

2009

# Willis Lauritz Petersen v. Riverton City, a municipality of the State of Utah : Brief of Appellee

Utah Supreme Court

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Jody K. Burnett; Robert C. Keller; Williams and Hunt; Counsel for Appellees.

Dale F. Gardiner; Scott M. Lilja; Cassie J. Medura; Nicol M. Deforge; Van Cott, Baggle, Cornwall, Cornwall and McCarthy; Counsel for Appellants.

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**IN THE UTAH SUPREME COURT**

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In the Matter of Application PLZ-07-4009:	:	
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	:	
WILLIS LAURITZ PETERSEN, JR., et al.	:	<b>BRIEF OF APPELLEE</b>
	:	<b>RIVERTON CITY</b>
	:	
Petitioners/Appellants,	:	Case No. 20090095-SC
	:	
v.	:	
	:	
RIVERTON CITY, a municipality of the State of Utah	:	
	:	
	:	
Respondent/Appellee.	:	

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Appeal from a Decision of the Third Judicial District Court, State of Utah  
Honorable Anthony Quinn, District Judge  
District Court No. 070911432

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Dale F. Gardiner  
Scott M. Lilja  
Cassie J. Medura  
**VAN COTT BAGLEY**  
**CORNWALL & MCCARTHY**  
36 South State Street, Suite 1900  
Salt Lake City, Utah 84111  
Telephone: 801-532-3333

**Attorneys for Petitioners/Appellants**

Jody K Burnett (A0499)  
Robert C. Keller (A4861)  
**WILLIAMS & HUNT**  
P. O. Box 45678  
Salt Lake City, Utah 84145-5678  
Telephone: 801-521-5678  
Fax: 801-364-4500  
[jburnett@wilhunt.com](mailto:jburnett@wilhunt.com)  
[rkeller@wilhunt.com](mailto:rkeller@wilhunt.com)

**Attorneys for Respondent/Appellee**

**FILED**  
**UTAH APPELLATE COURTS**

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**Attorneys for Petitioners/Appellants**

Jody K Burnett (A0499)  
Robert C. Keller (A4861)  
**WILLIAMS & HUNT**  
P. O. Box 45678  
Salt Lake City, Utah 84145-5678  
Telephone: 801-521-5678  
Fax: 801-364-4500  
[jburnett@wilhunt.com](mailto:jburnett@wilhunt.com)  
[rkeller@wilhunt.com](mailto:rkeller@wilhunt.com)

**Attorneys for Respondent/Appellee**

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## **JURISDICTION**

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-3-102(3)(j).

## **RESTATEMENT OF THE ISSUES**

The parties disagree about the issues that were presented and preserved below and are properly raised on appeal, particularly with respect to the appropriate standard of review. See e.g., Appellee’s Motion for Summary Disposition. Appellee Riverton City (the “City”) therefore restates the issues herein as follows:

### **A. Issues and preservation.**

The first issue properly presented and preserved is whether the trial court correctly determined that the legislative decision by the Riverton City Council to deny a third-party’s application to rezone the subject property was not arbitrary, capricious or illegal under the “reasonably debatable” standard that applies to such an exercise of legislative discretion under the provisions of Utah Code Ann. § 10-9a-801.

The City preserved this issue by its motion for summary judgment and supporting papers. R. 123-272. Petitioners and Appellants (collectively the “Petersen Family” or “Appellants” herein) expressly conceded that this was the central issue at oral argument on the City’s motion:

MR. GARDINER: First of all, Your Honor, I agree that the standard is reasonably debatable and that the controlling cases are the [Bradley v.] Payson City cases. I came prepared anticipating that I would have this difficult challenge.

Transcript of Hearing, R. 446 at p. 4.

The second issue properly presented and preserved is whether the district court correctly denied the Petersen Family's motion for discovery pursuant to Utah R. Civ. P. 56(f), and limited its review of the City's land use decision pursuant to Utah Code Ann. § 10-9a-801 to the record of the legislative proceedings before the City. The Petersen Family preserved this issue by moving for a continuance pursuant to Rule 56(f). R. 288-91.

The other issues the Petersen Family describes and argues at some length, including: whether "the reasonably debatable criteria set forth in Utah Code Ann. § 10-9a-801(3)(b) and § 10-9a-102 violate [sic] due process because it [sic] is so vague that it does not constitute any standard of review at all" (Aplts.' Br. at 2); whether Bradley v. Payson City, 2003 UT 16 "should be overturned based, in part, on Utah Code Ann. § 10-9a-701(3)(a)(i)" (id. at 3, 23-24); and whether the district court incorrectly applied the substantial evidence standard in this case to a decision on a single parcel rezone application (id. at 17-23); were not presented to or decided

by the district court. R. 446 at p. 4 (“I agree that the standard is reasonably debatable and that the controlling cases are the [Bradley v.] Payson City cases.”).

**B. Standard of Review.**

“When reviewing a city council's decision not to change the zoning classification of property, the Court presumes that the decision is valid and ‘determines only whether or not the decision is arbitrary, capricious, or illegal.’” Bradley v. Payson City, 2003 UT 16 ¶ 9, 17 P.3d 1160 (quoting Utah Code Ann. § 10-9-1001(3) (1999)). With respect to the issues properly raised, the principal issue whether the City’s decision not to change the zoning classification and a parcel of property was reasonably debatable based upon the evidence in the legislative record is a legal issue which the Court reviews for correctness. Id.

This court reviews the denial of a Rule 56(f) motion for an abuse of discretion. Brown v. Glover, 2000 UT 89, ¶ 29, 16 P.3d 540.

**DETERMINATIVE STATUTE**

(1) No person may challenge in district court a municipality's land use decision made under this chapter, or under a regulation made under authority of this chapter, until that person has exhausted the person's administrative remedies as provided in Part 7, Appeal Authority and Variances, if applicable.

(2) (a) Any person adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a

petition for review of the decision with the district court within 30 days after the local land use decision is final.

...

(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.

(b) A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if it is reasonably debatable that the decision, ordinance, or regulation promotes the purposes of this chapter and is not otherwise 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 a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.

...

(7) (a) The land use authority or appeal authority, as the case may be, shall transmit to the reviewing court the record of its proceedings, including its minutes, findings, orders, and, if available, a true and correct transcript of its proceedings.

(b) If the proceeding was tape recorded, a transcript of that tape recording is a true and correct transcript for purposes of this Subsection (7).

(8) (a) (i) If there is a record, the district court's review is limited to the record provided by the land use authority or appeal authority, as the case may be.

(ii) The court may not accept or consider any evidence outside the record of the land use authority or appeal authority, as the case may be, unless that evidence was offered to the land use authority or appeal authority, respectively, and the court determines that it was improperly excluded.

(b) If there is no record, the court may call witnesses and take evidence.

Utah Code Ann. § 10-9a-801(2005).

### **STATEMENT OF THE CASE**

#### **A. Nature of the Case.**

This is a land use case arising out of the City's exercise of its legislative discretion to deny an application to rezone an approximately 21 acre parcel of property (the "Property") which belongs to the Petersen Family. The Property is situated in, and largely surrounded by, the City's rural residential zoning district ("RR-22"), which allows for the keeping of large animals and no more than two residential lots per acre.

The Petersen Family had apparently entered into an agreement to sell the Property to a third-party developer, but the sale was conditioned upon the City's approval of an application to rezone of the Property to an R-3 residential zone

designation, which would allow higher density development of three dwelling units per acre and prohibit large animals. When the City denied the rezone application, the developer declined to purchase the property, and the Peterson Family initiated this action.

**B. Course of Proceedings.**

The Petersen Family commenced the action by filing a “Petition for Judicial Review of a Land Use Decision,” and did so explicitly pursuant to Utah Code Ann. § 10-9a-801. R. 1-36. The Petition challenged the City Council’s decision to deny a third-party developer’s application to rezone the Property from RR-22 to R-3 to allow for greater development density on the Petersen Family’s Property, and did so on the grounds that “[t]here was no substantial evidence to support the City Council’s land use decision, which was arbitrary and capricious, and therefore, invalid.” Id. at 5. The Petition asserted no other claim or cause of action, and for relief requested only that the court reverse the decision of the City Council and require the City to grant the rezone petition. Id.

In response to the Petersen Family’s Petition and as required by section 10-9a-801, the City compiled the record of the proceedings before the City on the rezone application, which included certified transcripts of public hearings held before both the City Planning Commission and City Council, and submitted that record to the

district court. R. 137-272. Based upon the record, the City moved for summary judgment upholding the City Council's decision declining to rezone the Property.

Id.

In support of its motion, the City pointed out that the “substantial evidence” standard as evoked by the Petition did not apply. Id. at 131-34. Rather, a decision on an application for rezoning is fundamentally a policy-based, legislative action afforded a high degree of deference and upheld on judicial review as not arbitrary or capricious if it is “reasonably debatable” that the decision promotes policy goals and objectives in furtherance of the general health, safety and welfare. Id. Because there was adequate evidence in the record supporting the decision to deny a change in the Property's zoning, including public comment opposing the change and the fact the Property was surrounded on three sides by properties with the same existing zoning designation or designations allowing an even lesser density, the City was entitled to judgment dismissing the Petition. Id.

The Petersen Family filed a memorandum opposing the City's motion, and also filed a motion pursuant to Utah R. Civ. P. 56(f) for a continuance to allow for discovery on certain issues. R. 298-386; 288-91. In doing so, the Petersen Family did not explicitly challenge the “reasonably debatable” standard as unconstitutional or contrary to case law, but instead argued that the “substantial evidence” standard



was dictated by Utah Code Ann. § 10-9a-701 because the City Council was an “appeal authority” under that statute. R. 320-21.

The Petersen Family argued the district court should overturn the City Council’s decision because it was not supported by “substantial evidence,” was based on an erroneous conclusion concerning spot zoning made by a member of the Planning Commission, and was illegal because it allegedly violated the Petersen Family’s rights to equal protection and due process. R. 320-31. The Petersen Family also argued they should be allowed to do discovery to support their “information and belief” the City’s denial of the application was motivated by an intent to devalue the Petersen Family’s Property so the City could purchase it for a reduced price, and other issues. R. 288-89.

In reply, the City pointed out: 1) that Bradley v. Payson City, 2003 UT 16 ¶¶ 11, 36, 17 P.3d 1160, held that a decision on an application for rezoning was fundamentally legislative in nature and therefore subject to the reasonably debatable standard of review; and 2) that section 10-9a-701 did not apply because the Planning Commission was a recommending body only and so the City Council was not an “appeal authority.” R. 395-408. The City argued that the Petersen Family’s characterizations of the record did not establish that the City’s decision was less than reasonably debatable because the decision maintained a zoning designation on the

Property that was consistent with the immediate neighborhood and was also consistent with the City's General Plan. Id. The City went on to argue that the City's decision was not illegal on constitutional grounds, and the Petersen Family's discovery motion was not well-taken because Utah Code Ann. § 10-9a-801 specifically limits judicial review to the record presented to the City Council. Id.

The district court held a hearing on the parties' motions. R. 421. At the beginning of the hearing, the district court announced its tentative conclusions, as follows:

In ruling on a motion and ruling on an appeal from a decision by a city council denying a request to change a zoning ordinance, I can only intervene on appeal if the decision of the city council was arbitrary, capricious, or illegal.

The statute further clarifies that if the decision of the city council involves the exercise of legislative discretion, I can only reverse the decision if it is not subject to reasonable debate or if it could not be the subject – if it's not reasonably debatable.

It would be my conclusion in this case that the action of the Riverton City Council was done pursuant to their legislative discretion. Mr. Gardiner has pointed out to me part 7 of the title dealing with land use planning. That title only deals with requests for variances and [appeals of] decisions applying the land use statute. This is a different circumstance. This is a proposed change to the land use statute, and therefore, it is purely a legislative function. So I can only reverse the decisions of Riverton

City Council if it is no – if their conclusion is not reasonably debatable.

Secondly, I agree with Riverton City in this matter that I can only consider the record that was provided by the land use authority. For that reason, it would not be appropriate or useful at this stage for me to permit discovery because I would not be able to consider the results of any discovery as part of this appeal.

So what that leaves you, Mr. Gardiner, is a fairly difficult job I would think at this stage. As long as the decision of the Riverton City Council was at least reasonably debatable, I have to affirm that decision. The decision that the Riverton City Council made was consistent with its General Plan. The zoning that they decided to allow to remain in place is similar to the zoning that surrounds the property on at least three sides. Those facts alone make that decision at least reasonably debatable in my judgment. The fact that the[re] were things stated in the record, even by the decision makers that now appear not to be correct doesn't in itself change the outcome. As long as the decision was at least reasonably debatable, I have to affirm it. And so that's where I am, at least in terms of tentative ruling.

R. 446, pp. 2-3.

In response, the Petersen Family's counsel conceded the standard of review:

MR. GARDINER: First of all, Your Honor, I agree that the standard is reasonably debatable and that the controlling cases are the [Bradley v.] Payson City cases. I came prepared anticipating that I would have this difficult challenge.

R. 446, p. 4.

The district court ultimately granted the City's Motion for Summary Judgment and dismissed the Petersen Family's Petition for Review. R. 422-25. In doing so, the district court reasoned, in pertinent part:

. . . [The court] has a very limited role in reviewing this challenge to the exercise of legislative discretion by the Riverton City Council on a petition for review which is subject to the highly deferential, reasonably debatable standard. The Court can only consider the record of proceedings before the City which has been provided by the City pursuant to Utah Code Ann. § 10-9a-801, and it is not appropriate to permit discovery under these facts and circumstances. The record of proceedings indicates that the application to rezone the property was consistent with the General Plan, but so is the existing zoning. In addition, the property in question is surrounded on three sides by similarly zoned property.

Id. at 2.

Within thirty days, the Petersen Family then filed this appeal. R. 433-35.

**C. Response to The Petersen Family's Statement of Facts.**

Pursuant to section 10-9a-801 the City provided the district court with the record of the proceedings before the City concerning its decision to deny the subject rezone application, and brought a summary judgment motion as the procedural vehicle for the Court to review that record pursuant to the standards set forth in section 10-9a-801. R. 123-272. In opposition before the district court and in their

brief on appeal, the Petersen Family set forth their own contrary characterizations of the record and additional record excerpts. R. 298-386

Where, as here, the record is complete and includes transcripts of proceedings, the fact that the parties may ask the Court to draw very different inferences based on their respective characterizations of the record is not sufficient to defeat the City's motion. See Utah Code Ann. § 10-9a-801(3)(b) ("A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if it is reasonably debatable that the decision, ordinance, or regulation promotes the purposes of this chapter and is not otherwise illegal."). That such differing characterizations are possible may itself evidence a "reasonably debatable" quantum of evidence. The record establishes the bases for the City's decision and the City's legislative decision must be upheld if the record itself reflects a reasonably debatable decision, regardless of the Petersen Family's characterizations. Id.

In this regard, the facts the Petersen Family describes in their brief are not all facts in the record which was presented to and considered by the district court, and particularly do not include facts supporting both the City Council's and the district court's decisions. Certainly the Petersen Family makes no attempt to marshal all the evidence in the record to demonstrate that the decision is not supported by "substantial evidence" as they would be required to do even if "substantial evidence"

were the appropriate standard of review, which it is not. See Patterson v. Utah County Bd. of Adjustment, 893 P.2d 602, 604 n. 7 (Utah 1995)(“It is incumbent upon the party challenging the Board's findings or decision to marshal all of the evidence in support thereof and show that despite the supporting facts, and in light of conflicting or contradictory evidence, the findings and decision are not supported by substantial evidence.”)(citations omitted).

In support of its position on appeal, the City submits herewith the facts supporting the City Council’s decision, with citations to the record submitted to the district court, as they were provided to the district court below:

1. Petitioners are the trustees of a trust which owns the Property consisting of 20.84 acres located at 12175 South 3600 West in the City. Pet. ¶ 1; Rezone Application, Appendix (“App.”) Exhibit (“Ex.”) 1.

2. The Property is situated in an area the City has zoned Residential RR-22. Pet. ¶ 2; App. Ex. 1. The RR-22 zone permits 2 dwelling units per acre and large, medium and small farm animals, and “is established to provide a residential environment within Riverton City that is characterized by low density single family housing, a minimum of vehicular traffic and quiet neighborhoods favorable for family life.” Riverton City Code § 12-220, App. Ex. 2.

3. The parcels adjoining the Property on the North and East are also zoned R-22. App. Ex. 1; Zoning Map, App. Ex. 3. The parcel adjoining the Property on the South is zoned R-1 Residential. Id. The R-1 zone allows one dwelling unit per acre and large, medium and small farm animals, and “is established to provide a rural residential environment within Riverton City that is characterized by large single-family houses, a minimum

of vehicular traffic and quiet neighborhoods favorable for rural family life.” Riverton City Code § 12-215, App. Ex. 4.

4. The parcel adjoining the Property on the West is zoned R-3 Residential. App. Ex. 1; App. Ex. 3. The R-3 zone allows three dwelling units per acre and is “to promote conditions favorable to medium-low density residential living. . . . The R-3 zoning district is to provide areas for single family residential neighborhoods on medium and smaller sized lots without animal rights, allowing for a variety of housing styles.” Riverton City Code § 12-230, App. Ex. 5.

5. On or about May 11, 2007, a developer [D. R. Horton] submitted an application requesting that the City rezone the Property from RR-22 to R-3. Pet. ¶ 6; App. Ex. 1. The City Planning Commission held a public hearing to consider the rezone request on June 14, 2007. Pet. ¶ 8; Planning Commission Minutes, App. Ex. 6; Planning Commission Transcript, App. Ex. 7.

6. At the hearing, the Planning Commission discussed the zoning applicable to the Property and surrounding parcels and the purposes of the zones. App. Ex. 7, pp. 3-5. The commission also reviewed the City’s General Plan, and noted that the General Plan designated the Property and certain of the adjoining parcels as medium density residential, which was consistent with the R-3 zoning designation sought by the applicant. Id. pp. 5-6; General Plan, App. Ex. 8.

7. The Planning Commission asked if the applicant wanted to “come up and propose this rezone,” to which the applicant stated: “Not much to say. Pretty straight R-3.” App. Ex. 7, p. 6. The planning commission then entertained public comment on the application. No comments were made in favor of the rezone, and several persons opposed the change. Id. pp. 7-14.

8. Persons commenting on the application expressed concerns about conflict with large animals, particularly horses, kept in the existing community, buffers between the parcels with larger lots and the Property, construction access, preservation of the rural character of the area, and

potential impacts from increased traffic which would result from greater density. Id.

9. The commission deliberated and discussed the concerns expressed. Id. pp. 14-23. For example, one commissioner noted, in pertinent part:

. . . My final question was regarding the borders here, the two properties north and south of the – the two subdivisions north and south having animal rights. I think we heard from each of the neighbors that testified that animal rights seemed to be an issue. And I think, you know, we’ve had this issue come before us a number of times with animal rights and this issue of putting them maybe in – you know, changing it from the RR-22, which permits it, to an R-3, that doesn’t. . . . [¶] Because it’s a pretty big impact if we turn it from R-22 to R-3 if everybody around it has animals. I think that’s a big impact.

Id. p. 22.

10. Ultimately the Planning Commission voted to recommend denial of the application on a motion by Commissioner Hansen:

I make a motion that we deny PL 07-4009 to rezone [to] third acre lots. My personal opinion is that would be spot zoning. It’s in the middle of R-22 and R-1. So I don’t think it needs to be there.

Id. pp. 23-24.

11. The City Council held a public hearing to consider the rezone request on July 10, 2007. Pet. ¶ 12; City Council Minutes, App. Ex. 9; City Council Transcript, App. Ex. 10.

12. At the hearing, planning staff reported on the zoning applicable to the Property and to the surrounding parcels, and discussed the purposes of



the various zones. App. Ex. 10, pp. 3-5. Staff pointed out the General Plan designation, and that the application was consistent with the General Plan. Id. pp. 4-5. Staff also noted that the Planning Commission had recommended denial of the application, and that “[e]ssentially the Planning Commission recommended that the property remain at its RR-22 designation.” Id. p. 5.

13. The City Council then opened the hearing for public comment. Again, no comments were made in favor of the rezone, and several persons opposed the change. Id. pp. 7-12.

14. Persons commenting on the application expressed concerns about the effect of the proposed change in density on the rural nature of the area, the potentially increased number of homes and people, the potential effect on water pressure and electrical power, and the potential the change would increase traffic and require currently stubbed roads to be connected. Id.

15. The City Council then closed the public comment portion of the hearing and allowed a representative of the developer to address the Council. Id. p. 14-15. That representative noted that there was some medium density housing in the area, and that the rezone would not likely affect existing home values. He acknowledged that traffic was a concern. He went on to calculate that if the zoning were unchanged, only 15 or 16 lots could be developed. Id.

16. After some discussion, the Council voted unanimously to deny the application to rezone the Property. Id. p. 18.

17. On or about August 9, 2007, Petitioners filed their Petition for Review of Land Use Decision. Pursuant to Utah Code Ann. § 10-9a-801, they seek this Court’s order overturning the City’s decision on the erroneous basis there was no “substantial evidence” supporting the decision and that it “was arbitrary and capricious, and, therefore, invalid.” Pet. ¶¶ 13-19.

Memorandum in Support of Riverton City’s Motion for Summary Judgment, R. 126-131.

One other portion of the Petersen Family's factual recitation merits comment.

Apparently to support an inference that they were treated differently than similarly situated applicants, the Petersen Family asserts that:

27. On the very date that the Riverton City Planning Commission recommended a denial of the Petersen Family's Application to rezone its land from R-22 (one half acre lots) to R-3 (one-third acre lots), the Planning Commission recommended rezoning property across the street to R-3. (R. 17-18.)

28. The same day that the Riverton City Council denied the Petersen Family's Application to rezone to one-third acre lots, the Riverton City Council rezoned property across the street to allow one-third acre lots. (R. 28-29, 241, 242)

Aplts.' Br. p. 15.

In fact, however, the minutes of the meetings the Petersen Family cites reflect that the application on property "across the street" was actually a request to "rezone property . . . from C-PO [Commercial Professional Office] and R-3 to R-3 and RM-8 [Residential Multifamily Eight Dwelling Units an Acre]." R. 241. The Planning Commission meeting minutes reflect that the property "across the street" actually consisted of two parcels totaling 33.98 acres, and "the parcel adjacent to Bangerter is zoned C-PO and other adjacent to 3600 West is zoned R-3." R. 17.

The Planning Commission minutes go on to reflect that the property "across the street" is "surrounded by R-3, a storm water management facility, Bangerter

Highway, RR-22, R-3 and R-2.” Id. By contrast and as set forth above, the Petersen Family’s Property is surrounded on the North and East by parcels which are also zoned RR-22 Residential, and property on the South zoned R-1 Residential, which allows only one dwelling unit per acre and large, medium and small farm animals. See supra p. 11 ¶¶ 2-3.

With respect to the “property across the street” on 3600 West public comment at the City Council meeting “supported the Planning Commission recommendation to stay with R-3,” rather than rezone to R-8. R. 241-42 (emphasis added). See also id. (Alex Harmon . . . would like it to stay R-3.”) The City’s decision on the application was to amend the designation on the two parcels from C-PO and R-3, to R-3 only. Id.

Thus the City did not in fact “rezon[e] property across the street [on 3600 West] to allow one-third acre lots,” as the Petersen Family asserts. Rather the City removed a commercial designation on the Bangerter Highway parcel, but maintained the existing, residential R-3 zoning designation on the 3600 West parcel. In that respect and by maintaining the existing zoning and denying a request for a higher density designation, the City treated the applicant for the property “across the street” the same way as it did the applicant on the Petersen Family’s Property. Moreover, the property “across the street” is surrounded by properties that are both

zoned and used differently than the properties surrounding the Petersen Family's Property. Thus, that property "across the street" is not similarly situated to the Petersen Family's Property and the Petersen Family's characterizations of the record are incorrect at best. Certainly the record does not support the bald assertions that Appellants were treated differently than similarly situated persons or property owners.

### **SUMMARY OF THE ARGUMENT**

The Petersen Family's arguments explicitly challenging the reasonably debatable standard of review in the context of a single-parcel rezone were not presented to the district court. Therefore they should not be considered here. Moreover, such arguments fail on the merits.

For example, the argument that a decision on a single parcel rezone is necessarily a quasi-judicial or administrative act is contrary to nearly a half century of well-established precedent in Utah case law. Further, the argument ignores the quintessentially legislative function and actions of the City Council in this particular case. Here, the application required the Council to decide between two zoning designations that were both consistent with the City's General Plan, and which required the Council to weigh and consider public policy issues, neighboring land uses, trends, and potential impacts on immediately surrounding properties.

Applying the appropriate standard of review, the district court correctly upheld the City Council's exercise of legislative discretion in deciding not to rezone the Petersen Family's Property from RR-22 to R-3 because it was not arbitrary or capricious. The decision was at least reasonably debatable because: 1) both the zoning density on the property as it currently exists and the zoning designation the Petersen Family wanted to see applied by amendment were consistent with the City's General Plan for the area; 2) the change in zoning was opposed by residents appearing at the public hearings on the application who were particularly concerned with compatibility with neighboring properties which had large animal rights; and 3) the zoning designation which the City Council decided to maintain was more compatible with the less dense, more rural zoning designations on the majority of properties which were immediately adjacent to the Petersen Family's Property.

Nor was the City Council's decision illegal as a violation of the Petersen Family's constitutional equal protection or due process rights. Regardless of the allegedly improper motivations which Appellants argue may have influenced the City Council, there was an objectively rational basis for the Council's decision. Equal protection review does not require more, nor allow an inquiry into individual legislator's subjective motivations. No due process claim is viable because it is well settled under these circumstances that Appellants had no right or entitlement to a

favorable decision on whether or not to rezone the Property. Thus, the Peterson Family did not have the necessary constitutionally protected property interest for any alleged due process violation.

Finally, the district court correctly denied the Petersen Family's motion for discovery. They brought their Petition explicitly pursuant to section 10-9a-801, which expressly requires that judicial review be conducted on the record of proceedings before the City. Moreover, the Petersen Family failed to identify by pleading or argument any viable constitutional claim to which such discovery would be relevant. The district court's decision was correct in all respects, and should be upheld.

## **ARGUMENT**

### **I. THE CITY'S DECISION WHETHER TO AMEND THE ZONING DESIGNATION APPLICABLE TO THE PETERSEN FAMILY'S 20.84 ACRE PROPERTY WAS AN EXERCISE OF LEGISLATIVE DISCRETION SUBJECT TO THE REASONABLY DEBATABLE STANDARD OF REVIEW.**

Despite counsel's explicit concession to the district court "that the standard is reasonably debatable and that the controlling cases are the [Bradley v.] Payson City cases," the Appellants' primary argument on appeal is now that "the individual, small-scale requests for a zoning change on a particular piece of property, such as is at issue in this case, require a quasi-judicial determination and should be viewed

under the substantial evidence standard.” Aplt’s Br. p. 23. According to Appellants, the Court’s statement in Bradley v. Payson City, that “the enactment and amendment of zoning ordinances is fundamentally a legislative act,” is not “sustainable in light of the substantial Utah case law expressly distinguishing between general, large-scale ordinances and policies and the small, individualized municipal decisions.” Id. They go on to assert:

Utah Courts have routinely considered these small-scale, individual decisions to be quasi-judicial in other contexts and there is no basis for ignoring that distinction in the zoning context. To the contrary, these are precisely the types of decisions for which judicial oversight is strongly needed.

Id.

This new argument squarely attacking the standard of review and requesting that this Court re-examine and overrule the Bradley decision is directly contrary to what the Petersen Family explicitly conceded to the district court. R. 446 (“I agree that the standard is reasonably debatable and that the controlling cases are the [Bradley v.] Payson City cases”). “As a general rule, claims not raised before the trial court may not be raised on appeal.” Tschaggeny v. Milbank Ins. Co., 2007 UT 37 ¶ 20, 163 P.3d 615. “The rule exists ‘to give the trial court an opportunity to address the claimed error, and if appropriate, correct it.’” Id. (citations omitted). It

also “prevents a party from avoiding the issue at trial for strategic reasons only to raise the issue on appeal if the strategy fails.” Id. See also Pratt v. Nelson, 2007 UT 41, P 15, 164 P.3d 366 (“[T]o preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.” (internal quotation marks omitted)). Thus this Court should respectfully decline to address Appellants’ belated challenge to the reasonably debatable standard on appeal.

Even if the Court deems it appropriate to address the argument without the benefit of the district court’s consideration, it nonetheless fails on the merits for several reasons. First, Appellants ignore the substantial and long standing precedent in Utah case law, well prior to Bradley v. Payson City, which consistently treats the decision whether to amend a zoning ordinance applicable to a single parcel of property as a fundamentally legislative, not administrative or quasi-judicial, decision. See, e.g., Dowse v. Salt Lake City Corporation, 255 P.2d 723 (Utah 1953) (upholding City decision not to rezone a single parcel from residential to commercial because “[p]alpably the exercise of the zoning power is a legislative function and activity.”); Gayland v. Salt Lake County, 358 P.2d 633, 636 (Utah 1961) (refusing to overturn decision not to rezone plaintiff’s 18 acre parcel because “[i]n pursuing its authority to zone the county the Commission is performing a legislative function.”);



Naylor v. Salt Lake City Corp., 410 P.2d 764, 765-66 (Utah 1966)(upholding zone change applicable to one-half city block as legislative action because “the court will not invade the province of the Commission and substitute its judgment therefor; nor will it interfere with the prerogatives of the Commission unless it is shown to be so clearly in error that there is no reasonable basis whatsoever to justify it and its action”); Chevron Oil Co. v. Beaver County, 449 P.2d 989 (Utah 1966)(upholding decision not to rezone land next to freeway offramps as legislative decision because “the courts do not ordinarily interfere in such matters”); Crestview-Holladay Homeowners Ass'n v. Engh Floral Co., 545 P.2d 1150, 1152 (Utah 1976)(upholding rezoning decision applicable to one business property as rationally related to legitimate goals as valid exercise of city's legislative discretion); Smith Investment Co. v. Sandy City, 958 P.2d 245, 252 (Utah App. 1998)(City's decision to downzone single 15.8 acre parcel upheld as reasonably debatable, legislative action); Harmon City, Inc. v. Draper, 2000 UT App 31, 997 P.2d 321 (upholding City decision to deny rezone application for single 10.3 acre parcel as legislative action that was reasonably debatable); Webber v. South Salt Lake City, 2002 UT App 208 (upholding denial of a rezone request for a single parcel and observing “[w]hen reviewing a municipality's denial of a request for a zoning reclassification, we consider whether it is ‘reasonably debatable’ that the municipality's legislative

decision serves ‘the interest of the general welfare.’”); Bradley v. Payson City, 2003 UT 16, 70 P.3d 47 (upholding decision to deny rezone of a single parcel as reasonably debatable legislative action); Tolman v. Logan City, 2007 UT App 260, 167 P.3d 489 (upholding decision to deny rezone applicable to plaintiffs’ single property because the decision was consistent with the City’s General Plan “and satisfies the reasonably debatable standard for such land use decisions.”).

This line of cases recognizes that the legislative process involved in weighing and considering the kind of public policy issues presented by a request to rezone a particular parcel of property is inherently subjective and political in nature, requiring local legislators to exercise broad discretion in balancing the competing interests of all concerned in furtherance of the health, safety and general welfare of the community. The cases from other jurisdictions which Appellants do cite provide no basis for disturbing this well-established precedent. Smith Inv. Co. v. Sandy City, 958 P.2d 245, 252 n. 9 (Utah App. 1998) (“With the wealth of Utah law on this subject, we reject Sandy Hills’s attempt to import a different standard from a different jurisdiction.”).<sup>1</sup>

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<sup>1</sup>Even the cases cited by The Petersen Family themselves from other jurisdictions do not support their position. As the Colorado Court noted in the Margaolis case which the Petersen Family cites, and incorrectly characterize (Aplts.’ Br. At 22):

Moreover, the Petersen Family's argument ignores both what it concedes to be the controlling case law, governing statutes and the facts of this case. For example, the Petersen Family admits, as they must, that "the determination of zoning policy [is] properly vested in the legislative branch." See Aplt.' Br. P. 22 (citing Scherbel v. Salt Lake City Corp., 758 P.2d 897, 899 (Utah 1988))("the determination of zoning policy is properly vested in the legislative branch"). In this case, while it is arguable that the City's General Plan might also support the higher density zoning the Petersen Family wanted applied to the Property, there is also no question but that the current zoning, which the City Council determined not to

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Arvada argues that a rezoning involving a small tract such as that rezoned in the present case under review is more adjudicative or quasi-judicial, and thus ought not be subject to referendum and initiative. We do not find such an analysis persuasive. . . . [¶] While decisions on "small" rezonings may directly affect only a few people, such decisions may more properly be seen as the setting of policy for the future. While rezonings occur more frequently than initial zonings, they likewise tend to be permanent in nature. See Arnel, supra, for a listing of California cases which hold rezoning of "small" parcels of land to be legislative.

In view of the purposes for which the referendum and initiative powers were reserved, and the nature of the acts themselves, we find that zoning and rezoning decisions – no matter what the size of the parcel of land involved – are legislative in character and subject to the referendum and initiative provisions of the Colorado Constitution.

Margaolis v. Dist. Ct., 638 P.2d 298, 304 (Colo. 1984).

change, also falls well within the uses contemplated by the General Plan for that area and is more consistent with immediately neighboring properties.

The choice by the City's legislative body between two alternative zoning designations which are both contemplated by and consistent with the General Plan is, by its very nature, a policy-based, legislative decision. Appellants point to no evidence in the record of proceedings that the City Council took any "quasi-judicial" action by applying fixed land use regulations which would somehow have dictated the appropriate result in this particular situation. There are simply no facts to suggest that the City Council's decision to maintain the existing zoning on a relatively large, 20 plus acre parcel to be consistent with the majority of immediately neighboring properties is anything other than a "determination of zoning policy [] properly vested in the legislative branch."

The Petersen Family's additional argument, that section 10-9a-701 implies the "substantial evidence" standard is appropriate because "the function of the City Council in a one parcel rezone is substantively that of an appeal authority" (Aplts.' Br. pp. 23-24), is nonsensical. That section requires a municipality to establish an "appeal authority" to hear "requests for variances from the terms of land use ordinances; and appeals from decisions applying land use ordinances," and provides that in those circumstances the appeal authority shall act in a quasi-judicial manner.

See Utah Code Ann. §10-9a-701(3) (emphasis added). Riverton City Code § 12-130-025 establishes a Board of Adjustment which is empowered to hear precisely these type of administrative matters. See Riverton City Code § 12-13–025(A.), (B.).

By contrast, the controlling provisions of both state statute and Riverton City ordinance specify that only the City Council has the authority to amend zoning ordinances. See Riverton City Code § 12-200-010; Utah Code Ann. § 10-9a-503. The fact that the City Planning Commission is both empowered and required to make a recommendation on such applications for rezoning to the City Council does nothing to convert the rezoning decision itself into any sort of appellate, administrative or quasi judicial proceeding like those that occur before Boards of Adjustment. Both the proceedings contemplated by section 10-9a-701 and the decisions made under authority of that section are administrative in nature, and if anything that statute illustrates the legislative nature of decisions made by the legislative body with respect to amendments of zoning ordinances.

## **II. THE CITY'S DECISION WAS NOT ARBITRARY OR CAPRICIOUS.**

### **A. Appellants' Substantial Evidence Arguments fail.**

Applying the erroneous, “substantial evidence” standard of review, the Petersen Family first argues that the City’s decision to deny the rezone application was arbitrary or capricious because it was not supported by “substantial evidence.” See Apls.’ Br. at 24-27. They assert this is so because: 1) there were answers, in many cases provided by City staffers or planning commissioners, to all of the concerns raised by neighbors and others during the public hearings; 2) the City Council considered the impact of a proposed larger, neighboring development in connection with consideration of potential development of the Petersen Family’s Property; and 3) one of the planning commissioners stated his “personal opinion” that approval of the application would constitute “spot zoning.” Id. However, these circumstances, considered separately or in combination, fail to make the City’s decision less than reasonably debatable.

Whatever additional information might have been considered or answers provided to address questions raised, it is clear the record contains evidence that would make the rezone of the property reasonably debatable. Both the zoning density on the property as it currently exists and the zoning designation the Petersen

Family wanted to see applied by amendment were consistent with the City's General Plan for the area. All residents appearing at the public hearings opposed the rezone based upon concerns about compatibility with neighboring properties which had large animal rights. Finally, the zoning designation which the City Council decided to maintain was more compatible with the less dense, more rural zoning designations on the majority of properties which were immediately adjacent to the Petersen Family's Property.

While Appellants correctly point out that there is also evidence that the concerns expressed could be addressed or some information was incorrect, they do not establish that the decision to maintain the less dense, more rural nature of the Petersen Family's Property which it believed was more compatible with the immediately surrounding properties was somehow arbitrary and capricious. As the Court stated in Gayland v. Salt Lake County:

Even though it be true that information was presented at the hearing which would have justified the Commission in amending the zoning ordinance as advocated, it is also true that the situation presented can be so viewed as to point to the conclusion that the action taken was reasonable and proper. Under such circumstances it was not the prerogative of the court to substitute its judgment for that of the Commission.

358 P.2d at 636.

And although the Petersen Family expends considerable energy and argument pointing out that one planning commissioner expressed his “personal opinion” that rezoning the property would constitute “spot zoning” and that opinion was incorrect, the short answer to these arguments is that the comment simply does not matter. As courts have long recognized:

Zoning agencies ordinarily conduct their proceedings with some degree of informality and the reasons given by a zoning authority, presumably composed of lay persons, to justify its action need not be in a form to satisfy the meticulous criterion of a legal expert.

Timber Trails Assocs. v. Planning and Zoning Comm’n of Town of Sherman, 916

A.2d 99, 113 (Conn. App. 2007). Furthermore, as set forth above, the Planning Commission only had authority to make a recommendation to the City Council, which is the legislative body empowered by state statute and City ordinance to make a final decision on a rezoning application.

Here, there is no evidence whatsoever that the City Council determined to deny the rezone application based on an individual planning commissioner’s personal legal opinion about spot zoning. At most, the substance of the comment reflects the reality on the ground that the property was largely surrounded by less dense, more rural parcels than the zoning designation the Petersen Family sought. The City



Council denied the application for these reasons, not because the City Council as a body made a mistaken legal determination that the rezone would be “spot zoning.”

**B. Appellants’ reasonably debatable arguments also fail.**

The Petersen Family then goes on to argue that the City’s decision on the rezone application was not “reasonably debatable” even under the appropriate standard of review because: 1) “it was motivated by the City’s improper intent to drive down the value of the Petersen Family’s Property in order to acquire a portion of it for a retention basin;” and 2) “it was based on an erroneous legal conclusion.” Apls.’ Br. at 28. This argument also fails.

Whatever subjective motivations there may have been for the City’s legislative decision do not dictate whether or to what extent the decision is reasonably debatable. Indeed, as commentators suggest:

Except as they may be disclosed on the face of the act or are inferrable from its operation, the courts will not inquire into the motives of legislators in passing or doing an act, where the legislators possess the power to pass or do the act and where they exercise that power in a mode prescribed or authorized by the organic law. Therefore, neither the motives of the members of a municipal legislative body nor the influences under which they act can be shown to nullify an ordinance duly passed in legal form, within the scope of their powers.

...

Parol evidence as to the motives of legislators or officers, protected by the rule of judicial refusal to inquire into their motives, is not admissible. Furthermore, the courts recognize, in the absence of evidence to the contrary, a presumption of good faith in the enactment of municipal legislation.

5 McQuillin Municipal Corporations § 16.89 (3d. ed.) (footnotes omitted).

In this case, and as more fully set forth above, the Petersen Family has not and cannot negate the district court's conclusion that the City's decision to deny the rezone application had a conceivably rational basis and is at least reasonably debatable because the property is surrounded by less dense, more rural properties which are consistent with the existing zoning and with the General Plan. Under such circumstances, the Petersen Family's allegations concerning the City Council's subjective motivation to "drive down the value" and a planning commissioner's comment about his "personal opinion" on spot zoning are irrelevant. Id. Compare Fitzgerald v. Racing Ass'n, 539 U.S. 103, 123 S. Ct. 2156, 2160, 156 L. Ed. 2d 97 (2003)("[J]udicial review is 'at an end' once the court identifies a plausible basis on which the legislature may have relied.").

### **III. THE CITY'S DECISION TO DENY THE PETERSEN FAMILY'S REZONE APPLICATION WAS NOT "ILLEGAL."**

The Petersen Family argues that the district court "erred in granting summary judgment in favor of Riverton City on the Petersen Family's equal protection

claims.” Aplt.s.’ Br. pp. 29 - 33. They make a similar argument with respect to “summary judgment” on “the Petersen Family’s due process claims.” Id. pp. 34-38. Neither argument is valid.<sup>2</sup>

**A. The City’s Land Use Decision Did Not Violate Any Constitutional Right to Equal Protection.**

To establish that the City’s decision could constitute some sort of equal protection violation, the Petersen Family relies upon the “class of one” rationale described in Village of Willowbrook v. Olech, 528 U.S. 562, 145 L. Ed. 2d 1060, 120 S. Ct. 1073 (2000), and Gardner v. Bd. of County Comm’rs, 2008 UT 6, 178 P.3d 893. Aplt.s.’ Br. pp. 29-30. Based upon evidence that the City Council knew the City was in negotiations to acquire a part of the Petersen Family’s Property for a detention basin, the Petersen Family argues:

In this case, there is evidence of dissimilar treatment by the City and an allegation, with some evidentiary support, of malicious or bad faith intent on the part of the

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<sup>2</sup>The short answer to these arguments is to point out that the Petersen Family’s complaint is a straightforward “Petition for Judicial Review of a Land Use Decision” which they expressly filed pursuant to Utah Code Ann. § 10-9a-801. R. 1-36. Nowhere in that pleading did the Petersen Family even expressly assert that the City’s decision was illegal, let alone allege any cause of action grounded in a constitutional equal protection or due process violation. Id. Obviously, therefore, the district court did not explicitly grant “summary judgment in favor of Riverton City on the Petersen Family’s” non-existent constitutional claims. See Summary Judgment and Order of Dismissal, R. 422-25.

City. The Petersen Family was intentionally treated differently than other similarly situated individuals applying for a zoning change because of the City's bad faith intent to lower the value of the Petersen Family's Property in an effort to obtain the Property at less than market value for use as a detention pond.

Aplts.' Br. P. 31. These arguments fail for several reasons.

First, the City's decision can give rise to no equal protection violation because regardless of alleged ill-will, malice and dissimilar treatment, the Olech equal protection review requires only a rational basis for the challenged decision. Olech, 528 U.S. at 564 (recognizing a plaintiff's right to bring an equal protection claim as a "class of one, where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.") (emphasis added). See also Gardner v. Bd. of County Comm'rs, 2008 UT 6, ¶ 39 (reviewing class of one claim and noting that "[a]n equal protection claim that, as here, does not involve a fundamental right or a suspect class is subject only to rational basis review.").

As the Tenth Circuit recently explained:

The paradigmatic "class of one" case, more sensibly conceived, is one in which a public official, with no conceivable basis for his action other than spite or some other improper motive (improper because unrelated to his public duties), comes down hard on a hapless private citizen. Perhaps he is the holder of a license from the state

to operate a bar or restaurant or other business, and the official deprives him of a valuable property right that identically situated citizens toward whom the official bears no ill will are permitted the unfettered enjoyment of. As one moves away from the paradigmatic case, the sense of a wrong of constitutional dignity, and of a need for a federal remedy, attenuates.

Jicarilla Apache Nation v. Rio Arriba County, 440 F.3d 1202, 1209 (10th Cir.2006) (quoting Lauth v. McCollum, 424 F.3d 631, 633 (7th Cir.2005) (emphasis added).

By the same token, where there is evidence of a rational government basis for the challenged decision, then the class-of-one claim fails as a matter of law regardless of allegations of malice, ill-will or improper governmental motivation. As the Tenth Circuit noted in Jicarilla:

Even if subjective ill will is a necessary condition for a class-of-one claim, it is not a sufficient one. If there was an objectively reasonable basis for the Defendants' actions in this case, the district court did not err in granting summary judgment in favor of the Defendants on that ground without allowing further discovery on the question of subjective ill will.

Jicarilla, 440 F.3d 1210-11. See also Flying J Inc. v. City of New Haven, 549 F.3d 538, 547-48 (7th Cir. 2008):

[A]llegations of animus do not overcome the presumption of rationality and the court evaluates those allegations

once a plaintiff has pled facts that show the irrationality of the government action in question. This standard reflects the fairly intuitive idea that a given action can have a rational basis and be a perfectly logical action for a government entity to take even if there are facts casting it as one taken out of animosity. It is only when courts can hypothesize no rational basis for the action that allegations of animus come into play. For instance, the classic example of irrational government action in a class of one equal protection case in this circuit is “an ordinance saying: ‘No one whose last name begins with “F” may use a portable sign in front of a 24-hour food shop, but everyone else may.’” What makes the ordinance in the example irrational is not simply the act of singling out, but rather that the singling out is done in such an arbitrary way. Another example, tailored to the present case, would be a zoning ordinance saying that any corporation whose name begins with “F” may not construct any development larger than a half-acre in size.

. . .

. . . As outlined above, however, such allegations of animus are only considered once the plaintiff has pled sufficient facts to demonstrate the irrationality of the government action that the court is asked to evaluate. By not pleading such facts, Flying J is unable to establish a class of one equal protection claim.

(Citations omitted).

Applying these principles here, the Petersen Family’s equal protection argument fails because they have not and cannot negate the district court’s conclusion that the City’s decision to deny the rezone had a conceivably rational basis. The Petersen Family’s Property is largely surrounded by property designated

with the existing zoning, and that zoning is consistent with the City's General Plan. Preserving a parcel of property's relationship with the surrounding properties provides a conceivably rationale basis for the City's decision. See Nordlinger v. Hahn, 505 U.S. 1, 12, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992)("[t]he State has a legitimate interest in local neighborhood preservation, continuity, and stability"). See also Tolman v. Logan City, 2007 UT App 260, ¶ 18, 167 P.3d 489 (noting that "a municipality's land use decision is reasonably debatable, and not otherwise arbitrary or capricious, where it is made to effectuate an objective set out in the municipality's general plan.").

When there is a rational basis for the City's decision, it does not give rise to an Olech class of one equal protection claim regardless of the alleged malicious or improper motive of the City Council. "Under the rational basis test, if there is a plausible reason for the legislative action, our inquiry is at an end." U.S. v. Castillo, 140 F.3d 874, 883 (10th Cir. 1998) (punctuation omitted); Fitzgerald v. Racing Ass'n, 539 U.S. 103, 123 S. Ct. 2156, 2160, 156 L. Ed. 2d 97 (2003)("[J]udicial review is 'at an end' once the court identifies a plausible basis on which the legislature may have relied.").

Moreover, "[t]he requirement that a plaintiff show that similarly situated persons were treated differently 'is especially important in class-of-one cases.'"

Jicarilla, 440 F.3d at 1212. A plaintiff must demonstrate similarity “in all material respects,” and “cannot prevail if there is any material difference between it and allegedly similarly situated parties that relates to a governmental interest.” Id. at 1212-13. This is an onerous burden. See, e.g., id. (“when the class consists of one person or entity, it is exceedingly difficult to demonstrate that any difference in treatment is not attributable to a quirk of the plaintiff or even to the fallibility of administrators whose inconsistency is as random as it is inevitable”); Neilson v. D'Angelis, 409 F.3d 100, 105 (2d Cir. 2005)(class-of-one plaintiff must show that “no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy”).

In this case, the Petersen Family did not and cannot make this showing. As set forth above, the two properties the Petersen Family points to for purposes of comparison, while “across the street” from one another, were both surrounded by differently zoned and situated properties and uses, and are not similar “in all material respects.” Moreover, the City decided to maintain the then existing zoning designations on both comparative rezone applications, and thus did not treat the applications materially different. The Petersen Family’s equal protection argument is invalid.



**B. The City's Land Use Decision Did Not Violate Any Constitutional Right to Due Process.**

Proving any constitutional due process violation requires that the Petersen Family establish a protectible property interest in the decision on the rezone application. Hyde Park Co. v. Santa Fe City Council, 226 F.3d 1207, 1210 (10th Cir. 2000) (“[T]o prevail on either a procedural or substantive due process claim, a plaintiff must first establish that a defendant's actions deprived plaintiff of a protectible property interest.”). See also Heideman v. Washington City, 2007 UT App 11, ¶17, 155 P.3d 900, 906:

To prevail on a due process claim, a party must first establish that it has a ‘protectible property interest.’ This is an interest in which one has ‘a legitimate claim of entitlement.’ It is not “an abstract need for, or [a] unilateral expectation of, a benefit.” Rather, it is a “right to a particular decision reached by applying rules to facts.”

(Citations omitted).

In Hyde Park, the court went on to note:

The entitlement analysis centers on the degree of discretion given the decisionmaker and not on the probability of the decision's favorable outcome. To prevail, [the plaintiff] must therefore demonstrate that a set of conditions exist under state and local law, “the fulfillment of which would give rise to a legitimate expectation” that the City Council would approve [plaintiff's] plat. In other words, [the plaintiff] must show that under the applicable law, the City Council had limited

discretion to disapprove the proposed plat.” Otherwise, the city's decisionmaking lacks sufficient substantive limitations to invoke due process guarantees.”

Hyde Park, 226 F.3d at 1210 (citations omitted).

Here, however, Appellants can point to no City ordinance or General Plan provision that limited the City Council’s discretion in considering the rezone application. On the contrary, and as the district court noted, both the existing zoning and the zoning the Petersen Family desired were consistent with the General Plan. And state law affords the City great discretion in determining whether to grant or deny a rezone application:

In general, because a "zoning classification reflects a legislative policy decision," we will not interfere with that decision "except in the most extreme cases." The guiding principle behind our interpretation of legislative zoning decisions is that we will not substitute our judgment for that of the municipality. Though a municipality may have a myriad of competing choices before it, "the selection of one method of solving the problem in preference to another is entirely within the discretion of the [city]; and does not, in and of itself evidence an abuse of discretion." The propriety of the zoning decision need only be "reasonably debatable."

Bradley v. Payson City Corp., 2003 UT 16, ¶ 24, 70 P.3d 47, 54 (emphasis added).

The Petersen Family recognizes the protected-property interest requirement, and attempts to satisfy its burden in this regard by reliance on Nasierowski Bros.

Investment Co. v. City of Sterling Heights, 949 F.2d 890 (6<sup>th</sup> Cir. 1991). Aplt.s.’

Br. pp. 34-35. Appellants argue that:

Here, as in Nasierowski, a protectable property interest arose in favor of the Petersen Family when the purchase of the Petersen Family’s property was expressly conditioned on the City’s representations to D. R. Horton that the Petersen Family would obtain a favorable zoning decision from the City and in the time and effort expended in seeking the rezoning of the property. The “understandings” between the parties regarding the rezoning of the property created constitutionally protected property interest in approval of the zoning application.

Aplt.s.’ Br. pp. 35-36. However, even a cursory examination of the facts in the

Nasierowski case exposes the fallacy in the argument.

As the Sixth Circuit described Nasierowski:

In the case at bar, Nasierowski actively pursued and completed a course of action of an inarguably substantial character in an effort to construct a retail and warehouse development on the property. First, and perhaps foremost, he expressly conditioned the purchase of the property on his obtaining a favorable zoning opinion from the City. It is clear that Nasierowski would not have purchased the land unless the City had first advised him that, as of right, he was authorized to develop the parcel along the proposed lines. The acquisition of the land was, in and of itself, a substantial act undertaken exclusively upon the City’s approval and affirmative encouragement of the proposal.

Second, Nasierowski expended considerable money and effort in drafting a site plan, submitting it to the City

for preliminary approval, petitioning the City for a variance from the specific site plan requirements, and negotiating with the City's planners and engineers in an effort to resolve minor disputes over relatively insignificant matters. These substantial undertakings bear only a vague resemblance to the modest efforts of the landowner in City of Lansing, who in 1927 "went no farther than to order the plans and cause a survey to be made of the lot." The expenditure of the plaintiff in City of Lansing, in contrast to Nasierowski's in the case at bar, was correctly deemed too modest to give rise to a vested property interest. Thus, Nasierowski had a property interest in the old zoning classification within which his development was permitted. That property interest was securely vested by Nasierowski's engagement in substantial acts taken in reliance, to his detriment, on representations from and affirmative actions by the City.

Nasierowski Bros., 949 F.2d at 897. Thus the plaintiffs in Nasierowski were expressly told by the government that the land they were considering for purchase had certain entitlements, the plaintiffs actually did purchase the property in reliance upon the existing entitlements and the representations concerning those entitlements, they spent substantial sums in developing the property pursuant to the existing entitlements, and the government then eliminated or substantially reduced those entitlements, allegedly without affording due process.<sup>3</sup> Id.

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<sup>3</sup>The Petersen Family also cites Moreland Properties v. Thornton, 559 F. Supp. 2d 1133 (D. Colo. 2008)(Aplts.' Br. 35), which had similar facts. There the plaintiff had purchased the subject property and undertaken development efforts based upon the existing zoning and representations concerning that zoning from

In this case, by contrast, and contrary to the Petersen Family's characterizations, there was no purchase of any property nor any development efforts undertaken based on the City's representations concerning the existing zoning. On the contrary, a third-party developer, D. R. Horton, offered to purchase the Petersen Family's Property if the existing zoning were to be changed. The developer, who is not a plaintiff, then submitted an application for a zone change, but did not purchase the property or undertake any development efforts whatsoever in reliance on any representation concerning a zone change. There is no allegation or evidence that the Petersen Family, who are the parties asserting a due process violation, took any action at all. The City then did not downzone or otherwise reduce the entitlements on the property in any way, but simply declined to change the zoning to allow greater densities than those allowed on surrounding properties.

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government officials, and the City defendant had then downzoned the property allegedly without affording due process. 559 F. Supp. at 1149. The Moreland court expressly distinguished cases where an applicant alleged a protected interest in the outcome of a process designed to change a land use classification, like this case. Id. citing JJR 1 LLC v. Mt. Crested Butte, 160 P.3d 365, 369-71 (Colo. Ct. App. 2007) (finding no property interest in the outcome of a building permit application procedure where the procedure affords the municipality broad discretion to grant or deny the permit); Hillside Cmty. Church v. Olson, 58 P.3d 1021, 1027-29 (Colo. 2002) (finding no property interest in outcome of special use permit application hearing where the municipality had discretion to deny the permit even after the hearing).

Thus both the Nasierowski and Moreland cases the Petersen Family has cited are completely inapposite. The Petersen Family has not and cannot cite any case or other authority which has recognized a property interest in the result of the City's rezone decision like the one at issue here sufficient to establish a constitutionally cognizable due process violation. This Court's observations in Patterson v. American Fork City, 2003 UT 7, 67 P.3d 466, are applicable:

Many courts have held that adverse municipal land-use decisions are not actionable under § 1983 because a developer does not typically have a claim of entitlement to a favorable decision. In Jacobs, Visconsi & Jacobs Co. v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991), the plaintiffs argued that denial of their rezoning request deprived them of their substantive due process interest in "making reasonable use of their property free from arbitrary and capricious restrictions imposed" by the city. The Tenth Circuit noted that the city had considerable discretion because the zoning statute prescribed a "reasonableness" standard for the city's refusal to rezone the property as requested by the developer. Given such discretion, the Tenth Circuit ruled that the developer could not point to any "rules or mutually explicit understandings that [would] support [their] claim of entitlement' to the rezoning of their property."

Patterson, 2003 UT 7, ¶ 24 (citations omitted).

#### IV. THE DISTRICT COURT DID NOT ERR IN DENYING THE PETERSEN FAMILY’S REQUEST TO DO DISCOVERY.

Citing Springville Citizens v. Springville City, 1999 UT 25, ¶ 13, The Petersen Family argues that “[f]aced with facially sufficient allegations that the City violated the Petersen Family’s constitutional rights,” the court “must consider matters outside of the record, and discovery outside of the record is therefore appropriate and necessary” regardless of the limitations imposed by section 10-9a-801. Aplt.s.’ Br. p. 39. This argument also fails.

The Springville Citizens opinion simply commented that discovery had occurred, and did not even address the question presented here. Springville Citizens, ¶ 13. The fact remains that the Petersen Family sought judicial review pursuant to section 10-9a-801, and that statute couldn’t be more clear:

“[i]f there is a record, the district court's review is limited to the record provided by the land use authority . . . . [¶] The court may not accept or consider any evidence outside the record of the land use authority or appeal authority, as the case may be, unless that evidence was offered to the land use authority or appeal authority, respectively, and the court determines that it was improperly excluded.

Utah Code Ann. § 10-91-801(8).

Moreover, in this case there are no “facially sufficient allegations” of any constitutional violation. The Petersen Family’s equal protection claim is subject to

rational basis review and fails because there is a conceivable rational reason for the City Council's rezone decision, regardless of what discovery could show about some subjectively improper motive. Similarly, the Petersen Family's due process claim fails because the Petersen Family had no constitutionally protected property interest in a decision whether to grant greater development densities or not.

Discovery is not appropriate where further factual development would not assist the Petersen Family in avoiding summary judgment. Holmes v. American States Ins. Co., 2000 UT App 85, ¶ 27, 1 P.3d 552 ("Because the Petersen Family's claims fail as a matter of law, there was no need to allow further discovery."); American Towers Owners Ass'n v. CCI Mech. Inc., 930 P.2d 1182 (Utah 1996) (because facts the plaintiff sought to discover would not be legally relevant to the resolution of the issues, the denial of the plaintiff's motion to continue discovery was proper).

### **CONCLUSION**

For the reasons stated above, the City respectfully requests that this Court affirm the district court's judgment and order in favor of the City on the Petersen Family's Petition for Review.



RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of September, 2009.

**WILLIAMS & HUNT**

By

A handwritten signature in black ink, appearing to read "Jody K. Burnett", written over a horizontal line.

Jody K. Burnett  
Robert C. Keller  
Attorneys for Appellee Riverton  
City

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 25<sup>th</sup> day of September, 2009, two (2) true and correct copies of the foregoing **Brief of Appellee Riverton City** and a courtesy copy of the brief on CD in PDF format were mailed by first class mail, postage prepaid thereon, to:

**Counsel for Petitioners/Appellants**

Dale F. Gardiner

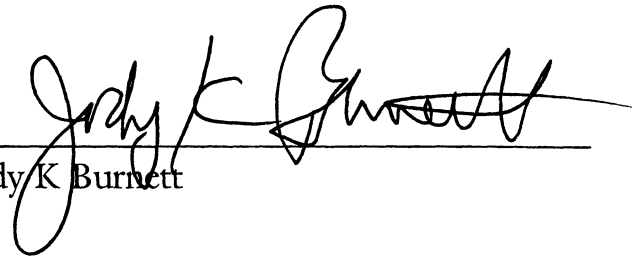
Scott M. Lilja

Cassie J. Medura

**VAN COTT BAGLEY CORNWALL & McCARTHY**

36 South State Street, Suite 1900

Salt Lake City, Utah 84111

  
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Jody K. Burnett

167881.1