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Willis Lauritz Petersen, Jr. Leslee P. Christensen,  
Allan D. Petersen, Kristine Petersen Smith, and  
Dean B. Petersen as trustees of the Margaret Park  
Petersen Family Living Trust v. Riverton City :  
Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT UTAH

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In the Matter of Application PLZ-07-4009:

WILLIS LAURITZ PETERSEN, JR,  
LESLEE P. CHRISTENSEN, ALLAN  
D. PETERSEN, KRISTINE  
PETERSEN SMITH, and DEAN B.  
PETERSEN, as trustees of the  
MARGARETT PARK PETERSEN  
FAMILY LIVING TRUST,

Appellants/Petitioners,

vs.

RIVERTON CITY, a municipality of  
the State of Utah,

Appellee/Defendants.

No. 20090095-SC

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REPLY BRIEF OF APPELLANTS

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Appeal from a Summary Judgment from the Third Judicial District Court, Salt Lake County,  
Case No. 070911432,  
Honorable Anthony Quinn

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ORAL ARGUMENT REQUESTED

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**IN THE SUPREME COURT UTAH**

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**REPLY TO RIVERTON'S RESPONSE TO THE PETERSEN FAMILY'S  
STATEMENT OF FACTS**

Riverton's assertion that the facts surrounding the denial of the Petersen Family's Application to rezone their property ("Application") are irrelevant so long as any reasonably debatable explanation for the denial exists is simply wrong. *See* Brief of Appellee Riverton City ("Appellee's Brief") at 12. As discussed below, those facts support the Petersen Family's claim that Riverton City ("Riverton"), in denying the Application, was improperly motivated by a desire to keep the value of the Petersen's Family's property (the "Property") low because Riverton had future plans to acquire a portion of the Property through condemnation. Riverton's motivation is, therefore, not only relevant in determining the validity of the statute but, if proven, invalidates the City Council's denial of the Application. Riverton's argument that its motivations are irrelevant is incorrect.

Riverton also mistakenly asserts that the Petersen Family was required to marshal the evidence in support of the denial of the Application in order to demonstrate that the decision was not supported. Appellee's Brief at 12-13. The duty to marshal the evidence applies only where a party on appeal is challenging a finding of fact by a trial court. *See United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶ 24, 140 P.3d 1200. Since no evidence was taken and no findings of fact were made by the City Council, the marshaling requirement has no application in this case.

Despite its assertion that the facts, and the inferences that may be drawn from the facts, are not relevant if any reasonably debatable justification for the denial of the Application exists, Riverton also argues its own characterization and interpretation of the facts to convince this Court of its position. Further, after asserting that only evidence

reflected in the City Council record can be considered by this Court in reviewing the denial of the Application, Riverton nevertheless spends three pages citing to meeting minutes regarding an unrelated zoning decision in an attempt to persuade this Court that its actions were proper. *See* Appellee's Brief at 17-20.

Riverton cannot assert that the Petersen Family's conclusions from the record below are irrelevant while urging this Court to consider its own characterization of the proceedings. Similarly, Riverton cannot assert that the Petersen Family is limited to only the record below, but then go outside the record in an attempt to support its own position.

At the end of the day, Riverton's inconsistent arguments are unavailing. Many courts deem, as this Court should, a zoning decision affecting a specific parcel of land a quasi-judicial action subject to the substantial evidence standard. Riverton's shunning of this important issue does not make it disappear. In addition, Riverton's denial of the Application for the purpose of depressing the value of the Property so that Riverton could later acquire a portion of the Property through condemnation renders the denial unconstitutional and void. At the very least, the Petersen Family is entitled to a trial on the issue of whether Riverton denied the Application for the purpose of depressing the value of the property so that Riverton could later condemn it at a lower value than if the property were rezoned and developed. The Petersen Family is also entitled to conduct discovery on the issue of the city's animus in denying the application for purposes of the Petersen Family's Equal Protection claim.



## ARGUMENT

### **I. THE PETERSEN FAMILY PROPERLY RAISED IN THE TRIAL COURT THE ISSUE OF WHETHER THE STANDARD OF SUBSTANTIAL EVIDENCE APPLIES**

“An issue is properly preserved in the trial court where the record shows that ‘(1) the issue is raised in a timely fashion; (2) the issue is specifically raised; and (3) the issue is supported by evidence or relevant legal authority.’” *State v. Chavez-Espinoza*, 2008 UT App 191 ¶ 9, 186 P.3d 1023 (quoting *Hatch v. Davis*, 2004 UT App 378, ¶ 56, 102 P.3d 774). If counsel raises an issue before the trial court and the trial court considers the issue, “the issue is preserved for appeal.” *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968. If a party briefs an issue in the context of summary judgment proceedings before the trial court, the issue is properly preserved for appeal. *See Sittner v. Schriever*, 2000 UT 45, ¶¶ 15-17, 2 P.3d 442. There can be no serious question that the substantial evidence standard was raised in the court below and is properly raised in this appeal.

Riverton incorrectly asserts that the issue of the substantial evidence test is a “new argument” because at argument the Petersen Family acknowledged the application of the reasonably debatable standard to the denial of its Application to rezone the Property. Appellee’s Brief at 21. That acknowledgment, however, only occurred following a preliminary ruling from the trial court rejecting the Petersen Family’s arguments for application of the substantial evidence standard and dictating application of the reasonably debatable standard in this case. *Id.* at 9-10; R. 446 at pp. 2-4. Although the Petersen Family had little choice but to accept the trial court’s ruling that the reasonably debatable standard is the controlling test under the present law, that concession does not negate the fact that the

Petersen Family specifically raised the issue of the substantial evidence test in its brief opposing Riverton's Motion for Summary Judgment. (R. 320-23).<sup>1</sup> In the Petersen Family's Memorandum in Opposition to Riverton City's Motion for Summary Judgment, the Petersen Family argued that the denial of the application to rezone their property "was not based on substantial evidence in the record [as required by] Utah Code Ann. § 10-9a-801(3)." (R. 321). The Petersen Family also asserted, with supporting authority, that because the City Council was acting in a "quasi-judicial manner" in denying the application to rezone the Property, the decision must accordingly be supported by substantial evidence in the record. (R. 320-21). In its brief Riverton expressly acknowledges that those arguments were raised below stating: "The Petersen Family argued the district court should overturn the City Council's decision because it was not supported by 'substantial evidence.'" Appellee's Brief at 8. Indeed, the trial Court's preliminary ruling was directed to, and is an acknowledgment of, those very arguments. (R. 446 at pp. 2-3).

Moreover, even if counsel could be found to have "conceded the standard of review" as argued by Riverton, statements by counsel regarding conclusions of law are not binding on the Petersen Family or the Court. *In re Hansen's Estate*, 55 UT 23, ¶ 37, 184 P. 197, 203 (Utah 1919). ("[W]e think this was but an admission of a legal conclusion and is binding neither upon appellant nor upon the court. It is the duty of the court to declare the law as it exists, regardless of what a party or his counsel may concede to be the law.") On appeal,

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<sup>1</sup> Rule 11 clearly gives the Petersen Family to make a good faith argument for a change in existing law. *See* Utah R. Civ. P. 11(b)(2).

conclusions of law are reviewed for correctness, regardless of any mistaken assumptions as to matters of law by counsel. *Lund v. Brown*, 2000 UT 75 ¶¶ 8, 12, 11 P.3d 277.

In summary, the Petersen Family specifically and timely raised the issue of the application of the substantial evidence test in the trial court in opposition to Riverton's motion for summary judgment. The Petersen Family also cited to relevant Utah statutory authority in arguing that Riverton's decision on the Application must be supported by substantial evidence in the record. The trial court considered and ruled on those arguments, rejecting that standard in this case. Lastly, the Petersen Family's counsel acted in accord with that ruling in arguing the reasonably debatable standard. (R. 446 at pp. 2-3). The issue of the application of the substantial evidence test was raised by the Petersen Family in the trial court and is properly before this Court.

## **II. UTAH CASE LAW SPECIFICALLY RECOGNIZES THAT ZONING DECISIONS, LIKE THE DENIAL OF THE PETERSEN FAMILY'S APPLICATION, ARE NOT LEGISLATIVE IN NATURE**

Although most Utah case law and that relied upon by Riverton holds that zoning decisions are legislative and subject to the reasonably debatable standard, at least two Utah cases have recognized that the rezoning of a particular parcel is an administrative rather than a legislative decision. See *Bird v. Sorenson*, 16 Utah 2d 1, 394 P.2d 808 (1967)<sup>2</sup>; *Wilson v. Manning*, 657 P.2d 251 (Utah 1982). In *Wilson*, the court specifically recognized the distinction between the enactment of an original zoning ordinance, which is legislative in

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<sup>2</sup> Many courts have cited *Bird* for the proposition that individual zoning changes are quasi-judicial rather than legislative in nature. Utah courts, however, did not cite *Bird* again until 1982 in the *Wilson* case, and the majority of Utah case law has held that zoning decisions such as the one at issue here are legislative.

nature, and changes to the general zoning in the form of exceptions or variances, which is quasi-judicial or administrative in nature. *Wilson*, 657 P.2d at 253 (citing *Walton v. Tracy Loan & Trust Co.*, 97 Utah 249, 92 P.2d 724, 728-29 (1939) and *Thurston v. Cache County*, 626 P.2d 440, 446 (Utah 1981)). Although Utah cases have held that zoning decisions are legislative for purposes of judicial review, no Utah courts have explained “how amendments to zoning ordinances can be legislative on one occasion but administrative on another.” *See id.* at 257 (Howe, J., dissenting).

### **III. CASE LAW CITED BY RIVERTON SUPPORTS THE PETERSEN FAMILY’S ARGUMENT THAT THE SUBSTANTIAL EVIDENCE STANDARD SHOULD APPLY**

The cases cited by Riverton show that Utah courts have consistently, with little or no review of the decision, upheld a municipality’s zoning decision. This pattern supports the Petersen Family’s argument that the reasonably debatable standard of review is, in effect, no review at all. Rather it is simply a rubber stamp for a municipality’s zoning decision, regardless of the correctness, motivation or evidentiary support for the decision. The cited cases are all relatively short opinions in which the court engages in little in-depth review of the zoning decisions at issue. Rather, in each case, the court simply summarily affirms the zoning decision under the “reasonably debatable” standard. It is difficult, if not impossible, to imagine any zoning decision or scenario which would not pass muster under the reasonably debatable test. Indeed, no published Utah case could be found by the Petersen Family where a zoning decision has EVER been successfully challenged under the reasonably debatable standard.

The reasonably debatable standard provides Utah property owners no protection whatsoever for their property interests. Instead, a municipality has unfettered discretion to make zoning decision affecting property owners, for any reason, valid or not, or for no reason at all. The Petersen Family therefore asserts that a change in existing law is warranted such that a zoning decision which affects an individual property owner should be considered a quasi-judicial decision subject to a higher “substantial evidence” standard rather than a “reasonably debatable” test.

#### IV. OTHER JURISDICITONS CONSTRUE INDIVIDUAL ZONING DECISIONS AS QUASI-JUDICIAL AND APPLY THE SUBSTANTIAL EVIDENCE STANDARD

For decades, courts and commentators have characterized zoning decisions that affect a single parcel of land as quasi-judicial. *See Chrobuck v. Snohomish County*, 480 P.2d 489, 495-96 (Wash. 1971); Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 Ohio St. L.J. 130 (1972).<sup>3</sup> The distinction between legislative and quasi-judicial acts and the conclusion that individual zoning decisions are quasi-judicial, sometimes referred to as the *Fasano* doctrine, can be summarized as follows:

A city in enacting a general zoning ordinance, or a planning commission, in exercising its primary and principal function . . . in adopting and in annually reviewing a comprehensive plan for development of a city, is exercising strictly legislative functions. When, however, the focus shifts from the entire city to one specific tract of land for which a zoning change is urged, the function

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<sup>3</sup> The American Bar Association Advisory Committee on Housing and Urban Growth report contains a series of recommendations, one of which is that, “in granting or denying development permission for a specific parcel of land at the request of a particular party is engaged in an adjudicatory process, wherein the essentials of procedural due process should be followed and judicial bodies reviewing such actions need not accord the traditional presumption of legislative validity to such acts.” Neil R. Shortlidge, *The ‘Fasano Doctrine’: Land Use Decisions as Quasi-Judicial Acts*, in PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 3-45 (Janice R. Moss ed., 1985).

becomes more quasi-judicial than legislative. While policy is involved, such a proceeding requires a weighing of the evidence, a balancing of equities, an application of rules, regulations and ordinances to facts, and a resolution of specific issues.

*Golden v. City of Overland Park*, 584 P.2d 130, 135 (Kan. 1978). Some courts have formulated a “test” to determine whether a decision should be considered legislative or quasi-judicial. See *Neuberger v. City of Portland*, 603 P.2d 771 (Or. 1979). The *Neuberger* court suggested considering three factors in identifying a quasi-judicial determination: (1) the decision is directed at a relatively small number of identifiable persons; (2) the action involves the application of existing policy to a specific factual setting; and (3) the process is bound to result in a decision. *Id.* at 775.

Many jurisdictions across the country agree that zoning decisions affecting a single property owner or parcel of land are quasi-judicial in nature. In *Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 469, 471-72 (Fl. 1993), the Florida Supreme Court explained the traditional reasonably debatable standard and the reason that its application to rezoning decisions affecting one property owner or a small number of property owners is flawed:

The district court of appeal acknowledged that zoning decisions have traditionally been considered legislative in nature. Therefore, courts were required to uphold them if they could be justified as being “fairly debatable.” Drawing heavily on *Fasano v. Board of County Commissioners*, 264 Ore. 574, 507 P.2d 23 (Or. 1973), however, the court concluded that, unlike initial zoning enactments and comprehensive rezoning or rezonings affecting a large portion of the public, a rezoning action which entails the application of a general rule or policy to specific individuals, interests, or activities is quasi-judicial in nature. Under the latter circumstances, the court reasoned that a stricter standard of judicial review of the rezoning decision was required. The court went on to hold:

Since a property owner's right to own and use his property is constitutionally protected, review of any governmental action denying or abridging that right is subject to close judicial scrutiny. Effective judicial review, constitutional due process and other essential requirements of law, all necessitate that the governmental agency (by whatever name it may be characterized) applying legislated land use restrictions to particular parcels of privately owned lands, must state reasons for action that denies the owner the use of his land and must make findings of fact and a record of its proceedings, sufficient for judicial review of: the legal sufficiency of the evidence to support the findings of fact made, the legal sufficiency of the findings of fact supporting the reasons given and the legal adequacy, under applicable law (*i.e.*, under general comprehensive zoning ordinances, applicable state and case law and state and federal constitutional provisions) of the reasons given for the result of the action taken.

The initial burden is upon the landowner to demonstrate that his petition or application for use of privately owned lands, (rezoning, special exception, conditional use permit, variance, site plan approval, etc.) complies with the reasonable procedural requirements of the ordinance and that the use sought is consistent with the applicable comprehensive zoning plan. Upon such a showing the landowner is presumptively entitled to use his property in the manner he seeks unless the opposing governmental agency asserts and proves by clear and convincing evidence that a specifically stated public necessity requires a specified, more restrictive, use. After such a showing the burden shifts to the landowner to assert and prove that such specified more restrictive land use constitutes a taking of his property for public use for which he is entitled to compensation under the taking provisions of the state or federal constitutions.

*Id.* at 471-72 (emphasis added). Applying those principals, the *Snyder* court concluded: “(1) that the Snyders' petition for rezoning was consistent with the comprehensive plan; (2) that there was no assertion or evidence that a more restrictive zoning classification was necessary to protect the health, safety, morals, or welfare of the general public; and (3) that the denial of the requested zoning classification without reasons supported by facts was, as a matter of law, arbitrary and unreasonable.” *Id.* at 472. Over the county’s argument that the zoning was a legislative decision subject to a reasonably debatable standard, the court reasoned:

Historically, local governments have exercised the zoning power pursuant to a broad delegation of state legislative power subject only to constitutional limitations. Both federal and state courts adopted a highly deferential standard of judicial review early in the history of local zoning. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926), the United States Supreme Court held that "if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." 272 U.S. at 388. This Court expressly adopted the fairly debatable principle in *City of Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 So. 2d 364 (1941).

Inhibited only by the loose judicial scrutiny afforded by the fairly debatable rule, local zoning systems developed in a markedly inconsistent manner. Many land use experts and practitioners have been critical of the local zoning system. Richard Babcock deplored the effect of "neighborhoodism" and rank political influence on the local decision-making process. Richard F. Babcock, *The Zoning Game* (1966). Mandelker and Tarlock recently stated that "zoning decisions are too often ad hoc, sloppy and self-serving decisions with well-defined adverse consequences without off-setting benefits." Daniel R. Mandelker and A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 Urb. Law. 1, 2 (1992).

Professor Charles Harr, a leading proponent of zoning reform, was an early advocate of requiring that local land use regulation be consistent with a legally binding comprehensive plan which would serve long range goals, counteract local pressures for preferential treatment, and provide courts with a meaningful standard of review. Charles M. Harr, "In Accordance With A Comprehensive Plan," 68 Harv. L. Rev. 1154 (1955). In 1975, the American Law Institute adopted the Model Land Development Code, which provided for procedural and planning reforms at the local level and increased state participation in land use decision-making for developments of regional impact and areas of critical state concern.

Reacting to the increasing calls for reform, numerous states have adopted legislation to change the local land use decision-making process. . . .

*Id.* at 472-73.

Based on the foregoing reasoning, the court stated:

[I]n deference to the policy-making function of a board when acting in a legislative capacity, its actions will be sustained as long as they are fairly debatable. On the other hand, the rulings of a board acting in its quasi-judicial



capacity are subject to review by certiorari and will be upheld only if they are supported by substantial competent evidence.

Enactments of original zoning ordinances have always been considered legislative. . . . [This] Court [has] held that the passage of an amending zoning ordinance was the exercise of a legislative function. However, the amendment in that case was comprehensive in nature in that it effected a change in the zoning of a large area so as to permit it to be used as locations for multiple family buildings and hotels. [Courts have also] held that board action on specific rezoning applications of individual property owners was also legislative.

[However,], [i]t is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. Generally speaking, legislative action results in the *formulation* of a general rule of policy, whereas judicial action results in the *application* of a general rule of policy. . . . A judicial or quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions. On the other hand, a quasi-legislative or administrative order prescribes what the rule or requirement of administratively determined duty shall be with respect to transactions to be executed in the future, in order that same shall be considered lawful. But even so, quasi-legislative and quasi-executive orders, after they have already been entered, may have a quasi-judicial attribute if capable of being arrived at and provided by law to be declared by the administrative agency only after express statutory notice, hearing and consideration of evidence to be adduced as a basis for the making thereof.

Applying this criterion, it is evident that comprehensive rezonings affecting a large portion of the public are legislative in nature. However, we agree with the court below when it said:

Rezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of . . . quasi-judicial action . . . .

*Id.* at 474 (citations omitted) (emphasis in first paragraph added); *See Park of Commerce Assoc., v. City of DelRay Beach*, 636 So.2d 12, 15 (Fl. 1994); *see also Snyder v. City of Lakewood*, 542 P.2d 371, 372 (Colo. 1975); *Town v. Land Use Comm'n*, 524 P.2d 84, 90-91 (Haw. 1974); *Cooper v.*

*Bd. of County. Comm'rs*, 614 P.2d 947, 952 (Idaho 1980); *Kaelin v. City of Louisville*, 643 S.W.2d 590, 591 (Ky. 1982); *Little v. Bd. of County Comm'rs*, 631 P.2d 1282, 1288 (Mont. 1981); *Massey v. City of Charlotte and Albemarle Land Co.*, 2000 NCBC LEXIS 7, \*19-20 (N.C. Sup. Ct. April 17, 2000).

Even where courts apply a fairly debatable standard, a zoning decision must be supported by substantial evidence in the record or it is considered arbitrary, capricious and a denial of due process. As explained by one court, the grant or denial of an application to change zoning on one particular tract of land:

requires a weighing of the evidence, a balancing of equities, an application of rules, regulations and ordinances to facts, and a resolution of specific issues . . . . A mere yes or no vote upon a motion to grant or deny leaves a reviewing court, be it trial or appellate, in a quandary as to why or on what basis the board took its action. A board, council or commission, in denying or granting a specific zoning change, should enter a written order, summarizing the evidence before it and stating the factors which it considered in arriving at its determination.

*Golden*, 584 P.2d at 135. Jurisdictions that treat a decision on a zoning application as quasi-judicial generally confine judicial review of the decision to the record. However, where allegations of unconstitutionality of the decision exist, a party is permitted to go outside the record and present evidence in support of their constitutional claims. *See e.g.*, OR. REV. STAT. § 197.830(11) (1983).

**V. REGARDLESS OF THE STANDARD OF REVIEW, THE DENIAL OF THE PETERSEN FAMILY'S APPLICATION WAS ARBITRARY, CAPRICIOUS, CONFISCATORY, UNCONSTITUTIONAL AND VOID**

The cases relied upon by Riverton are easily distinguishable and, therefore, inapposite in this action. None of the cases relied upon by Riverton involved circumstances in which

the municipality was attempting to drive down the price of the property at issue so the municipality could acquire the property for its own purposes. Zoning decisions made in cases where clear bias exists cannot be upheld. Indeed, even the appearance of impropriety in zoning proceedings may be enough to render a decision invalid:

[W]e start with the premise that comprehensive planning and zoning proposes and imposes limitations upon the free and unhampered use of private as well as public property, and when such regulations are once enacted, the indiscriminate amendment, modification or alteration thereof tends to disturb that degree of stability and continuity in the usage of land to which affected landowners are entitled to look in the orderly occupation, enjoyment, and development of their properties. Perforce, by the very nature of our society, the initial imposition of zoning restrictions or the subsequent modification of adopted regulations compels the highest public confidence in the governmental processes bringing about such action. Circumstances or occurrences arising in the course of such processes, which, by their appearance, tend to undermine and dissipate confidence in the exercise of the zoning power, however innocent they might otherwise be, must be scrutinized with care and with the view that the evil sought to be remedied lies no only in the elimination of actual bias, prejudice, improper influence or favoritism, but also in the curbing of conditions which, by their very existence, tend to create suspicion, general misinterpretation, and cast a pall of partiality, impropriety, conflict of interest or prejudgment over the proceedings to which they relate.

*Chrobuck*, 480 P.2d at 495-96.

Regardless of the standard of review applied, it is universally accepted that zoning decisions which are made to benefit an entity trying to condemn the property by reducing the value of the property are void.<sup>4</sup> See *City of San Diego v. Rancho Penasquitos Partnership*, 130

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<sup>4</sup> This issue generally arises in condemnation cases, but there is nothing to suggest that the zoning principals would not apply equally in a case where only zoning issues are raised. The trial court expressed concern regarding this issue at oral argument on the motion for summary judgment below. At the hearing, the trial court stated: “Implicit in [the Petersen Family’s] argument is that if the city council was in part motivated by a desire to acquire the drainage basin and that was the reason why they did not change the zoning, that there’s something wrong with that. Is that a problem? I mean, it seems to me – I see a big difference between the city council down-zoning the properties so they can acquire it

Cal. Rptr. 2d 108, 121-22 (Cal. Ct. App. 2003). When zoning decisions are made so a public entity can acquire property at low cost, such decisions have been held to be “discriminatory, confiscatory and invalid.” *Id.* at 122. Where the entity responsible for zoning is also the body responsible for condemnation, “it is practical and logical” that zoning decisions which affect property value for purposes of condemnation should be held invalid. *See id.* at 122. A municipal entity intending to condemn property “cannot enact restrictions on property it seeks to condemn for the express purpose of preventing development and thereby freeze or depress property values.” *Id.* at 123.<sup>5</sup> *See also United States v. Certain Lands in Truro, Barnstable County, Commonwealth of Mass.*, 476 F. Supp. 1031 (D. Mass 1979); *Exxon Co., U.S.A. v. State Highway Admin. of the Md. Dept. of Transp.*, 731 A.2d 948, 952 (Md. Ct. 1999) (“[T]here seems to be a general agreement among the authorities which have considered the question that zoning cannot be used as a substitute for eminent domain proceedings so as to defeat the constitutional requirement for the payment of just compensation in the case of a taking of private property for public use by depressing values and so reducing the amount of damages to be paid.”).

As argued by Riverton, the subjective motivations behind a municipality’s zoning decisions are generally not considered in reviewing the decision. *See Appellee’s Brief* at 32-

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cheaper and leaving it alone so that they don’t have to pay more to acquire it in the future.” (R. 446 at p. 15).

<sup>5</sup> When Riverton moves forward with the condemnation of the Petersen Family’s property, the Petersen Family will have a claim against Riverton for inverse condemnation “resulting from the disguised taking in the form of zoning and for the actual taking of the property.” *Rancho Penasquitos*, 130 Cal. Rptr. 2d at 122; *Dep’t of Public Works v. So. Pac. Transp. Co.*, 109 Cal. Rptr. 525, 528-30 (Cal. Ct. App. 1973) (property owner may bring one action for inverse condemnation and challenging zoning ordinance which depressed value of condemned property).

33. That general rule, however, does not apply where the motivation relates to the municipality's interest in keeping the value of the property low for the purpose of obtaining it through condemnation. Riverton's argument in that regard fails. See *Robertson v. City of Salem*, 191 F. Supp. 604, 610 (D. Or. 1961) (“[I]s conceded that the motives of a legislative municipal zoning authority such as Salem’s Council is not subject to a judicial inquiry in adjudicating the validity of a zoning ordinance restricting land uses . . . . On the other hand, it is not improper to judicially investigate the ‘real purpose, the object and the operative effect’ of such an ordinance when laboring to determine its reasonableness.”). Even under a reasonably debatable standard, “the decisive question becomes: What matter of public interest or general welfare of the enacting society is served by prohibiting one of its members from using his property [for a specific purpose], when his neighbor directly across a city street is permitted to do so?” *Id.*

A city may not purport to “exercise its police power by enacting a zoning ordinance [which] has in reality discriminated against a particular parcel or parcels of land in order to depress their value with a view to future takings in eminent domain.” *Dep’t of Public Works*, 109 Cal. Rptr. at 528 (citing Nichols on Eminent Domain (3d ed.) § 12.322). In such a situation, the property owner “may attack the validity of the invalid zoning ordinance.” *Id.* The fraudulent intent behind a zoning ordinance which is meant to depress the value of property so as to reduce the damages paid by the condemning public entity renders the zoning ordinance invalid. See *Mayor and City Council of Baltimore v. Kelso Corp.*, 380 A.2d 216, 220 (Md. 1977). “A city cannot ‘freeze’ property thereby preventing the owner from improving it so that he may enjoy a beneficial use thereof only because the city may, in the

future need such property” for public use. *Masheter v. Mariemont, Inc.*, 302 N.E.2d 583, 587 (Ohio Ct. App. 1971). “Where the real purpose of the enactment [of a zoning ordinance] was to depress or limit property values in order to minimize the costs of acquisition of such property in anticipated condemnation proceedings the courts have not been reluctant to declare such ordinances unconstitutional and void.” *Dep’t of Public Works and Bldgs. v. Exch. Nat’l Bank*, 334 N.E.2d 810, 819 (Ill. App. Ct. 1975).

In the record evidence supports the Petersen Family’s argument that the Application was denied in order to keep property values down so the City could later condemn a portion of the property at less than fair market value. That alone, regardless of the standard of review applied, renders the decision arbitrary, capricious, unconstitutional and void. At the very least, the Petersen Family should be permitted to conduct discovery, as it requested in its Rule 56 Motion, regarding Riverton’s motivations in denying the Application. *See Naylor v. Salt Lake City Corp.*, 17 Utah 2d 300, 301, 410 P.2d 764 (1966) (stating that a party was allowed to conduct discovery and present evidence at trial to show zoning decision arbitrary and capricious).

## **VI. SUMMARY JUDGMENT ON THE PETERSEN FAMILY’S EQUAL PROTECTION AND DUE PROCEEDS CLAIMS WAS INCORRECT AND SHOULD BE REVERSED**

Relying on *Gardner v. Board of County Commissioners*, 2008 UT 6, 178 P.3d 893, Riverton asserts that the Petersen Family cannot maintain its Equal Protection claim because a rational basis can be articulated for Riverton’s denial of the Application. Appellee’s Brief at 34-35. In *Gardner*, this Court, while stating that a relatively low level rational basis test applied, held that summary judgment is inappropriate where there is “evidence of dissimilar

treatment and an allegation, with some evidentiary support, of malicious or bad faith intent on the part of [public] officials.” *Id.* at ¶ 38. Riverton itself raises issues of fact with respect to the Equal Protection claim by citing to evidence outside the record regarding the “property across the street” and asserting that the Petersen Family was not, in fact, treated differently than other similarly situation property owners. *See* Appellee’s Brief at 39.

The trial court erred in disposing of the Petersen Family’s Equal Protection claim on summary judgment and denying the Rule 56(f) request to conduct discovery. The trial court’s ruling should accordingly be reversed and the Petersen Family should be permitted to conduct discovery and, if appropriate, proceed to trial on its Equal Protection claim.

With respect to the Petersen Family’s Due Process claims, Riverton asserts that the Due Process claims were properly dismissed because the Petersen Family has failed to establish that it had a protectable property interest for purposes of that claim. Specifically, Riverton asserts that the Petersen Family has not identified anything that limits Riverton’s discretion in making zoning decisions. *See* Appellee’s Brief at 40-41. Because Riverton’s planned condemnation of the Property is at issue, statutory limits on the City’s ability to exercise its eminent domain power exist. Riverton does not have the unfettered ability, under the guise of zoning, to attempt to condemn the Petersen’s Family property at lower than market value. Rather, Riverton is limited by the requirements of the Utah and United States Constitutions and by Utah statute that private property may only be taken if just compensation is paid to the property owner. *See* U.S. CONST., amend. v; UTAH CONST., art. I §22; Utah Code Ann. § 76B-6-511-12. Thus, Riverton’s assertion that the Petersen Family can point to nothing limiting Riverton’s zoning authority is simply incorrect.

Because Riverton's zoning authority as it relates to its attempt to condemn the property is statutorily and constitutionally limited, the Petersen Family has identified a protectable property interest in this case. Because the Petersen Family has a cognizable property interest as set forth in detail above, the fact that a rational basis may exist for the denial of the Application does not, as asserted by Riverton, automatically render the denial valid. Rather, the decision, if in fact it was made for Riverton's benefit in obtaining the property at a lower value, is arbitrary, capricious, illegal and deprives the Petersen Family of their property rights without due process of law. *See Robertson*, 191 F. Supp. at 612 (freezing the use of land so a municipality may acquire the property at a depressed value is "arbitrary and discriminatory and that is, in effect, an attempt on the part of [the municipality] to use its police power to take Robertson's property without due process of law" and renders the decision void). At the very least, the Petersen Family is entitled to discovery and a trial on that issue.

### CONCLUSION

The Petersen Family properly raised below and is arguing before this Court for a change in Utah law. Specifically, the reasonably debatable standard is no standard at all and provides no protection whatsoever for Utah property owners. Because a zoning decision which affects a single property owner or parcel of property is a quasi-judicial decision, it should be subject to a substantial evidence standard. Many other jurisdictions and scholars agree that such a standard is more appropriate for individual zoning decisions than the fairly debatable standard. This Court should accordingly take this opportunity to make a much needed change in the standard of review. If Riverton's denial of the Application is subject to



a substantial evidence standard, it cannot stand as the evidence in the record supports a grant of the Application.

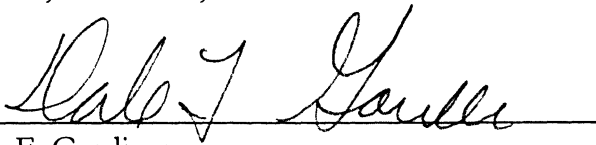
Even if this Court declines to change the law, the trial court's decision was erroneous and should nonetheless be reversed and set for trial. It is well-settled that zoning decisions which are made to drive down property values so that a municipality may acquire the property through condemnation are unconstitutional and void. Thus, regardless of the standard applied to the denial, the denial is arbitrary, capricious, illegal and unconstitutional on the ground that Riverton denied the Application so it could later acquire a portion of the property at less than full market value.

At the very least, the trial court erred in denying the Petersen Family's Rule 56(f) request. The denial of the Rule 56(f) motion should be reversed and the Petersen Family allowed to conduct discovery on relevant issues, including, but not limited to, Riverton's motivation for the denial of the Application. That discovery goes to not only the validity of the denial but also to the Petersen Family's Equal Protection and Due Process Claims.

The Petersen Family respectfully requests that the trial court's grant of summary judgment in favor of Riverton and the denial of the Petersen Family's Rule 56(f) motion be reversed in their entirety, with instructions that the Petersen Family may conduct discovery on all relevant issues, and proceed with a trial on its claims.

DATED this 30<sup>th</sup> day of November, 2009.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By:   
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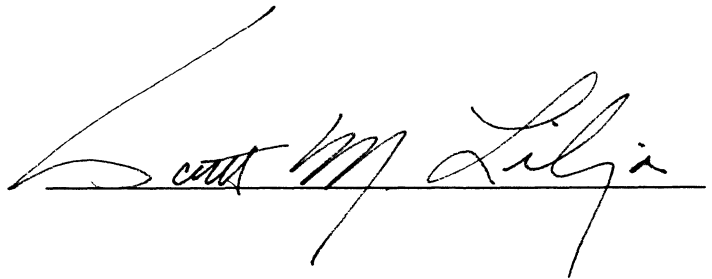
**CERTIFICATE OF SERVICE**

I hereby certify that I caused two (2) true and correct copies of the within and foregoing **REPLY BRIEF OF APPELLANTS** to be mailed, postage prepaid, this 30<sup>th</sup> day of November 2009, to the following counsel of record:

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A handwritten signature in black ink, reading "Scott M. Lyle", is written over a horizontal line.