

2017

**Jeramey McElhaney and Mary McElhaney, Feb - 7 2017 Appellees,  
v. The City of Moab and Moab City Council. Appellants.**

Utah Supreme Court

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UTAH APPELLATE COURTS

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**IN THE UTAH SUPREME COURT**

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JERAMEY McELHANEY and MARY  
McELHANEY,

Appellees,

v.

THE CITY OF MOAB and MOAB  
CITY COUNCIL.

Appellants.

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Appellate Court No. 20160142

District Court No. 140700048

**APPELLANTS' SUPPLEMENTAL BRIEF**

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Appeal from the Order of the Seventh Judicial District Court, Case No.  
140700048, Judge Lyle R. Anderson, Reversing the Decision of the  
Moab City Council to Deny a Conditional Use Permit

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The City of Moab submits the following Supplemental Brief as authorized by this Court’s order of January 12, 2017.

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## I. ARGUMENT

In this action the City of Moab (City) asserts four points of error with respect to the decision of the trial court to reverse the City's denial of the conditional use permit in question: a) the trial court incorrectly applied the so-called public clamor doctrine as it pertained to the administrative decision of the City Council; b) the court erred by failing to affirm the decision where the City found the application to be contrary to the mandatory terms of its comprehensive plan; c) the court erred in failing to order a remand for clarifying findings; and d) the court misapplied the standard of review by engaging in its own fact-finding. This brief will focus on the public clamor doctrine and the current procedural posture of the case. The City incorporates by reference the arguments previously advanced as to all points of error, as set forth in its Opening Brief and Reply Brief, and submits that reversal is warranted with respect to those arguments.

### 1. PUBLIC CLAMOR AS A REASON FOR INVALIDATING A LAND USE DECISION MUST BE PREDICATED UPON DISCRIMINATORY INTENT, OR SERIOUS PROCEDURAL MISCONDUCT.

The concept of public clamor as a basis for setting aside an adjudicatory land use decision traces back to this Court's decision in *Thurston v. Cache County*, 626 P.2d 440 (Utah 1981). In that case this court rejected a public clamor argument and held, *inter alia*, that a county government's reliance upon testimony from

neighboring landowners in the denial of a conditional use permit was proper where the testimony was of an advisory nature. *Id.* at 445. The Court noted that though the consent of neighboring property owners may not be a criterion for issuance or denial of a land use permit, there is nothing wrong with reliance upon such testimony through the public hearing process<sup>1</sup>. *Id.* Implicit in that decision was the concept that the local government must not cede its independence to those who support or oppose a given application, and that public testimony may be “advisory.” *Id.*

Public clamor has subsequently been applied by lower courts to invalidate local land use decisions where there was evidence of procedural misconduct by the local government, or where public opposition was motivated by improper factors outside the ambit of a zoning ordinance, such as a desire to exclude the mentally ill. Reply Brief, pp. 11-13; *citing: Davis County v. Clearfield City*, 756 P.2d 704 (Utah App. 1988); *Uintah Mountain RTC, LLC v. Duchesne County*, 127 P.3d 1270 (Utah App. 2005). Both decisions relied in part on this Court’s ruling in *Thurston County*, and both were in general agreement with the United States

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<sup>1</sup> Similarly, this Court has recognized that a local government may properly rely upon all manner of public testimony when it acts in a legislative context, such as a rezoning decision. *Gayland v. Salt Lake County*, 358 P.2d 633, 635-636 (Utah 1961).

Supreme Court decision in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

The instant case presents none of the invalidating causes for government action, such as procedural irregularities, or discriminatory motives, as found in *Davis County* or *Uintah Mountain RTC*. Nevertheless, the trial court erred by conflating public opposition focused on the approval criteria of the land use code with improper clamor. This illustrates that lower courts need clearer guidance as to when public testimony in a land use case crosses the line into improper clamor. In the absence of clarification there is a genuine risk that the doctrine of clamor will undermine constitutionally protected speech by those who seek to challenge land use applications.

a. **Clarification of the Thurston County Rule is Appropriate.**

Although this court abides by its precedent, stare decisis is neither mechanical nor rigid as it relates to courts of last resort. *State v. Menzies*, 889 P.2d 393, 399 (Utah 1994). And, precedent may be modified where it is unpersuasive, not firmly rooted, or likely to become inconsistent with other principles of law. *Eldridge v. Johndrow*, 345 P.3d 553, ¶¶22, ¶40 (Utah 2015). Indeed, where a rule of law has a chilling effect on constitutionally protected speech, or is otherwise in tension with First Amendment principles, that is a reason to abandon the precedent. *Id.* at ¶ 53, 54.

b. **Lower Courts Misapply *Thurston County* in a Manner that Infringes Upon First Amendment Freedoms.**

The First Amendment to the United States Constitution guarantees that citizens have the right to petition the government for redress of grievances, and this right to petition extends to efforts to influence the result of a local government land use decision. *Anderson Development Co. v. Tobias*, 116 P.3d 323, ¶ 26-28 (Utah 2005); Reply Brief pp. 10-11. Despite the constitutionally rooted nature of public testimony in land use proceedings, there is at least some authority which misapplies the public clamor concept to exclude or minimize the effect of public testimony.

In this case the Appellee property owners (Owners) place a great reliance upon the Utah Court of Appeals opinion in *Ralph L. Wadsworth Construction, Inc. v. West Jordan City*, 999 P.2d 1240 (Utah App. 2000), which they cite for the proposition that a decision to deny a conditional use permit may not be based solely on adverse public comment. *Id.* at ¶ 17; Appellees' Response Brief, pp. 44-45<sup>2</sup>. This conclusion is erroneous, as this Court in *Thurston County* held that it is appropriate that a local government hear and rely upon just such testimony. *Thurston County*, 626 P.2d at 445. Nonetheless, the argument shows that lower

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<sup>2</sup> *Wadsworth Construction* contains questionable reasoning and, in any event, is not binding upon this Court.

courts are applying the concept of public clamor in a manner that infringes upon the constitutionally mandated right to petition.

The dispute shows that the boundaries of the public clamor doctrine must be clearly defined so that fundamental First Amendment freedoms to speak and, more importantly, to have one's concerns acted upon, are not displaced by a *de facto* exclusionary rule as to public testimony. In fact, the Owners in this case urge just such a rule of exclusion as to public testimony. *See* Response Brief, p. 45.

A local government must be able to consider and give consideration to all credible testimony in an adjudicatory proceeding, and it may rely upon public testimony in reaching its decision unless there is a basis for invalidating that action under the doctrine of clamor. Any other conclusion would turn land use adjudicatory proceedings into an empty gesture, where the concerns of affected persons are heard and summarily ignored.

c. **Improper Motive is Established by Bias or Reliance Upon Factors which are Not Founded in the Land Use Code.**

An appropriate formulation of the public clamor doctrine requires that a court reviewing an adjudicatory decision of a land use authority may only find that the decision is the product of improper public clamor where: a) the decision is motivated by prejudice or improper motive; or b) the land use authority engages in serious procedural misconduct which confirms the presence of bias, or which

comprises the fairness of the proceeding<sup>3</sup>. The two elements are discussed separately.

**i. Bias or Improper Purpose May Constitute Clamor.**

Zoning and planning authority is vested in local governments for the purpose of promoting public health, safety, prosperity, morals, peace, general welfare, and good order. U.C.A. § 10-9a-102; *see also, Marshall v. Salt Lake City*, 141 P.2d 704, 709 (Utah 1943). But, where a local government engages in land use decision making which is attenuated from its legitimate purposes, such that it gives effect to bias or irrational fears directed at a disfavored group, then it acts irrationally and an adjudicatory land use decision will be struck down. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). Thus, while local governments can address concerns of public safety or welfare, they cannot give effect to public distaste or prejudice. *Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4<sup>th</sup> Cir. 1989)(invalidating denial of conditional use permit for operation of palmistry shop where decision was motivated by irrational public and religious concerns); *accord Davis v. Clearfield City*, 756 P.2d at 712 (noting near uniform public opposition when a mental health facility or jail is proposed, and identifying

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<sup>3</sup> As stated, this formulation of public clamor is entirely consistent with the statutory standard of review, which requires that an adjudicatory decision be supported by substantial evidence and not be arbitrary, capricious, or illegal. U.C.A. § 10-9a-801(3)(c).

the decision as pretext for that opposition). Land use decisions founded on bias or prejudice against a disfavored group may amount to improper clamor.

Conversely, where a local government acts on the basis of legitimate zoning concerns such as noise, access, parking, traffic, or the suitability of a proposed use for a given neighborhood, the action is proper, even if a source of evidence is testimony from interested members of the public. *E.g. Thurston v. Cache County*, 626 P.2d at 444-445.

**ii. Serious Procedural Misconduct May Evidence Clamor.**

At its core, improper clamor as a basis for setting aside a land use decision rests on the notion that a local government acted pursuant to a pretext to give effect to private bias. Markers for this kind of conduct may include procedural irregularities. Thus, the Utah Court of Appeals found public clamor where there was evidence of secret closed-door meetings by the land use authority in which the application was considered. *Davis v. Clearfield County*, 756 P.2d at 711-712; Reply Brief, pp. 11-14. Likewise, in that case the court noted that the planning commission yielded to public sentiment by asking for a show of hands of persons at a hearing to measure support or opposition to the application. *Id.* at F.N. 9. Again, those facts suggest that public officials have ceded their official duties to the public, rather than acting independently on the basis of their own judgment.

The rule to be gleaned from these authorities is that when public opposition to a land use matter is accompanied by significant procedural irregularities, it is proper for a court to infer that the decision was the product of public clamor.

**d. The City Acted Properly to Weigh the Testimony Against the Criteria in the Ordinance.**

In the review of an adjudicatory proceeding this Court owes no deference to the trial court decision, which is not accorded any presumption of correctness.

*Carrier v. Salt Lake County*, 104 P.3d 1208, ¶ 17 (Utah 2004). Under the correct formulation of the public clamor doctrine the decision by the Moab City Council easily stands up to review. See Reply Brief, pp. 14-16.

There is no evidence in this case that the City acted on the basis of a discriminatory motive, nor were there any procedural irregularities in the review process that would suggest bias or improper clamor. The record discloses staff level review, followed by hearings before the Planning Commission and City Council. The Owners reviewed a number of comments from the public and submitted their own written rebuttal prior to the final decision. R. 0320-0321.

There was genuine debate on the City Council followed by a 3-1 vote against the application. R. 0371-380; R.0408-0411. Prior to the vote, one Council member noted that the application did not comply with the mandatory provisions of the City's General Plan, a fact which would justify denial even in the absence of any public testimony. R. 0380-0381; Reply Brief, p 6. This record hardly suggests a

wholesale capitulation of a local government to the unreasoned sentiments of the public.

Moreover, review of the application was based on the substantive criteria in the Moab ordinances, which are strict when it comes to the expansion of business activities in residential neighborhoods. Public testimony focused on the criteria in the conditional use ordinance, and pointed out likely noise, traffic, and crowding impacts, as well as the concern that the proposed use was not compatible with the neighborhood<sup>4</sup>. Opening Brief, Statement of Facts, pp. 3-10. Some of this testimony was quite specific, noting, for example, the projected increase in traffic and evidence that noise emissions from off highway vehicles coming and going from the site would likely exceed City noise ordinance levels. See Reply Brief, pp. 15-16<sup>5</sup>. Despite having the burden of proof, the Owners did little to rebut these statements; nor did they suggest conditions that would mitigate the likely impacts of the project. R.0320-0321 (Owners rebuttal statement). The evidence was sufficient to convince the City Council that the use was not compatible with the site.

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<sup>4</sup> Compatibility of a proposed use with existing uses in a neighborhood is a valid approval condition, and does not amount to a “neighborhood veto” as to a land use approval. See *Stucker v. Summit County*, 870 P.2d 283, 290 (Utah App. 1994); citing: *Thurston v. Cache County*.

<sup>5</sup> In the interest of space, the City will not repeat that testimony here.

## II. CONCLUSION

This case reflects a careful, if imperfect, attempt by the City of Moab to evaluate a land use application based on the evidence in the record. There was no conduct to suggest that the City abandoned its role as independent decision maker or buckled to the unreasoned prejudice of a mob. This case does not present a decision based on pretext to conceal an improper motive or discriminatory purpose. Rather, this case illustrates that this Court must affirm that the public has an important role in adjudicatory land use proceedings, and that public testimony focused on zoning criteria cannot be dismissed as improper or “mere clamor.”

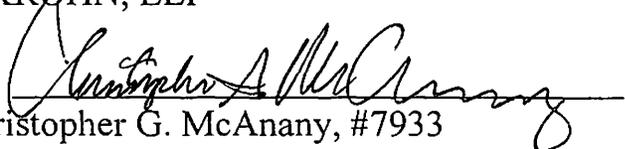
The decision of the trial court must therefore be reversed.

## III. REQUEST FOR ORAL ARGUMENT

The City of Moab hereby requests oral argument in this appeal.

Submitted this 7<sup>th</sup> day of February, 2017.

DUFFORD, WALDECK, MILBURN  
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**CERTIFICATE OF FILING/SERVICE**

I hereby certify that on this 7<sup>th</sup> day of February, 2017, I served a true and correct copy of the foregoing ***APPELLANTS' SUPPLEMENTAL BRIEF*** upon the parties listed below by mailing it by first class mail, postage prepaid (2 copies to opposing counsel and the original and eight copies to the Supreme Court) and electronic mail to the following addresses:

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