

**FINAL MINUTES**

**VIRGIN TOWN COUNCIL SPECIAL MEETING  
WEDNESDAY, February 19, 2014**

**6:00 pm**

**Virgin Town Office, 114 So. Mill Street, Virgin, Utah**

Present:

Council Members: Bill Adams  
Danyale Blackmore  
Jean Krause  
Jay Lee

Others: Monica Bowcutt, Town Clerk  
Darcey Spendlove  
Ken Cornelius  
Sean Amodt  
Lee Ballard, Town Representative  
Russ Gallian, Applicant Attorney  
Bonnie Strawser  
Bonnie Timmerman  
Cindy Escude  
Heath Snow, Town Attorney  
Jordan Gardner  
Monte Lutz

**SPECIAL MEETING:**

**1. Call to Order-Mayor Bruce Densley**

Council Member Jean Krause called the meeting to order at 6:03 pm. She excused Mayor Bruce Densley because he was in the hospital with pneumonia. Council Member Krause stated that Mayor Densley had asked if she would chair the meeting. She stated that because of the recent Town Council election and seat changes, no Mayor Pro tem had been appointed.

***Bill Adams made a motion to appoint Jean Krause as Mayor Pro tem to stand in place of the Mayor when he was absent.***

Council Member Jay Lee stated that he was for the motion, but wondered how this action could be taken when it was not listed on the agenda. Council Member Jean Krause responded that the agenda could not be modified at such a late date and the action was just for the night.

***Danyale Blackmore gave the second. Vote on Motion: Bill Adams-Aye, Danyale Blackmore-***

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*Aye, Jean Krause-Aye, and Jay Lee-Aye. The motion passed unanimously.*

#### **2. Pledge and Invocation**

Mayor Pro tem Jean Krause led the Pledge of Allegiance. No invocation was given.

#### **3. Declaration of Conflict of Interest**

No Conflicts of Interest were disclosed.

Mayor Pro tem Jean Krause stated that Russ Gallian was present to represent Aaron Smith, Scott Hill and Monte Lutz.

Russ Gallian stated that clarification of the procedure was needed. He stated that the Town had chosen to do this by proffer, which meant that the attorney stated the Applicant's position, which was also being supplemented by an affidavit from each of his clients in order to set forth the facts and to make a record. The reason a record was needed was in the case of an appeal. He went on to explain that appeals were based upon the record only, not any traditional evidence, unless there were some extraordinary circumstances. Mr. Gallian stated that it was very important that a record be made. He also stated that to shorten the time required, he was hoping the Town Council would allow prior arguments to be adapted from each case because they were virtually identical. This would help shorten the time so so he did not have to keep saying the same thing over and over. Mr. Gallian stated that the cases were very similar both legally and factually, although, the Monte Lutz case had a few differences.

#### **NEW BUSINESS:**

**4. Hearing on Application for Determination of Legal Non-Conforming Use (Nightly/Short Term Rental in a Residential Zone), Property location 491 E. Entrada Dr. Virgin, Ut.**

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**Applicant: Aaron Smith (maximum length 90 minutes-no public comment)**

Mr. Gallian stated that he was supplying, for the record, an affidavit of Aaron Smith and also had filed the CC&R's for Rio de Sion (where the property was located), in case it became a question or an issue. He also reported that a Memorandum had been done for the record, which was similar to the opening brief, but included other things that had been found through research since that time. He felt that the Memorandum straightened the facts out a little.

Mr. Gallian stated that there was a very important case called the Brown Case. The reason this case was so important was because it was on "all fours" or "on point" with the facts of his case. The Brown Case dealt with vacation rentals and the ability of the town to deny them if they do not have specific prohibition against them. Mr. Gallian informed the Council that the case was found in the binders he had supplied. He again stated that the case was very important because it represented the current law of State of Utah, which affected the way this type of thing, with very similar facts, had been dealt with.

Mayor Pro tem, Jean Krause, stated that Heath Snow, Town Attorney, had requested that each applicant case be heard separately. She asked Mr. Gallian to make the proffer on Aaron Smith, then let the Town present their position, following the agenda. When the discussion turned to the Scott Hill case, and an argument needed to be made which had been made prior, just refer back to it. Russ Gallian agreed that this would be suitable.

Russ Gallian informed the Council that he was basically stating the important facts of the case, speaking as if he was Aaron Smith. Mr. Gallian read the Affidavit of Aaron Smith, part owner of property located at 491 E Entrada Dr, Virgin Utah, 84779.

**a. Presentation of facts and arguments in support of Application-Applicant or Legal Counsel**

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**(limited to 35 minutes)**

Mr. Gallian read from the Memorandum in support of Application for Administrative Appeal. He interjected the fact that the applicant had not ceased the use, and had no intention of doing so, because the use of his property as a short term rental was protected under two separate doctrines in Utah Law. First, the Applicant's use began prior to any specific prohibition against such use and qualified as a non-conforming use. Second, the Applicant had invested significant funds to make his property more appealing to potential renters based on his understanding that short term rentals were not prohibited by the Virgin Uniform Land Use Ordinance. As such, his use of the property as a short term rental was an interest protected under the reasonable investment back expectation doctrine. Mr. Gallian stated that each of these subjects would be discussed separately.

Mr. Gallian continued reading on page 2 of the Memorandum. He explained that the Applicant's use of the property as a short term rental began in 2009 and had continued without interruption since that time. As such, the second prong of the three prong test was hardly an issue. There was no question that the use started in 2009 and had continued to this date. He stated that there was also no issue with the third prong, as it was clear that the recent amendment to the VULU Ordinance which now prohibited short term rentals, in a rural residential case. He explained that this meant that the Town now had something that said "you can't do that", but the Applicant qualified as a prior use. Mr. Gallian stated that the crux of the dispute lay in the time he started this use in 2009, whether or not short term rentals were legal in 2009. Under Utah Law, prohibited uses must be specifically identified in the land use ordinance in order to be enforceable. Mr. Gallian again continued reading from page 2 of the Memorandum, stating that the Virgin Uniform Land Use Ordinance, as promulgated at the time Applicant's use began, contained no provision specifically prohibiting renting a resident's home, or a portion thereof, on a short-term basis. He stated that there was no such thing. His firm had searched the code diligently and there was nothing that specific in Town codes. He stated the Town Council had

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recently taken the position that the VULU Ordinance had always prohibited the use under two prohibitions: 8-3 against “any uses not listed as permitted or conditional” as well as the prohibitions contained in VULU Chapter 25 regarding “Congregate Living Facilities” to justify ordering the applicant and other residents to cease this use. The Town Council had enacted subsequent ordinances clarifying, which is a term that the Council used, that short term rentals had always been prohibited in rural residential zones. Under Utah Law neither of these provisions nor any VULU provisions contained a sufficient prohibition against short term rentals and subsequent ordinances could not be enacted to defeat an already existing non-conforming use. Mr. Gallian explained that essentially this meant the use was there and vested and the Town could not take it away by clarifying an ordinance saying “we always meant it to be that way”, if it never said that.

Mr. Gallian stated that the next point was that short term rentals were legal at the time of the applicant’s use because they were not specifically prohibited by VULU ordinance. He explained that this was the standard of review or how the Town should look at their own ordinances in making this decision. Mr. Gallian quoted from page 3 of the Memorandum. He explained it to mean that if the zoning ordinance was ambiguous, it must be interpreted in favor of the home owner. He stated that the Constitution is in favor of property rights, and unless you are very specific with things, you can’t take rights away. He cited an example stating that the phrase “anything not written is a prohibited use”, had been specifically held by Utah courts under the Brown vs. Sandy Board of Adjustment (Utah App. 1998). This case ruled that an attempt to say that anything is prohibited by blanket doesn’t work because it was vague and unspecific. Mr. Gallian again read from the Memorandum explaining the case. He stated that it was not fair to say: if it’s not on our list, then you can’t do it, because there was an infinite number of possibilities that staff could come up with saying you can’t do that here. He explained that Towns could not rely on a general statement like that to say that people can’t do something that was otherwise OK. The reasons that it was not legal were: valid property rights and enacting something that vague to

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take away property rights was not allowed under Utah Law. Mr. Gallian stated that because this case was exactly on point with short term rentals, he believed it was controlling because the facts were virtually identical.

Moving to page 5 and 6 of the Memorandum, Mr. Gallian stated that another argument that had been made was that people should refer to the Congregate Living Facility Ordinance and apply it to a single family residence and its uses. He referenced an email from Lee Ballard which stated that this could not be done. Mr. Gallian read this section on Congregate Living Facilities, after which, he stated that the real question became was the Congregate Living Facility Ordinance even applicable to a single family zone. He read the definition of a congregate living facility from page 6 of the Memorandum and stated that none of the listed things applied in this situation. He stated that certainly the Applicant was not a resident in which 5 or more persons which do not constitute a family reside. The homes were being rented to families so they could have a vacation experience not unlike if they had their own second home and used it that way. Mr. Gallian stated that he did not see any rational way to say that particular portion of Virgin Town Code was intended to apply to single family home situations.

Mr. Gallian stated that another thing that he was concerned about was the idea that a subsequently enacted ordinance could defeat an already existing use. He explained that by calling it a clarification, it may have been an attempt to say that what the Town really meant back then was that, we should be doing this. When the Town did not have it in their ordinance in the first place, it's not a clarification it is a new ordinance. New ordinances cannot defeat an existing use, otherwise the Town could say they were clarifying their ordinance on anything to defeat those kinds of uses and not allow it under the law.

Mr. Gallian stated that another thing the Town should be aware of, as a matter of great jeopardy for them, was when a person invests a lot of money into something, reasonably relying upon the fact that

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he had the right to do that. Mr. Gallian stated that he felt this was what happened here, especially with Mr. Lutz. He explained that it had been long held that zoning regulations could constitute a government taking, even when the claimants were only deprived of some economic benefit (Penn Central Transportation Use vs. New York City, 1970, US Supreme Court Case). Based on Penn Central, the courts decisions had identified several factors of particular significance: the economic impact of the regulation on the claimant, in particular to which the extent with which the regulation had interfered with the distinct investment backed expectations and the character of the governmental actions. In takings cases they rely on the case that says you have to take all or substantially all of the value of the property in order to constitute an irregular take. In the Penn Central Case and other cases that have followed it, the court said you can have circumstances where it's not fair that someone had spent a lot of money and the town can not just take it away from them. Mr. Gallian stated that cases similar to Penn Central were bound to be ruled a taking. He suggested that if the Town wanted to take away the Applicants' already vested right, the Town would be facing a serious lawsuit because the Applicants had invested a lot of money (\$700, 000, \$650,000 and \$100,000 over and above what the home cost) in order to make this attractive for vacation rentals. Mr. Gallian stated that the basic idea was that Towns can not pass regulations that take away existing rights, and then say there is not damage.

Mr. Gallian read page 9, the conclusion to the Memorandum. He then stated that basically what the Applicant was asking the Council to do was to rule under the Town's rules that they recognized this as a prior non-conforming use. He also pointed out that each of the clients, including Aaron Smith, continued to pay taxes from the use, so the Town was receiving revenue. Mr. Gallian stated that this was pointed out in Lee Ballard's original memo. The Applicants were paying taxes to benefit the Town and were not bothering anyone. As far as he knew, there had been no complaints from their neighbors who lived by them. He stated that he did not see how over \$100,000 in the Lutz case and \$650,000 and

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\$700,000 in the other two cases for the total investment, did not represent a significant investment. This was especially true in two of the cases where their homes were being saved by being able to do this because they had come through a very poor economy and were unable to sell their houses. The homes were built to be re-sold and now they were having to rent their houses in order to stop them from being foreclosed on. Mr. Gallian stated that the figure in this case, was \$650,000 and the only way the applicant could afford to keep going was by renting it. He stated that another thing he found interesting was that there was a market for this use because Virgin was so close to Zion. It was not unreasonable to think that they might be able to do nightly rentals in a situation like that, because Zion occupancy rates during the season were over 90 percent. He explained that a lot of people would rather stay in a home rather than a hotel and were willing to pay the vacation rental prices. Mr. Gallian reaffirmed that there was a market for this use. He stated that the evidence in the file showed how much the applicants had been renting, keeping pretty busy. The damages that would happen if the Town took this use away from them were not insignificant. In Mr. Smith's and his co-owners case, he could stand to lose his property and his \$650,000 investment, if they were not allowed to continue their income stream. He reminded the Council about the equitable situation that they must consider as well. He asked if it was fair of the Town, after having previously allowed the use, without any complaints, actually telling people that it was alright to do this, and having no prohibitions against the use, to take the right away from anybody. He stated that it was an awful loss to be incurred.

#### **b. Presentation of Town Staff Position/Report-TBD (limited to 35 minutes)**

Lee Ballard introduced herself and stated Mayor Densley had asked that she represent the Town, or at least provide the facts and the history. She apologized for the way her presentation was put together, stating that she had been asked only several days ago, so she had very little time.

Lee Ballard began by reading from her presentation. She began at Purpose and Intent at the top of the

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page and read word for word. She noted other municipalities which had successfully relied solely on the ‘unlisted uses are prohibited’ rule, such as in the Brown case. She also commented that the Town had repeatedly enforced its prohibition of short term leasing for many years, since shortly after the adoption of the Congregate Living Facility Ordinance. In fact there had been a denial of a use variance request for locating a bed and breakfast in a residential zone in 2009.

Lee Ballard continued reading the next section, Single Family Dwelling Use word for word. She explained that VULU 25:25:1 might sound vague, but it was actually quite specific because there were definitions for each of the qualities mentioned. For example, a permanent residential facility had a specific definition in that chapter.

She continued to read the section Family, stating that it was an important consideration in a Single Family Dwelling Use.

Mrs. Ballard then went on to read the section Defining Short Term Lodging Uses. She stated that Virgin’s Transient Hotel Room Tax Ordinance would be a reasonable place to look because the definition section of VULU 1-6 states that “Words used in this Ordinance but not defined herein shall have the meaning as defined in any other ordinance adopted by the local jurisdiction”.

She continued to read the section Business Use of a Dwelling. She explained that the Home Occupational Chapter was amended in 2013, so the chapter prior would be the one used for this hearing’s purpose.

Lee Ballard read her section entitled: Statements by the Land Use Authority.

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Lee Ballard read her section entitled: Payment of Transient Room Taxes.

Mrs. Ballard read the section Recently Adopted Ordinance. She noted that the Town went through the entire proper process, which included a public hearing notice in the newspaper, the Planning and Zoning Commission who recommended it, and the Town Council who voted on it. She stated that it was not sold as a clarification, but was called An Ordinance Amending Language in the Virgin Uniform Land Use Code to Clarify that Short Term Lease or Rental of Homes for Less than 30 days is Prohibited in Residential Zones. She stated that it was clearly labeled an ordinance and an amendment.

Lee Ballard read her notes, word for word. She explained that Note Number 1 described all the processes the Town went through to implement the placement requirements in the Congregate Living Facilities Ordinance. She explained that Note Number 2 was a quote from VULU that gave the entire placement rules for Residential and Rural Residential Zones. She stated that Note Number 4, was trying to explain why the Town had irrelevant language in the ordinances, such as a specific definition of lodging house, which was not used anywhere in the ordinance, nor in the town until this week. She explained that Note Number 6, gave language for Home Occupational Permits and as far as she knew, Mr. Smith had not come in for a Permit. Note Number 8 gave the language from the Public Hearing notice for the recent ordinance change. She continued to read Note Number 9.

Council Member Jay Lee stated that Note Number 9 did not apply to Aaron Smith, only to Monte Lutz. Mrs. Ballard agreed. Lee Ballard asked that all pertinent information also be rolled over to the other Applicants, to minimize time spent in the meeting.

Lee Ballard asked if Aaron Smith had a state license to collect the taxes. Mr. Gallian replied that Mr. Smith was working on getting that through the state. He explained that Mr. Smith did not know until

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recently about that requirement, but the taxes would be paid. He reported that the other two applicants had been paying all along.

Lee Ballard asked if anyone was domiciled on the property. Mr. Gallian answered that Mr. Lutz lived there as domiciled, the other two Applicants stay from time to time, but it was not their primary residence.

Mayor Pro tem Jean Krause stated that Mr. Gallian had referred twice in Aaron Smith's Memorandum that it was "his" or "our" understanding that VULU allowed him to rent the home. She asked what the basis was for his understanding. Mr. Gallian replied that the Memo also stated that VULU did not say anywhere that the use was prohibited. For this reason he did not find it necessary to ask someone at the Town office.

Council Member Danyale Blackmore asked if Mr. Smith just assumed, like other communities, VRBO's were something that everyone was doing and wasn't specific to going to the town officials to ask for the ordinances. Perhaps he thought it was more of a personal property right. Mr. Gallian stated that Lee Ballard did not dispute the fact that at that time there was no specific prohibition against this. Under Utah law people were allowed to use their property. The Brown case very strongly said people had their rights and Towns had to be very specific to take rights away. There was no specificity, only generality in Town ordinances. Mr. Gallian stated that what Lee Ballard was trying to argue was the intent of the Town, but she was not the arbiter of what things meant. The words themselves must be looked at first. He stated that nobody was going to talk to everyone to get their interpretations, because they would get different interpretations, so the law required the wording in the ordinances be clear and carry its own weight, which it did not do in this case.

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Council Member Danyale Blackmore asked when VRBO came into existence. Mayor Pro tem Jean Krause stated she was not positive, but thought 2002. Mr. Gallian stated that it had been out there awhile.

Mayor Pro tem Jean Krause asked if Aaron Smith had a business license for renting the house. Mr. Gallian answered he did not, but his position was that he did not need one any more than someone who was renting for more than thirty days. There was no definition which defined temporary rentals as a commercial use, nor renting for longer periods of time. Mayor Pro tem Jean Krause asked if Mr. Smith considered it a business. Mr. Gallian answered no, unless renting a house for more than thirty days was also a business. He stated that the point was that the Town had not defined this in any way, not for one day or thirty days. He questioned how renting for thirty days was any different than renting for less than thirty days. He again stated that Town ordinances did not define that as being a commercial use, so it was not a commercial use.

Council Member Jean Krause asked about page 10 of the Aaron Smith Memorandum, which indicated that he invested significant funds in acquiring, building and furnishing the property. Mr. Gallian replied that yes, Mr. Smith invested these funds based on his understanding that short term rentals were not prohibited under VULU. Mr. Gallian also clarified that Mr. Smith built to sell, but because of the economy, he could not sell the house. Instead of losing the house to foreclosure, he sought to use lawful uses to generate income so he could pay for it. This, of course, was before any prohibition. Mr. Gallian stated that if the Town took the right away now, they would jeopardize the house because this was how he had been paying for it. Mayor Pro tem Jean Krause clarified that he did not expend the funds with the intent to rent the home to vacationers.

Lee Ballard stated that she found “only permanent residential facilities are permitted in these zones”

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very specific, which was found in the placement rules in chapter 25. Mr. Gallian stated that, in his view, VULU by definition did not apply to these types of situations. It was intended to be for residential facilities for the elderly and/or treatment programs. This was not intended to apply to ordinary houses that were being rented. He stated that there was nowhere that classified short term rental was anything different than long term rental. Mayor Pro tem Jean Krause stated that if the argument was not a business, what about the argument that this was a home occupation. Mr. Gallian gave an example from St. George, stating that they defined in their ordinance that if you have more than two rentals you must have a business license. He stated that a lot of people understand that it was their rule, but they had defined it that way. Virgin had not defined, up to the recent changes they have made, that there was any difference between a nightly rental or a monthly rental. He also stated that Virgin certainly did not require anyone to get a business license if they were renting their house. Because of this, it was not deemed to be a commercial use that required either a home occupational permit or a business license. If the Town had chosen to define it as such, it would be such, as a matter of law, but Virgin had not done so. He asked if the Council could imagine the uproar they would have if they told every one in Town that a business license was required to rent their house. He stated that they would be thrown out of office in a Town this size.

Council Member Bill Adams asked why the Applicants were paying taxes. Mr. Gallian stated that State Law required them to pay State tax, with Virgin getting their share. He stated that is was almost like sales tax, but was called Transient Room Tax. Mayor Pro tem Jean Krause clarified that Aaron Smith had not been paying this tax, but was making arrangements to do so. Mr. Gallian replied that Mr. Smith did not know about the tax, but had been advised to do that, so he was getting burned because he had not collected it from any renters.

Council Member Jay Lee clarified that the person renting the home on a monthly/yearly basis must

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claim it on their income tax. If the home owner did not show that income on his taxes as a business, the federal government would come after him. He stated that was why they listed it as a business. Mr. Gallian stated that his point was that the Town had not defined renting a house as a business. Town ordinances did not require a home occupational permit or a business license. Council Member Bill Adams suggested that it was just a gap in rules. Mr. Gallian agreed that it very well may be a gap, but until it was fixed, his clients were entitle to abide by the rules the Town had at the time.

Mayor Pro tem Jean Krause asked what the average length of stay of any of the people who rent from Aaron Smith. Mr. Gallian replied he did not know for sure, but that information could be found on the calendar. Mayor Pro tem Krause responded that the calendar did not differentiate between different renters.

Council Member Jean Krause asked what was the average group size that rents his house. Mr. Gallian responded that he did not know the answer.

#### **c. Rebuttal Statements-Applicant and Town (limited to 10 minutes each)**

Mr. Gallian stated that in Lee Ballard's second paragraph it emphasized that this was a commercial use. He disagreed, stating that they were dealing with property rights and have to be specific under case law. Virgin had not done that. The Town had not previously chosen to say that anyone that rents, whether it be one day, thirty days, or sixty days, is the rule. So any kind of a rental to a family, in our view, is not covered by the Congregate Living Facility Ordinance. The real intention of the Congregate Living Facility Ordinance had nothing to do with families staying in a home. It did not apply and was intended for other types of purposes.

Mr. Gallian stated that he had a retort to the idea that these rentals were bed and breakfasts. Vacation

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rentals were a completely different operation. These rentals were stayed in by their owners, who rented them out when they were not there. The definition of a lodging house which is the only place where it is attempted to be defined, talks about only being one type of facility. Obviously, that was not what was in use here. What they were was a single family home. The use was not a commercial use or a home occupation use. Just as there was no permit required to rent your house out for six months, no permit was required for short term rentals.

Council Member Danyale Blackmore asked if Aaron Smith had received any complaints from his neighbors, until 2013. Russ Gallian answered that none of the Applicants had any complaints until 2013.

Mr. Gallian wondered why the definition of family was being disputed, because it was basically what the Applicants were renting to. He stated that the Applicants were renting to families and it was OK because a single family use was allowed in the zone. He stated that he was not sure why the reference to families was quoted, because the Applicants agreed that they were renting to families. It was not a situation where they were renting to treatment people or senior living people. Mr. Gallian stated that the Congregate Living Facility Ordinance did not apply.

Lee Ballard stated that the Ordinance was intended, although it may not do it very well, to cover hotel, motel, and all lodging uses. Mr. Gallian stated that the definition states “only” doing that and clearly his clients were not only doing that. Each one of these homes used their personal home at times. With Monte Lutz it serves as his residence full time. He rents out the apartment over the garage. He only had 750 square feet he was renting, so not to more than 5 people stayed.

Mr. Gallian stated he appreciated that Lee Ballard stated the Town was not attempting to apply this as a

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retroactive clarification. The Applicants brought the ordinance up because they could see no other reason to call it a clarification. Apparently, that was not an issue the Town was raising and it was not an issue anymore.

Mr. Gallian explained that Lee Ballard stated that the Town had not and did not argue that a vacation home was not necessarily a congregate living facility. He stated that was the Applicant's point. These homes were not congregate living facilities and the Town could not apply that rule. He also stated that there was no home occupation permit required because they were not a commercial use by the Town's definition.

Mr. Gallian stated that lodging house was defined in Virgin Town Code as "a building where lodging only is provided for compensation to at least three but not more than 15 people but not including hotels and motels". That definition did not apply here. Lee Ballard stated that the Town was not trying to use the definition for anything. Mr. Gallian stated that if the Town was looking for something that fit into a vacation rental house, it was the closest thing, but the Town's own definition belies it. Lee Ballard stated that lodging use was not defined and the plain language rule would probably work. Mr. Gallian stated that the plain language of nightly rental of your own home is not a lodging house. Lodging is dedicated to the hotel and motel use.

**d. Deliberation/Determination-matter to be taken under advisement with determination made by subsequent written memorandum of determination, findings and conclusion. (0 minutes)**

Mayor Pro tem stated that there would be a five minute break.

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**5. Hearing on Application for Determination of Legal Non-Conforming Use (Nightly/Short Term Rental in a Residential Zone), Property location 124 Sierra Bella Virgin, Ut. Applicant: Scott Hill (maximum length 90 minutes-no public comment)**

Mayor Pro tem Jean Krause stated that because some of the information was redundant to the previous applicant, she reminded Mr. Gallian that he may indicate that at the appropriate places.

**a. Presentation of facts and arguments in support of Application-Applicant or Legal Counsel (limited to 35 minutes)**

Russ Gallian reminded the Council that in their binders they had the affidavit of Scott Hill, which had the factual of things which he would be reciting. He stated that the Council had also been provided the CC&R's, in case they became an issue. Also, a Memorandum for record had been given, which included the case law already discussed. He stated that he would not attempt to re-argue every point because it was virtually identical to the Aaron Smith case. Mr. Gallian read the entire Affidavit of Scott Hill. Mr. Gallian stated that Scott Hill had been paying taxes all along. He also stated that short term rentals were legal at the time the applicant's use began and the same arguments apply. The Applicant was a valid non conforming use under the rules, which meant that he had the right to continue, assuming he did not abandon the use. Mr. Gallian stated that he hoped the Council agreed with the Applicant, or the court agreed after, if the Council did not.

He also stated that the Congregate Living Facility Ordinance did not apply. He pointed out that Lee Ballard's own memo suggested it did not belong in the single family home section. Mr. Gallian stated that he was not sure Mrs. Ballard was ready to concede that position, but she did state that fact in one of her points. He stated that he agreed that the interpatation did not apply to single family homes, so there was no support for the Town's argument.

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He realized that there was not an issue on the clarification ordinance, and he appreciated Lee Ballard's position on behalf of the Town. He stated that it was no longer a concern.

As for the Reasonable Investment Back Expectations, Scott Hill had a very similar situation. He had built the house and then the bad economy hit and everything went down in value, leaving him unable to sell the home. The applicant believed that renting is home to vacationing families in order to not lose his home was a valid thing to do. Mr. Gallian stated that Mr. Hill was within his rights to do so and it came as a big surprise when he found out there were claims otherwise, especially when nobody had said anything about the use. Mr. Gallian suggested that paying a mortgage on \$700,000, with this market, was hard to do. It was hard to find a monthly rental that would pay the mortgage. He stated that was not reasonably possible and Scott Hill had similar circumstances to Aaron Smith.

#### **b. Presentation of Town Staff Position/Report-TBD (limited to 35 minutes)**

Lee Ballard stated that she thought he was referring to the statement "the Town hasn't and does not now view that a vacation rental home is necessarily a congregate living facility ordinance, however, any dwelling may be presumably prescribed as a residential facility". She stated that certainly the Town considered vacation rentals to be a lodging use, which made them subject to Chapter 25. She further explained that the number of people involved was key because 5 or less exempts them from most of the terms of the Congregate Living Facility Ordinance, when it did apply.

#### **c. Rebuttal Statements-Applicant and Town (limited to 10 minutes each)**

Russ Gallian, stated that Scott Hill and Aaron Smith had rented to 5 or less people many times and the Lutz case rented to 5 or less virtually all the time because it was too small of a place to do otherwise. He explained further that all of the Applicants had rented to 5 or less people many times, which

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established their right to be there. He stated that if it turned out that 5 is a key number, then the Applicants had established their vested right.

Lee Ballard stated that it was clearly a temporary versus permanent use as defined in Chapter 25.

Mr. Gallian stated that the permanent versus temporary requirement of applying the Congregate Living Facility Ordinance to the situation, which he believed couldn't be done, because it was not defined as such. He stated that it was not intended to cover single family residential uses.

Mayor Pro tem Jean Krause clarified that the taxes were filed quarterly. She asked if Mr. Gallian was using the same argument with Mr. Hill that renting was not a business. He replied that was correct. Mayor Pro tem asked if Mr. Hill was also claiming his use was not a home occupation. Mr. Gallian stated that was correct. Russ Gallian stated that he was incorporating the prior arguments from the Smith matter, because they were primarily the same thing.

Lee Ballard pointed out that the requirement to get a Home Occupational Permit was for businesses being run out of a dwelling.

Mr. Gallian responded that the Town was going to have to define a number of days. He stated that the way it was now written, any type of rental of would be a business use, but there was not support for that in Town record either. He further explained that the Town did not require any kind of a permit to rent a house because it was not defined that way. It did not matter the number of days, less or more, it was no different, no permit was required. Lee Ballard stated that Town Ordinance allowed borrowed the definition from the Transient Hotel Room Tax Ordinance. Mr. Gallian stated that he disagreed with that.

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**d. Deliberation/Determination-matter to be taken under advisement with determination made by subsequent written memorandum of determination, findings and conclusion. (0 minutes)**

**6. Hearing on Application for Determination of Legal Non-Conforming Use (Nightly/Short Term Rental in a Residential Zone), Property location, 189 N. Mesa Road Virgin, Ut.**

**Applicant: Monte Lutz (maximum length 90 minutes-no public comment)**

**a. Presentation of facts and arguments in support of Application-Applicant or Legal Counsel (limited to 35 minutes)**

Mr. Gallian stated that Monte Lutz and Bonnie Strawser owned the property coming into Town on the North side of the highway. They had no nearby neighbors. He read the Affidavit of Monte Lutz and Bonnie Strawser in its entirety. He pointed out that the total square footage for the garage apartment was less than 20 percent, so if the Town somehow found that there needed to be a Home Occupation Permit, it would not apply because that only applies if 25 percent of the building was being used. It would not apply because only a small portion of his premises was being affected by this. Besides, because of the size of the building, Monte Lutz rarely rented to more than 5 people.

Russ Gallian stated that he would like to incorporate the prior statements where applicable, although several things were different. He explained that the reasonable investment expectation back doctrine that was previously discussed, had an even stronger equitable case in the Lutz case. This was because the house was actually built to a certain point, then, after Mr. Lutz determined and checked with Town people, he determined that VRBO would be a good investment. Mr. Lutz had been successfully renting since 2010. Mr. Gallian stated Monte Lutz was a careful man and checked with a number of Town

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people, all who told him it wasn't prohibited. Mr. Gallian stated that obviously a person would not take the trouble to come before the planning authority if nothing in the ordinance says you can't do it and you are told by numerous people in authority (and on these planning commissions) that the use was not prohibited. Mr. Gallian stated that adequate investigation had been made by Monte Lutz to evoke the doctrine of equitable estoppel. He explained this law from page 8 of the Memorandum. He pointed out that all three qualifications of equitable estoppel applied to the Lutz case. First, officials said it was OK to do it and then the next day said it is not OK and tried to stop him. Second, in this case the Applicants went out and spent an additional \$100,000 to install pools and other things. Third, the Applicant was not claiming omission of the zoning authority, nor claiming there was silence or inaction, but rather affirmative action that he was allowed to do this use. Russ Gallian stated that Mr. Lutz did inquire and confer with the local zoning authority regarding the uses of the property that would be permitted. Mr. Gallian then continued reading on page 10 of the Memorandum, explaining that he was talking about reasonable. His client had gone to a number of people, who were officials, to ask them about the vacation rental use and they all told him the same thing. Then Mr. Lutz went to the Town Clerk, who was the most knowledgeable on ordinances and was told no permit was required. Mr. Gallian asked why his client would think a formal application was needed for something he was told he could do. Mr. Gallian stated that the point was under the equitable side of this, the Applicant went to extraordinary lengths to make sure that what he was doing was OK because he was spending money to do it. He clarified that the other Applicants had already purchased their places. Monte Lutz's case was much more extreme.

Council Member Jay Lee, stated that a correction needed to be made in the Memorandum where it stated that Lee Ballard was a Planning and Zoning Commission member. She was, in fact, on the Town Council and the Planning and Zoning Liaison, at the time. Lee Ballard agreed with the correction. Mr. Gallian stated that the Memorandum contained the information the way Monte Lutz remembered it.

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Mr. Gallian stated that the Town Council was the Land Use Authority, if anything, that would be better for Mr. Lutz, as the Land Use Authority actually made the rules. The Planning and Zoning Commission was a recommending body.

Mayor Pro tem Jean Krause asked if the comments in parentheses (on page 10 in the middle of first paragraph) were actually what Mr. Lutz remember Lee Ballard saying. Mr. Gallian answered yes.

Mayor Pro tem Jean Krause stated that Lee Ballard perhaps emphasized that it was not an approved use, just that it wasn't prohibited.

Mr. Gallian stated that because the Memo did not tell the whole story, his client received the information from Dan Snyder and Larry Amodt after the construction was completed.

Mayor Pro tem Jean Krause stated that she understood money was spent to make the property attractive to potential renters. It appeared the living quarters above the garage was not done with the intent to rent to vacationers because it was done in 2009, but he did not start renting until after indication from Dan Snyder and Larry Amodt. Monte Lutz stated that when he built the place he intended to rent. The house was built in 2006, as a second home. They spent part of the time there and part in Ohio. Mayor Pro tem Jean Krause clarified that in 2006, when he built the garage apartment, he intended to rent. Monte Lutz stated that was correct.

Russ Gallian stated that the circumstances were very similar and he wished to incorporate prior arguments into the record for Monte Lutz and Bonnie Strawser.

#### **b. Presentation of Town Staff Position/Report-TBD (limited to 35 minutes)**

Lee Ballard stated that everything from her prior arguments were relevant here. She clarified that Mr.

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Lutz would be unlikely to have more than 5 people at a time, which made a difference. She also stated there was a question about whether it was being used by a single family when it was being rented.

Lee Ballard stated that the Land Use Authority required the Planning and Zoning Commission just as much as it did the Town Council. They worked jointly and together.

Lee Ballard read note number 9 from her presentation.

Mayor Pro tem Jean Krause asked Monte Lutz about the tax papers, which were attached to the affidavit. She questioned payment of taxes for the vacation rental under the name Utah Mountain Bike Adventures. She asked if Mr. Lutz was renting the apartment as part of his biking business. Monte Lutz answered no. Mayor Pro tem Jean Krause asked if he considered the rental a business. Russ Gallian stated that it was a situation where Monte Lutz was just using his DBA number and personally filing his taxes under that number. He stated that the point was that the taxes were being paid. Mayor Pro tem Jean Krause stated that it certainly implied it was a business. Monte Lutz stated there was no implication whatsoever and that he complied with all tax regulations, even though the Town did not know that. Mr. Gallian stated that the biking portion was a business, but the rental was not, as defined by Town ordinances. It was just a rental, by his interpretation. He felt that the Town could not say otherwise because they did not require any kind of license, from anyone, for renting property.

**c. Rebuttal Statements-Applicant and Town (limited to 10 minutes each)**

**d. Deliberation/Determination-matter to be taken under advisement with determination made by subsequent written memorandum of determination, findings and conclusion. (0 minutes)**

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Mayor Pro tem Jean Krause stated that there was not going to be any formal conclusion during the night's meeting. She then asked Mr. Gallian if the people who were renting for a short term were tourists, coming to recreate. She clarified that this question was applicable to all three Applicants. Monte Lutz replied that the people who rent do not live here, so that would default to the answer yes, although the Goodrich company had rented from him a few times.

Russ Gallian stated that he had not previously submitted the CC&R's for Aaron Smith and Scott Hill, which he wanted included in the record. He also stated that there were no CC&R's for Monte Lutz.

Mayor Pro tem stated that the Town Council would take all that they had heard during the meeting under advisement and would then submit their written findings in the form of a letter. If the findings were against the Applicants, then they would be able to appeal to the Board of Adjustment.

Council Member Jay Lee asked if the part of the agenda stating "taken under advisement with determination made by subsequent written memorandum of determination, findings and conclusion" would be done in a public meeting. Mayor Pro tem Jean Krause answered that the Council would have another meeting, but whether it would be an open or closed meeting would be decided at a later time.

### **ADJOURN PUBLIC MEETING:**

#### **7. Approve Motion to Adjourn Public Meeting.**

*Mayor Pro tem Jean Krause made a motion to adjourn the public meeting. Bill Adams seconded the motion. Vote on Motion: Bill Adams-Aye, Danyale Blackmore-Aye, Jean Krause-Aye, and Jay lee-Aye. The motion passed unanimously.*

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The Meeting adjourned at 7:48 pm.

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Monica Bowcutt  
Town Clerk

Approved: \_\_\_\_\_