

2010

Moab Local Green Party, Living Rivers, Julianne Fitzgerald, Natalie McDowell v. City of Moab, City Planning Commission, City of Moab Board of Adjustment : Brief of Intervenor LB Moab Land Company, LLC

Utah Court of Appeals

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Recommended Citation

Legal Brief, *Moab Local Green Party v. City of Moab*, No. 20100931 (Utah Court of Appeals, 2010).
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IN THE UTAH COURT OF APPEALS

MOAB LOCAL GREEN PARTY;
LIVING RIVERS; JULIANNE
FITZGERALD AND NATALIE
MCDOWELL,

Petitioners/Appellants,

vs.

CITY OF MOAB; CITY
PLANNING COMMISSION and
the CITY OF MOAB BOARD OF
ADJUSTMENT,

Respondents/Appellees,

LB MOAB LAND COMPANY,
LLC,

Intervenor/Appellee.

BRIEF OF INTERVENOR
LB MOAB LAND COMPANY, LLC

Appeal No. 20100931-CA

Appeal from the Judgment and Order of the Seventh Judicial District Court for
Grand County
District Court No. 080700176
Honorable Lyle Anderson, Presiding

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JURISDICTION

The Supreme Court transferred this matter to this Court pursuant to Rule 42(a), Utah R. App. P. and Utah Code Ann. § 78A-3-102(4). This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j).

RESTATEMENT OF ISSUE PRESENTED FOR REVIEW

I. Whether Moab City (“City”) and the district court correctly determined that the approval of the Preliminary Master Plan Development of the Lionsback Resort was supported by substantial evidence and was therefore not arbitrary, capricious, or illegal.

Standard of Review: Summary judgment is appropriate when there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. *See* Utah R. Civ. P. 56(c). In reviewing a grant of summary judgment, the court does not defer to the legal conclusions of the district court. Springville Citizens for a Better Community, et al. v. City of Springville, 1999 UT 25, ¶ 22. When reviewing municipal land use decisions, the “review is limited to the recorded provided by the land use authority. . . .” Utah Code Ann. § 10-9a-801(a). In addition, the court shall “presume that a decision . . . is valid,” and the review is limited to determining whether the decision “is arbitrary, capricious, or illegal.” Utah Code Ann. § 10-9a-801(3)(a). “A final decision of a land use authority or an appeal

authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.” *Id.* § 10-9a-801(3)(c).¹

DETERMINATIVE STATUTES AND ORDINANCE(S)

Utah Code Ann. § 10-9a-801

Moab City Code - Preliminary MPD § 17.65 *et seq.*

STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS.

This case originated as a petition for review by the district court of a land use decision pursuant to Utah Code Ann. § 10-9a-801. Petitioners challenged the City’s approval of a Preliminary Master Plan Development Plan (“Preliminary MPD Plan”) for the proposed Lionsback Resort (“Project”), which was submitted by LB Moab Land Company, LLC (“LB Moab”). LB Moab seeks to develop certain land (“Subject Property”) it is acquiring from the State of Utah, acting by and through the School and Institutional Trust

¹LB Moab agrees that the substantial evidence standard is the appropriate standard for reviewing the City’s approval of LB Moab’s Preliminary MPD Plan. Petitioners incorrectly characterize the district court’s ruling on this matter by suggesting the district ruled that the City had “substantially complied” with the Preliminary MPD approval process. The district court did not rule that the City had substantially complied with the Preliminary MPD Plan review ordinance when it approved LB Moab’s Preliminary MPD Plan. Rather, it ruled that the City had “acted on the basis of substantial evidence” when it approved the Preliminary MPD Plan. R. at 420. Petitioners support this assertion by arguing that Springville Citizens v. City of Springville, applies. *See* 1999 UT 25, ¶ 29, 979 P.2d 332, 337. However, the Springville Citizens holding relied on by Petitioners addressed whether Springville City had complied with mandatory substantial requirements within its Code, not whether the land use decision on its merits was supported by substantial evidence, which is the case here.

Lands Administration (“SITLA”) pursuant to a certain Development Agreement and Ground Lease made between LB Moab and SITLA dated as of June 6, 2006 (“Lease”). The Subject Property, located in Grand County, Utah, consists of 175.12 acres of land. It is situated in and about the Navaho Sandstone “Lionsback” fin located on the northern portion of the site, which is the dominant physical site feature and gives its name to the area and the Project being proposed by LB Moab, *e.g.* the “Lionsback Resort.”

Following the execution of the Development Agreement, LB Moab began discussions regarding the development of the Lionsback Resort with the City. As a result of those discussions, LB Moab submitted an Annexation Petition to the City, seeking to annex the Subject Property into the municipal boundaries of the City. The Annexation Petition was approved by the City in accordance with applicable laws, codes and ordinances enacted by the City and the State of Utah. The Annexation Petition has not been challenged by Petitioners or any other person, party or entity. As a consequence, the Subject Property has been duly annexed into the City.

While LB Moab was in discussions with the City about its annexation application, the City created a new zone which is classified as the City’s Sensitive Area Resort Zone (“SAR”). Land classified in the SAR zone may be developed for various uses and activities stated in the zone, including, without limitation, a mixed use (commercial and residential) resort project. Development of such a mixed use resort project on land classified in the SAR zone requires review by the City in accordance with the City’s Master Planned

Development (“MPD”) review processes, as stated in the City of Moab Land Use Code (“LUC”). As stated in the LUC, the MPD review processes consist of three stages, namely:

(a) Conceptual MPD review; (b) Preliminary MPD review; and (c) Final MPD review.

Consistent with the LUC and applicable state law, LB Moab submitted its application to the City for Conceptual MPD Plan review contemporaneously with the filing of its Annexation Petition. At a duly noticed and conducted public hearing/meeting held on October 25, 2007, the City of Moab Planning Commission (“Planning Commission”) reviewed and approved LB Moab’s Conceptual MPD Plan review (“Concept MPD Plan”), subject to conditions stated in the document reflecting the Concept MPD Plan approval. No appeal of the Concept MPD Plan approval was brought by any person, party or entity.

Following annexation and Concept MPD Plan approval, LB Moab submitted its application with the City for Preliminary MPD Plan review. At a duly noticed and conducted public hearing/meeting held on May 8, 2008, the Planning Commission reviewed and recommended approval of the Preliminary MPD Plan application to the Moab City Council (“City Council”). A public hearing/meeting regarding LB Moab’s Preliminary MPD Plan was held before the City Council on June 24, 2008. It was further reviewed in the course of a meeting held on July 8, 2008, and certain conditions were added and the

City Council approved the Preliminary MPD Plan on that date, subject to the newly added conditions.

After receiving and reviewing the evidence concerning the Development Application, the Planning Commission and the City Council respectively found that: (i) the Subject Property achieved the applicable purposes contained in the LUC which are relevant to the review and approval of a Mixed Use MPD within a SAR zone; and (ii) the resulting development will be consistent with the provisions of the applicable sections of the LUC relevant to the review and approval of a Mixed Use MPD developing under the SAR zone.

Petitioners noted their objection to the City's approval of the Preliminary MPD Plan. In accordance with the LUC, appeals of a Preliminary MPD Plan are to be considered by City of Moab Board of Adjustment ("BOA"), based upon the record of materials and evidence presented to and considered by the Planning Commission and City Council. At a duly noticed and conducted public hearing/meeting held on August 20, 2008, which was continued to August 28, 2008 to allow for further review of the record and input from all interested parties, the BOA reviewed and determined that the decisions of the Planning Commission and City Council on the Preliminary MPD Plan application complied with the applicable provisions of the LUC and were supported by sufficient, competent evidence in the record.

This judicial appeal, brought by Petitioners, ensued. At the District Court, Petitioners challenged the decision of the BOA affirming the City Council's adoption of the

Moab Planning Commission's recommendation for approval of the Preliminary MPD Plan. The review by the district court, like this appeal, was limited to a review of the record relied on by the City in granting its approval of LB Moab's Preliminary MPD Plan.

The parties completed briefing on their respective cross-motions for summary judgment. Petitioners submitted a Notice to Submit for Decision based on the briefs on July 1, 2010. On October 20, 2010, Judge Lyle R. Anderson determined that the record submitted by LB Moab contained substantial evidence supporting the City's approval of the Preliminary MPD and granted summary judgment in favor of the City and LB Moab. On appeal, Petitioners again challenge the sufficiency of the evidence submitted by LB Moab to the City for its review of LB Moab's Preliminary MPD Plan.

B. STATEMENT OF FACTS.

1. The land at issue here is owned by the State of Utah and administered through the School and Institutional Trust Lands Administration ("SITLA"). DEF330.
2. On June 6, 2006, LB Moab entered into a ground lease with SITLA which authorized LB Moab to apply to the City for Master Plan Development of the property and to acquire and develop the Subject Property upon terms and conditions stated in the ground lease. DEF 331.
3. On February 19, 2008, LB Moab submitted an application for MPD for Lionsback Resort, a proposed mixed use development. DEF 328-331.

4. Concept MPD Plan documents were submitted to the City in the spring/summer of 2007. DEF 1435.
5. The development Concept MPD Plan was approved by the Planning Commission on October 25, 2007. DEF 326-327.
6. On January 4, 2008, LB Moab submitted the Preliminary MPD Plan documents required by the LUC and some which were not expressly required by the LUC:

- Lionsback Resort Preliminary Site Inventory and Vicinity Map
- Lionsback Resort Preliminary MPD Plan
- Lionsback Resort Preliminary MPD Plan - Open Space
- Lionsback Resort Preliminary MPD Plan - Phasing
- Lionsback Resort Preliminary MPD Plan - Lots
- Lionsback Resort - Lots and Units Summary
- Lionsback Resort - Site Analysis
- Photos of Key Observation points.
- Lionsback Resort - Elevation Hotel (Phase-1) On Site
- Lionsback Resort - Elevation of Hotel - Colored
- Architectural Sketch of Typical Cluster
- (3) Architectural Sketches of Street/Alley views
- Typical Stucco Colors
- Lionsback Resort - Signage and Lighting Plan
- Lionsback Resort - Landscape Planting Plan, Water Zone and Lighting Notes
- Lionsback Resort - Landscape Zone Diagram
- Lionsback Resort - Path Lighting Diagram
- Lionsback Resort - Erosion control measures
- Lionsback Resort - Typical Tree Layout
- Lionsback Resort - Slope Analysis
- Lionsback Resort - Site Photo With Development
- C1 - Preliminary Street Plan
- C2 - Preliminary Street Plan
- C3 - Preliminary Street Sections
- C4 - Preliminary Grading Plan
- C5 - Preliminary Grading Plan
- C6 - Preliminary Water and Sanitary Sewer Plan
- C7 - Preliminary Water and Sanitary Sewer Plan

C8 - Preliminary Dry Utilities Plan
C9 - Preliminary Dry Utilities Plan
C10- Preliminary Draining Basins Plan
C11- Preliminary Draining Basins Plan
C12- Preliminary Draining Basins Plan
Lionsback Village Traffic Impact Study
Phase I Site Assessment
Lionsback Village Raptor Assessment
Lionsback Resort Preliminary Drainage Plan
Lionsback Resort Preliminary Design Guidelines

DEF 1436.

7. A report on the proposed Lionsback Resort preliminary plan was prepared by the City's planning staff and submitted to the Planning Commission on April 30, 2008. The report discussed the proposal, provided the Commission with the applicable ordinance requirements and recommended that the Commission recommend approval of the preliminary plan with three conditions related to road ownership and timing of annexation.

DEF 1543 - 1556.

8. A public hearing on the Project was held before the Planning Commission on May 8, 2008. DEF 1417-1420. It appears that only four persons spoke at the hearing.

(Id.)

9. The Preliminary MPD Plan received a 4-0 recommendation for approval subject to five conditions. DEF 1404.

10. On June 6, 2008, the Moab City Engineer, Dan Stenta, reported his review of the MPD submissions and concluded that all requirements had been met.

I have completed a review of the package submitted for the Lionsback Resort MPD Preliminary Plan. The scope of my review was limited to the following plan elements: water and sewer systems, site access and street plan, drainage analysis and proposed grading and drainage improvements, project traffic impacts, site geological hazards, and drinking water source protection issues. The Applicant's design team has worked extensively with me over the past 24 months, and the submitted Preliminary Plan addresses all issues that I have raised pertaining the [sic] elements listed above. It is my determination that the plan as submitted complies with all applicable state and city codes and furthermore the plan does a very good job at addressing all site design issues specific to this site in a manner that fits very well with the intent of the SAR zone and the MPD process. At this time I do not have any recommended conditions to be imposed on the Preliminary Plan that would deal with any of the plan elements listed above.

DEF 1538.

11. Mr. Stenta then addressed how the plan had dealt with specific concerns raised at the Planning Commission hearing. DEF 1538 - 1539.

12. On June 24, 2008, the Moab City Council voted 4-0 to approve the Lionsback Preliminary MPD Plan. DEF 1411

13. The City's ordinances contain provisions for Master Plan Developments in Title 17 of its Municipal Code (the "LUC").

14. The MPD provisions are separate from the City's subdivision ordinances which are contained in Title 16, Chapter 65 of its Municipal Code.

15. The purpose of the MPD process "is to provide greater flexibility and, consequently, more creative and imaginative design than generally is possible under conventional zoning regulations." (Moab City Code §17.65.010.)

16. The Code expressly requires that development in the City's sensitive area resort (SAR) zone be processed under the MPD provisions. (Moab City Code § 17.65.020.)

17. The MPD provisions govern over conflicting provisions from other parts of the code. "When provisions within this chapter expressly allow for a deviation from an existing city code, all provisions herein shall apply." (Moab City Code § 17.65.020.)

18. The requirements for approval of a Preliminary MPD Plan are contained in § 17.65.100. DEF 1455-1456.

The preliminary development plan shall identify the final proposed location of all lots, tracts, parcels, open space, rights-of-way, building envelopes, and other significant features. Components of this submittal may be combined into one or more site plans or reports provided that they are clear, legible and successfully demonstrate their purpose.

(Moab City Code § 17.65.100, emphasis added.)

19. The Preliminary MPD review process requires a developer to submit "a proposed set of codes, covenants and restrictions which shall be recorded following the approval of their content and the approval of the final MPD." (Moab City Code § 17.65.100.K.)

20. LB Moab submitted a copy of its proposed codes, covenants, and restrictions to the Moab City Attorney for review. DEF 1545; DEF 696-883.

SUMMARY OF ARGUMENT

In reviewing the decision below, several preliminary observations are important. First, the review of the district court was limited to the City's record of the proceedings associated with Preliminary MPD Plan. Second, the land use decision is afforded a

statutory presumption of validity. Third, the administrative decision at issue is valid if supported by substantial evidence in the record and is not arbitrary, capricious or illegal. In addition, because of its expertise in the area of land use decisions and familiarity with City ordinances, the Planning Commission's and the City Council's respective application of the LUC to the facts presented in the application and other materials and evidence in support Preliminary MPD Plan a land use proposal is afforded some judicial deference.

It is also important to recognize the approval is pursuant to and controlled the City's LUC provisions that govern the consideration of MPD applications, as distinguished from the review and action on a traditional subdivision application. The MPD review process is intended to provide for considerable flexibility to both the applicant and the City to accomplish various stated land use policies, goals and objectives. At every stage of the proceedings to date, Petitioners have repeatedly and erroneously assumed that the application was for a standard subdivision review and governed by the LUC provisions that separately address subdivisions. The sections of the LUC that govern the review and action by the City on a subdivision application simply do not apply to a development proceeding under an MPD review. The MPD review process, in addition to addressing other land use policies, goals and objectives, also applied and reviewed the applicable issues dealing with subdivisions to the consideration of the MPD application. As a result of the SAR zoning classification and the MPD review process, LB Moab's land use application has been subjected to a higher level of review and scrutiny, than would occur for a typical subdivision

review. Because the MPD process supplants the City's subdivision ordinance within properties subject to the SAR zone, no further or separate subdivision review is required under the applicable LUC provisions.

In compliance with the LUC submittal requirements, LB Moab submitted voluminous plans, narratives, studies and other reports in support of its Preliminary MPD review application. As the Preliminary MPD ordinance identifies, these documents are components "which may be combined into one or more site plans or reports. . . ." Moab City Code § 17.65.100. Some of the submitted materials covered one topical item, some covered multiple topical items, but in sum, each and every item required to be submitted by LB Moab under the applicable provisions of the LUC, and more, was in fact submitted by LB Moab, determined to be complete by the City, and was carefully considered, reviewed and approved by the City. However, throughout this appeal process, Petitioners have placed form over substance and mistakenly argued that each component to the Preliminary MPD Plan should be prepared as discrete individual reports, not the comprehensive format allowed by the Preliminary MPD process. *See* Moab City Code § 17.65.100.

In addition, some materials appropriate for consideration in the context of the Final MPD Plan review process will be submitted at that later stage of the process. This appeal taken by Petitioners has delayed submission of applications and supporting materials for the Final MPD Plan review.

As the Court will note in its consideration of the record, there is unquestionably substantial evidence in the record to support the Preliminary MPD Plan approval.

ARGUMENT

I. THE CITY AND THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE CITY'S APPROVAL OF LB MOAB'S PRELIMINARY MPD PLAN IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

This Court's review of the City's decision is limited to facts contained in the record provided by the City. Utah Code Ann. § 10-9a-801(8)(a). The decision is statutorily presumed to be valid and the Court is limited to determining whether the decision is arbitrary, capricious or illegal. Utah Code Ann. § 10-9a-801(3)(a). "A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious or illegal." *Id.* § 10-9a-801(3)(c).

Petitioners' statement of the standard of review is inaccurate and incomplete. The standard is statutory and includes a presumption that the land use decision is valid.

Pursuant to Utah Code Ann. § 10-9a-801(3)

(a) The courts shall:

- (i) presume that a decision, ordinance or regulation made under the authority of this chapter is valid; and
- (ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious or illegal.

...

(c) A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious or illegal.

(d) A determination of illegality requires a determination that the decision, ordinance, or regulation violates law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.

Utah Code Ann. § 10-9a-801(3).

Local land use authorities are afforded “a comparatively wide latitude of discretion.”

Patterson v. Utah County Bd. of Adjustment, 893 P.2d 602, 604 n. 4 (Utah App. 1999).

Interpretation and application of local ordinances are afforded some deference based upon

the local authorities’ specialized knowledge. Carrier v. Salt Lake County, 2004 UT 98,

¶ 28.

Because a determination of illegality is based on the land use authority’s interpretation of zoning ordinances, [courts] review such determinations for correctness, but . . . also afford some level of non-binding deference to the interpretation advanced by the land use authority.

Fox v. Park City, 2008 UT 85, ¶ 11 (punctuation, footnote omitted).

The issue of whether a decision is arbitrary or capricious presents only a question of whether a reasonable mind could reach the same conclusion as the local authority and does not permit a court to independently weigh the evidence. Patterson at 604. The court may not substitute its judgment for that of the municipality. Springville Citizens for a Better Community v. City of Springville, 1999 UT 25, ¶ 24. The burden is on the Petitioners here to marshal all of the evidence in favor of the City’s decision and demonstrate that the findings are not supported by substantial evidence. Patterson at 604 n. 7.

In addition, even in the event a municipality does not fully comply with a component of its ordinance, “[p]etitioners must establish that they were prejudiced by the City’s noncompliance with its ordinances” Springville Citizens, ¶ 31. This requires proving “how, if at all, the City’s decision would have been different and what relief, if any, they are entitled to as a result.” *Id.* This obstacle is insurmountable in the present matter. *See Gardner v. Perry City*, 2000 UT App. 1, ¶ 20, n. 7 (“Springville Citizens imposes a difficult – if not impossible – burden on a citizen who seeks to challenge the procedural illegality of a city’s land use decision.”)

The correct standard of review, therefore, requires that the Court give the local land use decision a presumption of validity and afford the local body’s interpretation and application of its ordinances deference in the process.

It is insufficient for the Petitioners to nitpick at the City’s alleged failings. They must come forth with affirmative evidence which establishes that they are entitled to the relief they seek in order to avoid summary judgment. *See generally Home Builders Ass’n v. City of North Logan*, 1999 UT 63 (Petitioner required to adduce evidence to avoid summary judgment in favor of city). A decision which, as is the case here, was carefully considered, as evidenced by the record, is not arbitrary or capricious. Springville Citizens ¶ 25.

Finally, throughout their arguments, Petitioners repeatedly argue that each individual component of the Preliminary MPD ordinance requires a discrete individual

report. This argument is contrary to the ordinance which provides “[c]omponents of this submittal may be combined into one or more site plans or reports. . . .” Moab City Code § 17.65.100.

A. TO THE EXTENT THAT NATURAL FEATURES AND CULTURAL RESOURCES EXIST AND ARE MATERIAL TO THE DEVELOPMENT THE RECORD CONTAINS INFORMATION SUPPORTING THE CITY’S DECISION.

LB Moab’s Preliminary MPD application adequately addressed the natural features and cultural resources. Petitioners erroneously argue that the record lacks a Significant Features Plan, or any site plan that accommodates and preserves historic, cultural, or archeological resources. *See* Petrs.’ Br. at 32. The LUC requires a Significant Features Plan to include “natural and cultural features from the concept site inventory that will be protected through delineation of open space. . . .” *See* Moab City Code § 17.65.100.A. Contrary to Petitioners’ assertion, the record contains substantial evidence that LB Moab adequately addressed the historic, cultural, or archeological resources within the proposed development. A site survey was conducted on the Project which revealed that there are no cultural or historic features on the site requiring inclusion in the Significant Features Plan. DEF 463, 873-883. *See* Moab City Code § 17.65.090.B.7.² The site survey indicated that

²This survey was completed during the Conceptual MPD phase of the process, which was approved on October 25, 2007, in a separate review process that was not challenged. Accordingly, that site inventory and the record of that process is not part of the record on appeal. However, during the Board of Adjustment appeal hearing on August 28, 2008, representatives from LB Moab indicated that a “site assessment which is in the big book in which there aren’t any cultural or historic things on site.” DEF 463.

the site had been used as a commercial campsite in excess of 20 years. DEF 874. The site survey also indicated the property contained several primitive roads and trails crossing the campground area and as a result of years of unregulated use the area “in and around the Lionsback suffered significant damage from uncontrolled camping and motorized use.” DEF 873, 1540. To the extent that the site survey contained evidence of historic cultural or archeological activity, those findings consisted primarily of discarded automotive parts including tires and batteries, and scattered trash. DEF 876. Accordingly, the site survey provided the City with substantial evidence that other than the Lionsback Fin, the site lacked any other cultural or historic resources requiring incorporation into a Significant Features Plan.

Petitioners correctly identify that the Lionsback Fin is historically and culturally significant. Petrs’ Br. at 33, DEF 1511. The site inventory identifies the Lionsback Fin as “Historic/Culturally” significant, but it is outside the area of planned development. DEF 1511. However, because of its proximity to the Project, LB Moab has addressed the Project’s potential impact on this feature by creating an open space buffer adjacent to the Lionsback Fin. DEF 1511, 1375 (identifying the Lionsback Fin and depicting the open space within the Project, which includes the area surrounding and including the Lionsback Fin). Regardless, Petitioners have failed to identify how this feature will be damaged as a result of the Project. While there is no report specifically titled in the manner Petitioners would prefer, the record establishes that LB Moab’s Preliminary MPD submissions

regarding the Significant Features Plan satisfy this requirement.

B. LB MOAB SUBMITTED SUBSTANTIAL EVIDENCE ADDRESSING TRAFFIC, TRAILS, AND CIRCULATION.

LB Moab provided the City with substantial evidence addressing traffic, trails and circulation. Once again Petitioners place form over substance by mistakenly arguing that because LB Moab did not have a report specifically entitled a “Traffic, Trails, and Circulation Plan,” there was not substantial evidence supporting approval of the Preliminary MPD Plan. Petrs’. Br. at 33. As alleged evidence of this failure, Petitioners point to the preliminary street plan, which identifies the proposed routes through the Project. DEF 1487-1488. This preliminary street plan indicates where the proposed roads will be, and by extension where the vehicles will circulate. *Id.* In support of its application, LB Moab provided the City with a Traffic Impact Study, which was submitted and considered by the City. DEF 1059. LB Moab also submitted pavement design recommendations. DEF 1319-1322. They also provided the City with a Concept Plan which shows internal trails, access roads, internal roads, and the Hells Revenge four wheel drive road. DEF 1374³. These multiple submittals were reviewed by the City and carefully considered. DEF 1544. The City correctly determined that LB Moab’s traffic, trails and circulation met Preliminary MPD requirements.

³The internal trails are identified in the Concept Plan by grey lines, which do not contrast well with the contour lines on the map. Regardless, the proposed location of the trails are identified in the Concept Plan.

Petitioners also attempt to create requirements where none exist. They argue that because the streets “meander and curve in many different directions, as opposed to a grid system,” LB Moab has somehow failed to demonstrate how traffic will circulate through the Project. Petrs’. Br. at 34. However, there is no such requirement in the Preliminary MPD review process. Regardless, the record clearly demonstrates LB Moab provided the City with the required preliminary street plan. The existence of the proposed street plan and the careful review of the submittals by the City is evidence that LB Moab’s preliminary street plan met the Preliminary MPD requirements.

Petitioners also conclude that the preliminary street plan “only indicates where proposed parking is approximately located” and does not “state the number of spaces.” Apt’s Br. at 34. This assumption overlooks the fact that the preliminary street plan clearly identifies the proposed parking areas and the spaces. DEF at 1487, *see also* DEF 1525 (Preliminary Site Plan - includes a reference to the total number of parking spaces). The combined effect of these submittals provided the City with substantial evidence supporting its decision.

LB Moab also provided adequate evidence of its proposed trails and links to offsite trails. In the “Preliminary Site Plan” LB Moab identified proposed trails and other pedestrian infrastructure. DEF 1374, 1525. LB Moab also identified proposed links to existing trails, like the Hell’s Revenge 4x4 trail/road. DEF 1374, 1487. While the trail markings are not easily identifiable on the Preliminary Site Plan because of their similar

shading to the contour lines, the trails are clearly identified on the Preliminary Site Plan and satisfy this requirement of the Preliminary MPD review process.

While LB Moab may not have presented its Preliminary MPD Traffic, Trails, and Circulation Plan in a format preferred by Petitioners, it has certainly complied with the LUC's requirements and provided the City with substantial evidence supporting the approval of its Preliminary MPD traffic, trails, and circulation plan requirements.

C. GRADING AND DRAINAGE ISSUES HAVE BEEN ADEQUATELY ADDRESSED.

Petitioners argue that the draining and grading issues were not adequately addressed in LB Moab's submittals.⁴ However, even a cursory review of the record shows that LB Moab satisfied the Preliminary MPD grading and drainage plan requirements with its substantial submittals. First, LB Moab provided the City with a comprehensive summary assessment of its Preliminary Drainage Report. DEF 1186-1296. This 110 page report divided the Project into three major basins and dozens of sub-basins, then calculated discharge rates associated with a 100 year flood event. *Id.* The stormwater discharge issue was addressed in the Preliminary Drainage Report prepared by Foley Associates, Inc., January 4, 2008. DEF 1189-1296, 1495-1497. The summary to this report stated:

⁴ Petitioners also argue that the stormwater and drainage submittals are insufficient because they do not indicate when they will be used. This argument is without merit, the Preliminary MPD ordinance is clear, the plans will be effective both during and after construction. *See* Moab City Code § 17.65.100.E.

Under 30% of the entire ownership will be developed and of that area a smaller percentage of the individual sites will be impervious. The Moab City Engineer directed the development team not to have storm water detention as part of this development. The 10-year and 100-year design storms were utilized for the preliminary drainage design. The 10-year design storm passes through all proposed culverts and drainage facilities and the 100-year storm runoff area does not have a harmful effect on the development or Sand Flats Road. The historic drainage patterns (swales) will be used west of Sand Flats Road and at this time it does not appear that there will be grade changes on Sand Flats Road to accommodate concerns.

(*Id.* at 941.)

Petitioners argue that LB Moab failed to meet the “relevant standard” for preventing increased runoff, but fail to provide any authority for this assertion. *Petr.’ Br.* at 38. However, the record is clear LB Moab addressed increased runoff in its Preliminary Drainage Report. DEF 1186-1296, at 1202. In this report, LB Moab’s engineer considered that over 70% of the existing site will remain open space, then he considered that of the approximately 30% that will be developed, not all of that area will be impervious. *Id.* The report then concludes, “it appears that the developed flows will not have a significant impact on the existing drainage.” *Id.* In addition, due to the City Engineer’s concerns about downstream drainage, LB Moab was “directed not to have any onsite detention.” *Id.* The record is clear, LB Moab provided the City with substantial evidence of its plan to prevent increased runoff resulting from the development.

LB Moab’s Preliminary Grading Plan also satisfies the Preliminary MPD requirements. The Grading Plan and road design were prepared to minimize any grading on the site. *See* DEF 482 (August 8, 2008 transcript from Moab BOA meeting developer

discussing the Grading Plan). In the Preliminary Grading Plan LB Moab identified the “existing topography, including elevations, and the clearly delineated location and depth of all proposed fills and cuts of finished earth surfaces, as well as any mapped floodways or FC-1 zoned areas.” *See* Moab City Code § 17.65.100.E; *See also* DEF 1495-1497, DEF 1490-1491. Further, “locations and proposed details for storm sewers, detention/retention structures, diversions, waterways, drains, culverts and other water management control measures” are identified in Preliminary Drainage Basins. DEF 1495-1496. These plans address the requirements the Preliminary MPD and provide substantial evidence that support the City’s decision.

Petitioners do not suggest that LB Moab failed to submit information in support of its grading and drainage plan requirements, rather their argument is that they simply do not agree with the methods and information presented by LB Moab. In other words, contrary to the law and the evidence, Petitioners ask the Court to substitute their judgment for that of the City and LB Moab’s engineer. *See* Springville Citizens ¶ 24 at 337. However, the voluminous record is clear, LB Moab provided the City with substantial evidence of its stormwater and drainage plan and the Court is not allowed to substitute Petitioners’ collective judgment for the City’s.

D. LANDSCAPING HAS BEEN ADEQUATELY ADDRESSED.

Consistent with their approach throughout this appeal process, Petitioners nitpick the details of LB Moab’s landscaping submittals. LB Moab provided the City with

substantial landscaping plans.⁵ DEF 1545. Indeed the landscaping requirements are addressed multiple times throughout LB Moab's comprehensive submittals. DEF 705; 1545; 1526-1529. Because of the size of the Project it was determined the most efficient way to address the requirements of the Preliminary MPD Landscape and Irrigation Plan requirements was to pick a typical area within the Project and demonstrate the intention of the landscaping. This was addressed in the General Landscaping Guidelines and in the Landscaping Guidelines of the Preliminary Design Guidelines. DEF 1216-1224, 710-712. To comply with this requirement, LB Moab also produced the "Planting Plan, Water Zone, and Lighting Notes," the "Landscape Zone Diagram," "Path Lighting Diagram," "Erosion Control Measures," and "Typical Tree Layout." *See* DEF 1516-1529. These guidelines provide ample evidence that LB Moab provided the City with substantial evidence supporting its approval of this Preliminary MPD requirement.

⁵To the extent that the voluminous landscaping submittals provided by LB Moab did not include some of the criteria suggested to be included in the Landscaping and Irrigation Plan, e.g. counting every tree on the 175 acre parcel, Petitioners have failed to establish that they have been prejudiced by any of the submissions. *See* Moab City Code § 17.65.100.F (Includes a non-exclusive list of criteria to be included in the report); *See also* Springville Citizens, ¶ 31 (Petitioners must demonstrate how the presence of any missing information would have changed the City's decision.). *See* DEF at 1545.

E. THE PROPOSED COMPREHENSIVE DESIGN GUIDELINES FULFILL LB MOAB'S OBLIGATION TO PROVIDE PROPOSED COVENANTS, CODE, AND RESTRICTIONS.

Perhaps most illustrative of Petitioners' desire to place form over substance, Petitioners erroneously state that "Covenant, Code, and Restrictions do not exist." Petrs' Br. at 39. However, LB Moab submitted a comprehensive document entitled the "Lionsback Preliminary Design Guidelines" ("Guidelines") dated January 28, 2008. DEF 696-883. This substantial document provides preliminary guidelines for development within the Project and upon further refinement will serve as the Codes, Covenants, & Restrictions (CC&Rs) within the completed Project. As the Guidelines indicate, "[t]he Lionsback Resort's Guidelines are part of a series of governing documents [. . .] which will be used to manage and administer the Lionsback Resort. . . ." DEF 700. The Preliminary MPD code only requires the developer to submit a "proposed set of codes, covenants and restrictions which shall be recorded following approval of their content and the approval of the final MPD." Moab City Code § 17.65.100.K. The preliminary nature of this submittal provides both the City and LB Moab time to refine the CC&Rs before final approval. LB Moab submitted its proposed Guidelines on January 28, 2008, nearly eight months before the City approved the Preliminary MPD Plan. While the Guidelines have not yet been recorded, LB Moab is not required to record the CC&Rs until final approval of the MPD. Despite the obvious nature of the Preliminary Design Guidelines, Petitioners argue

the absence of their preferred label somehow invalidates this submittal. However, the City correctly concluded that these Guidelines satisfied the Preliminary MPD requirements.

F. THE SUBDIVISION ORDINANCES DO NOT APPLY TO THE PRELIMINARY MPD APPROVAL PROCESS.

Petitioners have repeatedly and mistakenly argued that the City's subdivision review requirements apply. However, the sections of the LUC that govern review and action by the City on a subdivision application do not apply to a development proceeding under and MPD review. *See generally* Moab City Code § 17.65.020. The SAR code requires all development projects within the a SAR zone to be developed as a Master Planned Development. Moab City Code § 17.32.040.A. Pursuant to the MPD ordinance "when provisions within this chapter expressly allow for a deviation from an existing city code, all provisions herein shall apply." Moab City Code § 17.65.020.F. The Project area is zoned SAR. DEF 1536-1537. While the stated intent of the MPD process is to provide greater flexibility and creative design, this stated purpose should not be misconstrued to mean that lesser requirements exist. The MPD process provides a greater level of involvement between the City and the developer, in this case LB Moab. Moreover, the MPD process allows for greater oversight and input from both the City and the public as the Project advances. Because the Subject Property is zoned SAR, the MPD review process was required and supplanted the City's subdivision process. No further separate subdivision review is required under the applicable LUC provisions.

Finally, the City's use of the MPD review process instead of the subdivision ordinance does not prejudice Petitioners. As was outlined above, the MPD process provides for greater involvement and oversight by both the City and the public. To date, LB Moab has provided voluminous submittals to obtain approval of its Preliminary MPD, many of which would not be required in a traditional subdivision. Regardless, Petitioners have failed to show that a different result would have occurred had the City reviewed LB Moab's application under its subdivision ordinance. *See* Springville Citizens, 1999 UT 25, ¶ 31.

CONCLUSION

It is obvious that Petitioners simply do not want to see the Project developed and have, at every stage in which they have elected to participate, made clear their intent is to simply derail the Project. At each step, Petitioners have failed to introduce compelling facts, arguments or other information to persuade City decision makers that their position is meritorious. Petitioners have repeatedly asked the City and the courts to place form over substance. The arguments advanced in this appeal make it clear that the Petitioners are merely nitpicking the substantial information contained in the record, and using a shotgun approach, hoping to convince the Court that something is amiss.

A review of the record and the proceedings below demonstrates Petitioners' shotgun approach is without substance or merit. Petitioners have failed to establish any substantive defect in the evidence supporting the City's approval and the lower court's decision.

However, even if the City failed to comply with a small component of the Preliminary MPD ordinance, Petitioners have failed to demonstrate how, if at all, they were prejudiced and how remand and reconsideration by the City will change the outcome.


This Court should not accept the Petitioners' invitation to substitute its judgment for that of the City officials responsible for protecting the public interests of the citizens of Moab. The decision by the City Council to grant Preliminary MPD Plan approval was not arbitrary, capricious or illegal. The BOA and the district court affirmation of that decision was correct. LB Moab therefore respectfully requests that the Court affirm the decision of the district court.

Finally, this Court should consider an award of reasonable attorney fees and court costs to LB Moab in connection with this appeal. As set forth above, many of the arguments advanced by Petitioners are unsubstantiated and border on the frivolous.

RESPECTFULLY SUBMITTED this 20th day of May, 2011.

WILLIAMS & HUNT

By



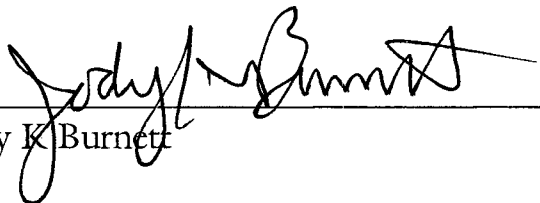
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May, 2011, two (2) true and correct copies of the foregoing Brief of Intervenor LB Moab Land Company, LLC, along with a Courtesy Brief on CD, were mailed by first class mail, postage prepaid thereon, to:

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