

2016

**Jeramery McElhaney and Mary McElhaney, Petitioners/Appellees,  
v. The City of Moab and Moab City Council, Respondents/  
Appellants**

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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JERAMEY McELHANEY and MARY McELHANEY,  Petitioners/Appellees,  v.  THE CITY OF MOAB and MOAB CITY COUNCIL.  Respondents/Appellants.	Appellate Court No. 20160142  District Court No. 140700048
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**APPELLANTS' OPENING BRIEF**

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

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Appellants, the City of Moab and Moab City Council (City) submit the following memorandum of points and authorities in this case.

## **I. STATEMENT OF JURISDICTION**

This case is an appeal of the final judgment of the Seventh Judicial District Court in a municipal land use matter. Review by the trial court was based on the administrative record, per U.C.A. § 10-9a-801(8)(a)(i). This Court has jurisdiction pursuant to U.C.A. § 78A-4-103(2)(a)(ii) or (2)(b)(i)(appeals of adjudicative proceedings of political subdivisions or local agencies).

## **II. ISSUES PRESENTED FOR REVIEW**

1. Did the trial court err in overruling a decision to deny a conditional use permit where the proposed land use was contrary to the terms of a municipality's General Plan, as made mandatory by ordinance?
2. Did the trial court err in concluding that a municipal land use decision was the product of improper public clamor in the absence of a finding of improper purpose or discriminatory motive?
3. Where an adjudicative decision by a local government did not include express findings of fact, did the trial court err in failing to order a remand for clarification of the basis for decision?

4. Did the trial court err in applying the substantial evidence standard of review as to a local government land use decision where the court engaged in its own fact finding and ignored or discounted the testimony as mere speculation or clamor?

### **III. PRESERVATION OF ISSUES PRESENTED**

1. The lack of conformity of the land use application with the provisions of the Moab General Plan was litigated before the trial court. See Record, 0476-0488 (City of Moab's Brief in Opposition to Petitioners' Brief on Appeal, R. 0480, 0484); also R. 1081-1082 (oral argument).

2. The proper application of the so-called public clamor doctrine was litigated before the trial court. R. 0476-488 (Defendants' Brief at R. 0481); also, R. 1076-1077 (oral argument).

3. The issue pertaining to findings of fact was litigated before the trial court. The issue was briefed, R. 0485-0486 (Defendants' Brief), and covered at oral argument. R. 1094, 1102 (discussing remand for further findings as remedy).

4. The correct standard of review was briefed. R. 0480-0481.

### **IV. STATEMENT OF THE CASE**

The City of Moab appeals the decision of the Seventh Judicial District Court reversing the City's denial of a conditional use permit for the operation of a

lodging facility in a residential neighborhood. The Appellees, Jeremy McElhaney and Mary McElhaney (Owners), sought approval of a conditional use permit for the operation of a bed and breakfast facility in an area of the City zoned for residential development. After review by the City staff and the Planning Commission, the City Council concluded that the application should be denied because of adverse impacts on the neighborhood.

The Owners brought an action alleging, inter alia, that the City Council decision was arbitrary and capricious. The trial court, reviewing the record, reversed the City Council decision, and this appeal follows. The relevant facts are as follows:

## **V. STATEMENT OF FACTS**

1. The Plaintiffs submitted an application for approval of conditional use permit for a bed and breakfast facility to be located at their property at 100 Arches Drive in Moab. Record 085<sup>1</sup>.
2. The proposal calls for new construction of a 3,721 square foot home with attached structures totalling 1,152 and 864 square feet, for a total of 5,737 square feet of new construction. Id. All structures would be two story, and the facility

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<sup>1</sup> Unless otherwise indicated all citations are to the numbered record pages on file with the court and distributed to the parties.

would have five guest bedrooms. Id. The Owners would continue to reside on the property, and they stated that they would build the residence as planned, regardless of whether or not they obtained conditional use permit approval to operate a bed and breakfasts. R. 0208; 0320.

3. The subject property is located in the R-2 residential zone, and is located in a developed subdivision including single family homes. Id. and R. 095-0103 (photographs depicting the neighborhood).

4. The subject lot is 0.57 acres in area, or roughly 24,829 square feet. R. 0209 (minutes of testimony by Jeremy McElhaney); R. 0259 (Site Plan). A significant portion of the lot is hillside. R. 0106-0115 (photographs of the area).

5. The subject property comprises a single lot located at the end of a residential cul-de-sac with only one means of ingress/egress. R. 110 (aerial photo of subject lot).

6. Properties adjacent to the proposed bed and breakfast are all single family residences. See Id.; R. 092.

7. City staff noted that application showed parking for five vehicle spaces, four trailer spaces (for recreational equipment), and six enclosed garage parking spaces. R. 0119, ¶ 4 (staff report). The Owners concur with those numbers, though they note the site could house up to six guest trailers, depending on their size. R. 0207

(minutes of Planning Comm. September 11, 2014).

8. City staff noted that the ITE traffic manual estimates that a bed and breakfast can assume 8.9 average daily trips per day (ADT) per room, together with 10-12 ADT for a single family residence. R. 0119. This would result in an average of 54.5 to 56.5 ADT for the subject facility. Staff noted that there could be some variation in these vehicle counts. Id.

9. The application was reviewed by the Planning Commission on September 11, 2014, and the hearing was continued until September 25, 2014. R. 0205, 0213.

10. Several neighbors voiced concerns at the hearing, as reflected in the staff report, minutes, and written comments provided to the Planning Commission, staff, and later, the City Council. Neighbor comments were primarily addressed to the issues of traffic, noise, parking, storm water drainage, and general incompatibility of the use with the neighborhood. Id.

11. The Planning Commission subsequently recommended approval of the conditional use permit, subject to four conditions. R. 085-086 (Staff Report).

These conditions included:

- a. The bed and breakfast shall be reviewed each year for code compliance;

- b. All lighting shall be downward directed full cutoff as required by MMC 17.09.660(H), Lighting Plan;
- c. Fencing and/or landscaping shall be used to buffer the parking area and the entrance from the street; and
- d. The daycare center will discontinue operations once the bed and breakfast facility is operational<sup>2</sup>.

12. The City Council, as land use authority, considered the conditional use permit application at a public hearing on October 28, 2014. R. 0324, et seq. (Council Transcript).

13. A couple living immediately adjacent to the subject property, provided written comments about parking, increased traffic, and noise. R. 0216-219. The neighbors stated that: a) Arches Drive is a cul de sac, and that all traffic would have one means of ingress/egress; b) Arches Drive has 11 residential structures, two of which are duplexes; c) based on cited Federal Highway Administration

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<sup>2</sup> The Owners own a home at 95 Arches Drive, adjacent to the subject property. At this location the Owners have operated an in-home child day care business. This business, though a permitted use under the R-2 zoning designation, has been the subject of neighbor complaints about excessive traffic. R. 0217. At least one neighbor stated that this level of traffic is an unacceptable “benchmark” for the area. R. 0231, 0233. Another witness noted that traffic will increase, relative to the existing day care, because of the limited number of families using that day care, as compared to likely use of the bed and breakfast. R. 0338-0339.

Data, the average driver in a residential area generates five round trips per day; d) the existing residents generate 130 vehicle trips per day; d) the addition of a bed and breakfast would generate at least 50 additional trips per day, an increase of 38%; and e) the use of Off Highway Vehicles (OHVs) brought by guests would increase that traffic burden. R. 0216-219; 0223-0224. These neighbors also noted that the operation of a bed and breakfast would result in different traffic patterns, at all hours of day or night, and particularly on weekends. R. 0217; also 0340.

14. Because of the proximity of the subject property to Sand Flats Road, a locally significant recreation area, and the Owners' statements about parking OHV trailers on the property, the neighbors expressed the concern that noise from OHVs would be significant and likely violate City ordinances. R. 0218. Citing a State of California noise study, the neighbors noted that OHVs emit noise at the rate of 75 to 80 decibels at a distance of 50 feet, which is in excess of Moab Municipal Code ordinances, Section 17.74.080, which limits noise to 65 decibels. *Id.* They noted that routine use of OHVs staged at the bed and breakfast would alter the

quiet of the neighborhood and constitute a nuisance<sup>3</sup>. Id.

15. Other persons expressed concerns about increased traffic on the cul de sac, noise, and safety for residents. R. 0203; 0222. One neighbor noted that the applicant was required to show, under the applicable ordinance, that the application had a “clearly minimal negative impact,” and that the proposal did not meet that exacting standard due to its alteration of the character of the residential neighborhood, again due to traffic and noise, from guests, employees, and OHV riders. R. 0231-232. Other long-term residents objected to the encroachment of a commercial use into an existing residential neighborhood, and observed that the proposed bed and breakfast would result in qualitative changes in traffic, because of the behavior of tourists and the odd hours when they would be coming and going to the site. R. 0233; R0240-0241

16. At least one person stated his support for the application, and his belief that it would not result in additional noise or traffic. R. at 0221.

17. One resident of Arches Drive lost a contract to sell his home to an existing tenant because of the pending bed and breakfast conditional use permit application.

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<sup>3</sup> Another witness noted that one of the Owners is a former president of a four wheel drive club, and that OHV enthusiasts will naturally be drawn to the location. R. 0341. Although the broader issue is not well defined in the record, OHV use, and particularly noise in residential areas, is a matter of significant local concern in Moab.

R. 0255.

18. At the public hearing, a long-time resident who is a retired traffic engineer, provided testimony that he reviewed the development file and there was no traffic study present. He testified that that traffic and noise in the neighborhood would increase; that the steep grades on Arches Drive meant that vehicles would be working harder and emitting more noise as they descend or ascend; and that the neighborhood was otherwise a quiet and good place where children can play in the street. R. 0353-0357; R. 0288-0289. This neighbor also testified that OHV noise is likely to range between 80 and 100 decibels (range for motorcycles and all terrain vehicles); Id. at 0355-0356. He noted that a 10 decibel increase in noise is equal to a ten fold increase sound intensity. Id.

19. An attorney representing neighbors living on Arches Drive voiced concerns about the compatibility of the bed and breakfast use with the neighboring residential uses; the dead end street location; the size of the new buildings in relation to the neighborhood; and the increase in traffic. R. 0345-0349. She also noted that there are no overnight tourist accommodations in the immediate vicinity of the proposed use. R. 0334.

20. Another long term neighbor also living on Arches Drive is perhaps representative in that he stated his belief that the applicant had not satisfied his

burden of proof to show that the proposed use would not adversely affect the residential character of the neighborhood. R. 0357-0359.

21. In advance of final action by the City Council, the Owners submitted a detailed rebuttal outlining the ordinance criteria and explaining why they believed they had met all requirements. R. 0320-0321. The statement did not include any proposals as to conditions which might mitigate the impacts associated with the business. Id.

22. City Staff provided a report to the Council outlining the Planning Commission recommendation, staff's review of the project, and staff's assessment as to compliance with applicable criteria. R. 0293-0304.

23. The City Council reconvened on November 25, 2014. A motion to approve the application was made and seconded. R. 0371. Discussion by the Council followed.

24. Upon a final vote one Council member voted in favor of the application and three Council members voted against. Supplemental Record, Minutes of November 25, 2014 Council meeting. R. 0408-0411 (Council Minutes).

25. The record of the Council decision shows that Councilman Gregg Stucki made a detailed and thoughtful plea for approval of the application. R. 0371-380.

26. Councilwoman Kirstin Peterson argued against the application, noting that

this is fact specific inquiry as to whether the proposed use is the “right fit for the right place.” Id. at 0380. She also noted that the Moab General Plan, as adopted by the City, calls for the City to restrict the expansion of commercial development in residential zones, and that in this instance the use is incompatible with the neighborhood. Id. 0381.

27. The Moab General Plan, in relevant part, states a goal of achieving “..attractive, stable, and safe residential areas.” R. 0621. To implement that goal, the General Plan states that the City is to “restrict commercial development in residential zones.” Id.

28. Councilwoman Heila Hershadi voice the concern that residents of Moab believe that commercial development is “taking over” neighborhoods, and that she could not support this application. Id. at 0382-0383<sup>4</sup>.

29. Councilman Baily stated that he was on the planning commission when changes to the ordinances were discussed, and that the clear intent of the ordinances was to listen to neighbor concerns by requiring that bed and breakfasts

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4 This concern illustrates the context of the review of the conditional use permit application. The City Council received a request from the Planning Commission at the October 28, 2014 meeting (the same night that the instant application was reviewed) that the City adopt a moratorium on the conversion of residential properties to overnight rentals because of the shortage of affordable housing in Moab. R. 0275-280

have “clearly minimal negative impacts,” and that this application’s impacts would not be minimal. *Id.* at 0383.

30. After briefing and oral argument, the Seventh Judicial District Court overturned the Council decision in its Ruling of January 20, 2016. R. 0537-0549.

The trial court held, first, that the City erred in concluding that traffic would pose an undue burden on the neighborhood; second, that noise concerns were mere speculation; and third, that the City gave undue credence to public clamor. *Id.*

31. A request by the City for stay of the Court’s decision, R. 0592-0599, was rejected on March 1, 2016. R. 1006.

## **VI. SUMMARY OF ARGUMENT**

In its order the trial court reversed the decision of the City Council, concluding that there was insufficient evidence to conclude that impacts of the proposed land use were likely to be problems. Instead, the trial court held that the City improperly yielded to public clamor in opposition to the application. As set forth below, the trial court erred by failing to recognize that the proposed use was inconsistent with the City’s General Plan, which restricts the encroachment of commercial use in residential areas. Second, the trial court incorrectly applied the so-called public clamor doctrine, rejecting the testimony and evidence from neighboring property owners without finding that these persons acted with an

improper purpose. Third, though the trial court criticized the City Council decision as not being supported by written findings, it improperly refused to grant a remand for additional findings. And fourth, the trial court misapplied the standard of review by engaging in its own fact finding and discounting the judgments of the local government.

## VII. ARGUMENT

### 1. STANDARD OF REVIEW.

A court reviewing a local land use decision shall presume that the decision, ordinance, or regulation...is valid; and determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal. U.C.A. §10-9a-801(3)(a)(i) and (ii). Local land use decisions are entitled to a great deal of deference, and local officials should be afforded a “wide latitude of discretion” in their decision making. [\*Xanthos v. Board of Adjustment of Salt Lake City\*, 685 P.2d 1032, 1034 \(Utah 1984\)](#). A decision of a land use authority is “valid if the decision is supported by substantial evidence and is not arbitrary, capricious, or illegal.” U.C.A. § 10-9a-801(3)(c). The “substantial evidence” standard of review applies to review of municipal decisions concerning the grant or denial of a conditional use permit. [\*Uintah Mountain RTC, LLC v. Duchesne County\*, 127 P.3d 1270, 1275 \(Utah App. 2005\)](#). Substantial evidence is that quantum and

quality of evidence that is sufficient to convince a reasonable mind to reach a particular conclusion. Id.

Last, an appellate court is not bound to accord any deference to a trial court decision where, as is the case here, the trial court is reviewing a matter based on the administrative record before a local government, without taking new testimony.

[\*Davis v. Clearfield City\*, 756 P.2d 704, 710 \(Utah App. 1988\)](#).

**2. THE CITY PROPERLY REJECTED THE EXPANSION OF A COMMERCIAL USE IN A RESIDENTIAL AREA WHERE THE MOAB LAND USE PLAN, AS MADE MANDATORY BY ORDINANCE, DISCOURAGES SUCH USES.**

The trial court noted that the City rejected the application, in part, based on the fact that it did not conform to the City’s General Plan. R. 0541. That said, the trial court erred in giving no credence to this legal defect.

**a. The Zoning Favors Stable Residential Development.**

The subject property is located in the R-2 zoning district, an ordinance designation which is “characterized by smaller lots and somewhat denser residential environment than the R-1 zone..” but which includes “..spacious yards and other residential amenities adequate to maintain desirable residential conditions..” including one and two family dwellings. [MMC 17.45.010](#). Apart from residential uses, the only other permitted uses in the R-2 zone include

schools, libraries, churches, agriculture, home occupations, and child day care centers. See [MMC 17.45.020](#) (use requirements). A bed and breakfast facility is not a use by right in the R-2 district, but it may be allowed as a conditional use. Id. at (L); also [MMC 17.09.530](#)(B)(use matrix).

**b. A Conditional Use Requires Compliance with Stringent Approval Criteria.**

A conditional use is defined to mean a use of land that:

“..because of its unique characteristics or potential impact on the municipality, surrounding neighbors, or adjacent land uses, may not be compatible in some areas, or may be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts.” U.C.A. § 10-9a-103(5).

Under the Utah Land Use Development and Management Act (LUDMA) local governments are empowered to enact ordinances that require conditional uses to comply with standards in the ordinance. U.C.A. § 10-9a-507(1). If reasonable conditions can be imposed to mitigate the adverse effects of a conditional use, the applicant is entitled to approval; if not the use may be denied. Id. at (2)(a), (b).

Moab’s ordinances contain detailed provisions for all conditional uses, and provisions specifically applicable to bed and breakfast uses.

[MMC 17.09.530](#)(general approval criteria); [17.09.531](#)(9)(conditions for bed and breakfast conditional uses). The ordinance provides that the burden of proof is on the applicant. [MMC 17.09.530](#)(H)(stating that the applicant shall adequately

demonstrate that the criteria have been met). These criteria are as follows:

- “1. The proposed conditional use and accessory uses are compatible with adjacent existing uses and other allowed uses in the zoning district. Such compatibility shall be expressed in terms of appearance, architectural scale and features, site design and scope, landscaping, as well as the control of adverse impacts including noise, vibration, smoke, fumes, gas, dust, odor, lighting, glare, traffic minimization or circulation, parking issues, or other undesirable or hazardous conditions.
2. The proposed conditional use has incorporated design features sufficient to protect adjacent uses including but not limited to: service areas, pedestrian and vehicular circulation, safety provisions, access ways to and from the site, buffering, fencing, and site building placement.
3. The proposed use is not detrimental to the public, health, safety and welfare through effective management or prohibition of outdoor storage, a required sewer connection, and proper disposal of waste.
4. Adequate public services such as streets, off-street parking, pedestrian facilities, water, sewer, gas, electricity, police, fire, and EMS protection must be available without the reduction of services to other existing uses.
5. Provisions for proper maintenance of the building, parking and loading areas, drives, lighting, signs, landscaping, etc. shall be provided.
6. The proposed conditional use shall conform to all regulations of this code concerning adopted plans, hours of operation, polices and requirements for parking and loading, signs, highway access, and all other applicable regulations.
7. The use is consistent with the city of Moab general plan as amended.
8. The applicant must demonstrate that site impacts within the property as well as adjoining properties have been fully mitigated appropriate to the topography of the site. The review of impacts include, at a minimum, slope retention, flood potential, and possible damage to riparian or hillside areas.
9. After considering the public comment relating the criteria listed above in relation to the requested conditional use permit, the planning commission shall

adopt a resolution stating their findings of the applicant's demonstrated ability to meet the criteria for a conditional use permit. Approval or denial of the application by the city council shall be memorialized in the minutes of the meeting. A determination that the applicant has not met one or more of the applicable criteria shall be sufficient to deny the request..." Id.

Among the criteria specific to bed and breakfast facilities are the following:

"1. Bed and breakfast facilities, rooming and/or boarding houses may be allowed as a conditional use permit where applicant can show evidence of compliance with outlined standards and procedures *and where there is clearly minimal negative impact on adjacent residential properties and neighborhoods...*" [MMC 17.09.531](#)(9)(A)(1)(italics added)

Additionally, the facility must meet several other criteria:

"1. The bed and breakfast facility shall not unduly increase local traffic in the immediate neighborhood. Road design and access shall be considered in the planning commission's recommendation. Construction and alterations of bed and breakfast facilities shall not alter the residential character of residential zones and of the dwelling." [MMC 17.09.531](#)(9)(B)(1).

The remaining criteria are focused on parking; limitations on length of guest stays; bulk standards; limitations on the number of rooms; signage; and the like. See Id. at (B)(2)-(9). Thus, under Moab ordinances, the grant of a conditional use permit for a bed and breakfast in a residential zone is subject to a number of site specific criteria pertaining to neighborhood impacts, and one of those criteria is that the application must be consistent with the General Plan<sup>5</sup>.

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<sup>5</sup> The trial court did not rule that the conditional use permit ordinance is unlawful, nor have the Owners attacked the validity of same. R. 1068

**c. The Council Properly Denied the Application for Inconsistency with the General Plan.**

Under LUDMA every municipality is required to adopt a comprehensive long range general plan covering land use matters, growth, community needs, the efficient use of land, and the like. U.C.A. § 10-9(a)-401. Although a general plan is an advisory document for land use decisions, the impact of that document may be altered by ordinance. U.C.A. § 10-9a-405. And, where a city denies a land use application because the application is found to be incompatible with a comprehensive land use plan, that decision is neither arbitrary nor capricious. [\*Tolman v. Logan City\*, 167 P.3d 489, 495 \(Utah App. 2007\)](#)(affirming denial of rezoning where application was inconsistent with land use plan favoring single family residences). Similarly, case law from other jurisdictions holds that a municipality may properly deny a conditional use permit authorizing a commercial use where that use is found to be inconsistent with the objectives of a comprehensive plan. See [\*Barton Contracting Co. v. City of Afton\*, 268 N.W.2d 712, 717-718 \(Minn., 1978\)](#)(city properly denied conditional use for gravel pit where comprehensive plan favored preservation of rural area). Issuance of an adjudicatory land use permit which is inconsistent with mandatory provisions of a general plan is invalid, and may be set aside. See [\*Land Waste Management v.\*](#)

*Contra Costa Cty. Bd. Of Supervisors*, 222 Cal. App. 3d 950, 958 (Cal. App. 1990).

Here, the Moab ordinances require that the Owners show that their proposed “use is consistent with the City of Moab General Plan, as amended.”<sup>6</sup> MMC 17.09.530(G)(7). In relevant part, the General Plan favors “attractive, stable, and safe residential areas..” R. 0621<sup>7</sup>. To implement that goal, the plan provides that the City will “restrict commercial development in residential zones.” *Id.* Related provisions call for the City to “separate and buffer conflicting land uses, especially where commercial abuts residential.” *Id.* 0607. The import of these provisions is that the City is directed to move cautiously when commercial development is proposed in residential areas, and that such development may not be appropriate in every case. The Council noted these concerns when it denied the application. Statement of Facts, *supra*, ¶26.

The particular site constraints noted in the record, the established character of the subdivision; the location on a cul de sac; the siting at the top of a hill; the relatively small lot sizes; the proximity to OHV recreation areas; the prospect of

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<sup>6</sup> The Owners have not brought any legal claims challenging the validity or enforceability of the Moab General Plan.

<sup>7</sup> The entire text of the General Plan is the record at R. 0602-0666.

OHV use by guests; existing noise and traffic complaints; and the qualitative change of tourists coming and going at all hours; could properly give rise to legitimate concern, as expressed in the record here, that the proposed use is incompatible with the location. Given the expressed General Plan policy of discouraging the encroachment of commercial uses in residential areas, the City acted properly, and in conformity with the law in denying the application here. It was error for the trial court to overrule this lawful interpretation of the Moab ordinances.

**3. THE TRIAL COURT IMPROPERLY LABELLED THE COUNCIL DECISION AS YIELDING TO PUBLIC CLAMOR IN THE ABSENCE OF A FINDING OF IMPROPER PURPOSE OR MOTIVE.**

The trial court held that the City Council improperly yielded to public clamor in opposition to the bed and breakfast. R. 0548. In doing so the Court applied an incorrect legal standard.

The grant or denial of a conditional use permit may not be predicated solely on the consent of neighboring land owners. [\*Thurston v. Cache County\*, 626 P.2d 440, 445 \(Utah 1981\)](#). But, there is no impropriety in a local government relying upon the testimony or other information which may be provided by landowners in the vicinity. *Id.* Indeed, the very nature of a conditional use is that it may result in adverse consequences for neighbors, *see* U.C.A. § 10-9a-103(5), and those

persons have a legally protected right to petition the government for redress of grievances. U.S. Const. Amend, 1. Neighbors may be the most credible and knowledgeable witnesses as to the likely effects of a change in land use.

Similarly, a local government need not apply trial-type rules of evidence in weighing public comment on a land use matter. [\*Bradley v. Payson City Corp.\*, 70 P.3d 47, 55 \(Utah 2003\)](#). And local administrative bodies must be given some deference as to their resolution of conflicting testimony. [\*Rosen v. Saratoga Springs City\*, 288 P.3d 606, 612 \(Utah App. 2012\)](#).

Precedent from this Court holds that public opposition to a land use application should not invalidate a local government decision unless the reasons for denial have no support in the record, or it is apparent that those reasons are mere pretext for public prejudice. See [\*Uintah Mountain RTC, LLC v. Duchesne County\*, 127 P.3d 1270, 1277-1278 \(Utah App. 2005\)](#)(noting that safety concerns for mental health facility were inconclusive in the record, and citing [\*Davis v. Clearfield City\*, 756 P.2d 704 \(Utah App. 1988\)](#), for the proposition that the public is uniformly opposed to prison, mental health, or similar facilities). Implicit in this analysis, as stated in *Uintah County*, is that public opposition to a land use application only becomes improper “clamor” where it is cover for other,

discriminatory, motives<sup>8</sup>.

Given the particular attributes of a conditional use, including the fact that it is designed to address negative externalities affecting other property owners, it is error to simply discount neighbor testimony that is addressed to the substantive approval criteria in the absence of a finding of prejudice, improper motive, or evidence of improprieties in the decision making. See [\*Davis v. Clearfield City\*, 756 P.2d at 711](#) (noting that the local government held closed-door meetings and resorted to asking for a show of hands from the audience as to support/opposition to the application Fn.<sup>9</sup>); see also [\*City of Cleburne v. Cleburne Living Center\*, 473 U.S. 432, 448-449 \(1985\)](#)(courts may properly disregard public objections to conditional use decision where they are the product of discriminatory motives—such as fear of the mentally handicapped).

Here, the testimony from neighbors was uniformly addressed to whether the application met the criteria in the ordinance, and whether it could satisfy the obligation that it have “clearly minimal negative impact” on the adjacent

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<sup>8</sup> To the extent that this Court’s previous analysis of the issue in [\*Uintah County\*](#) leaves this question unclear, the City respectfully requests that this Court take this opportunity to hold that improper clamor must be predicated upon some finding of discriminatory motive or improper purpose, not mere opposition based on ordinance-based criteria.

residential areas. The trial court did not find any discriminatory motive, nor did it conclude that these objections were made in bad faith. Nor does this case concern a group which is subject to prejudice, such mental health patients. At most, the trial court found that the testimony from the various parties was in conflict. Under these circumstances it was error to simply dismiss the landowner opposition as improper clamor, not fit to be considered<sup>9</sup>.

**4. WHILE CRITICISING THE LACK OF FINDINGS, THE COURT ERRED IN FAILING TO ORDER A REMAND FOR A CLEARER RECORD.**

In its ruling the trial court noted the lack of explicit findings to support the rationale for the Council Decision. R. 0540. At oral argument this was a substantial bone of contention, with the trial court questioning the validity of a decision that was not accompanied by specific findings of fact. R. 1059-1061.

It is axiomatic that if an administrative record is deemed lacking in specific findings sufficient to permit review, then the remedy is to remand for further findings identifying the basis for decision. See [\*La Sal Oil Co. v. Dept. of Environmental Quality\*, 843 P.2d 1045, 1047-1048 \(Utah App. 1992\)](#); *see also*

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<sup>9</sup> In its ruling the trial court gratuitously, and without record support, implied that the City Council was acting merely to curry favor with voters. R. 0548. Again, this statement suggests that the trial court lost its way in applying the correct legal standard to the review of testimony focused on the criteria in the ordinances.

[\*West Valley City v. Roberts\*, 993 P.2d 252 \(Utah App. 1999\)](#)(remedy for lack of adequate record in land use proceeding is remand for new hearing).

Here the applicable ordinance does not require written findings, merely that the decision be announced on the record and commemorated in the minutes of the Council. [MMC 17.09.530\(G\)\(9\)](#). But, without conceding that the decision was defective, the City explicitly requested that the trial court remedy any perceived defect by remanding for further findings of fact. R. 1094, 1102. To the extent that the lack of findings impaired the decision of the Council, and thus led to the reversal by the trial court, the appropriate response is to order a remand for further process, rather than simply reversing the decision.

#### **5. THE TRIAL COURT FAILED TO CORRECTLY APPLY THE STANDARD OF REVIEW.**

In the review of an adjudicatory land use decision the role of the court is limited to determining whether there is evidence in the record to support the local government action. [\*Xanthos v. Board of Adjustments of Salt Lake City\*, 685 P.2d 1032, 1035 \(Utah 1984\)](#). The trial judge is not empowered to weigh anew the underlying factual considerations or policy judgments made by the city, in effect substituting his judgments for that of the local government. *Id.* In this case the applicable ordinance is genuinely strict in its policy of requiring that a bed and

breakfast show “clearly minimal negative impact on adjacent residential properties and neighborhoods.” [MMC 17.09.531](#)(9)(A)(1). But, in rejecting the Council decision, the trial court engaged in an exacting trial-type review in which the court substituted its own preferences for the decisions of the City Council, deeming the evidence against the application to be mere speculation.

In its ruling, the trial court proceeded to make its own findings, engaging in its own calculation of traffic impacts by comparing record evidence to outside sources such as Google Earth. R. 0543-0545. Significantly, this analysis was at odds with the testimony from various parties, and amounted to an effort to buttress the position of the Owners, who did not offer a traffic study to carry their own burden of proof.

Additionally, the trial court’s ruling, and the record at oral argument, is suffused with the Court’s hostility towards the presumed motivations of the members of the City Council, and to the process selected by City ordinances, which was to have the Council serve as the land use authority. R. 1094-1095 (noting the unsatisfactory nature of a decision making process involving politicians); R. 1074, 1075 (noting City Council, being subject to political pressure, might not be able to do their duty). Moreover, the trial court’s colloquy with counsel suggests a hostility to basic judgments of the fact finder. R. 1079 (stating

that one half acre lot size of the subject property is “not small to me”).

These statements in the record show that the trial court misapplied the standard of review, and instead essentially cast the burden of proof onto the City.

In fact, the City Council was faced with a dense suburban setting, which presents a host of greater development impacts, as opposed to development which might be proposed in a sparsely populated area. Yet, the trial court deemed those concerns trivial.

Further, the trial court’s effort to isolate the various factors, noise, traffic, parking, and the like, from one another ignores that the City Council had to weigh the totality of the application. Here the City could and did conclude that the collective impacts, on balance, did not meet the requisite certainty, the “clearly minimal negative impact” required to grant approval under the ordinance.

### **VIII. CONCLUSION AND RELIEF SOUGHT**

The City of Moab requests that the decision of the trial court be reversed and that the decision of the City Council denying the conditional use permit be found to be valid. In the alternative, if the Court concludes that additional findings are required, then the City requests a remand for a hearing before the Council and additional findings.

**IX. APPENDIX OF STATUTES AND ORDINANCES**

- A. Trial Court Ruling;
- B. Moab Conditional Use Ordinance;
- C. R-2 Zoning Ordinance; and
- D. Moab Noise Ordinance.

Submitted this 6<sup>th</sup> day of June, 2016.

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**CERTIFICATE OF FILING/SERVICE**

I hereby certify that on this 6<sup>th</sup> day of June, 2016, I served a true and correct copy of the foregoing ***APPELLANTS' OPENING BRIEF*** upon the parties listed below by mailing it by first class mail, postage prepaid and electronic mail to the following addresses:

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