT COURT**  
Third Judicial District

NOV 18 1999

By *Le Thompson*  
SALT LAKE COUNTY  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

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JOHN COLLINS and JUNE COLLINS :

Petitioners, :

**SUMMARY JUDGMENT  
AND ORDER OF DISMISSAL**

SANDY CITY BOARD OF :

Case no. 980912601

ADJUSTMENT and SANDY CITY :

CORPORATION, a municipal :

corporation, :

Judge Timothy R. Hanson

Respondents.

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This matter came before the above-entitled court on oral argument on August 16, 1999 before the Honorable Timothy R. Hanson on cross motions for summary judgment made on behalf of Petitioners and Respondents. Petitioners were represented by Franklin L. Slaugh; Respondents were represented by Steven C. Osborn.

Based upon the memoranda, arguments, and exhibits submitted by the parties,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:



1. There is no issue of material fact in this matter, and judgment can be issued as a matter of law for the reasons set out in the memoranda and oral argument of Respondents.

2. Petitioners have not borne their burden to demonstrate that they are entitled a nonconforming use for any of the three subject properties. The Board of Adjustment decision was not arbitrary, capricious or illegal, and was supported by substantial evidence.

3. The Respondent's Motion for Summary Judgment is granted and Petitioners' Motion for Summary Judgment is denied in respect to Petitioners' property at 1875 East Alla Panna Way in Sandy based on the doctrine of issue preclusion, due to Petitioners' not having appealed the trial court's decision in Third District Court case number 960905929CV, and for the following reasons: the home was not used as a short-term rental (less than 30 days) on March 27, 1998, the effective date of the new ordinance prohibiting such use because Petitioners were complying with the City's earlier cease and desist order; and because Petitioners failed to carry their burden of demonstrating that when the property was used as a short-term rental; the Petitioners did not submit any evidence to show that the use was in conformity with the City's ordinances requiring that the use of properties in single family zones be by a "family" as that term is defined in the Sandy City ordinances.

4. The Respondent's Motion for Summary Judgment is granted and Petitioners' Motion for Summary Judgment is denied in respect to Petitioners' property at 472 East 9400 South in Sandy based on the doctrine of issue preclusion, due to Petitioners' not having appealed the trial court's decision in Third District Court case number 960905929CV, and for the following reasons: the home was not used as a short-term rental (less than 30 days) on March 27, 1998, the effective date of the new ordinance because Petitioners were complying with the City's earlier

cease and desist order; and because Petitioners failed to carry their burden of demonstrating that when the property was used as a short-term rental, the Petitioners did not submit any evidence to show that the use was in conformity with the City's ordinances requiring that the use of properties in single family zones be by a "family" as that term is defined in the Sandy City ordinances.

5. The Respondent's Motion for Summary Judgment is granted and Petitioners' Motion for Summary Judgment is denied in respect to Petitioners' property at 9255 Maison Drive in Sandy based on the doctrine of issue preclusion, due to Petitioners' not having appealed the 1996 Board of Adjustment decision case number 96-31 to Third District Court, and for the following reasons: the home was not used as a short-term rental on March 27, 1998, the effective date of the new ordinance, nor was there evidence submitted that the property was ever used as a short-term rental.

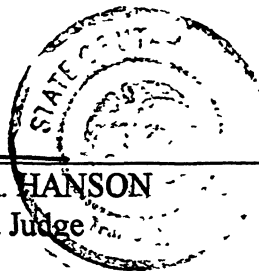
6. The Petition for Review is hereby dismissed, with prejudice and upon the merits, no cause of action.

DATED this 18 day of <sup>Nov</sup>~~October~~, 1999.

BY THE COURT:

By: 

TIMOTHY R. HANSON  
District Court Judge



APPROVED AS TO FORM:

\_\_\_\_\_  
FRANKLIN L. SLAUGH  
Attorney for Petitioners

## **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)