

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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<p>JERAMEY McELHANEY and MARY McELHANEY,</p> <p>Petitioners/Appellees,</p> <p>v.</p> <p>THE CITY OF MOAB and MOAB CITY COUNCIL.</p> <p>Respondents/Appellants.</p>	<p>Appellate Court No. 20160142</p> <p>District Court No. 140700048</p>
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**APPELLANTS' REPLY 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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The City of Moab, through counsel, submits the following Reply Brief in Support of this appeal.

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## I. ARGUMENT

### 1. OWNERS INCORRECTLY ASSERT THAT REVIEW OF THE ADMINISTRATIVE DECISION OBVIATES REVIEW OF THE TRIAL COURT DECISION.

Both parties agree that this is an appeal of an adjudicatory proceeding, and that the decision of the land use authority is valid if supported by substantial evidence, and not otherwise arbitrary, capricious, or illegal. Response Brief, p. 19. But, Owners contend that the City incorrectly applies the standard of review by attacking the order of the trial court, and that any error by the trial court is rendered “harmless” because this Court must review the City Council decision without according any deference to the trial court judgment. *Id.* at 20.

The City agrees that this Court need not accord the trial court decision any presumption of correctness. *See, Save our Canyons v. Board of Adjustment of Salt Lake County*, 116 P.3d 978, 982-983 (Utah App. 2005). With respect to the assertion that any error by the trial court was harmless in light of the standard of review, the Owners fail to cite any legal authority to support this dubious proposition. Lack of deference to a trial court judgment does not mean that the

appellate court must ignore the trial court decision<sup>1</sup>. The argument does not even make logical sense in that, if accepted, no appellate court in an appeal of administrative action could ever address erroneous rulings of law by a trial court. This appeal centers on a reversal on the merits of a municipal decision as land use authority. The errors in this case were adopted by the trial court at the urging of the Owners. This Court has jurisdiction to reverse any error of law in the proceeding subject to review. See U.C.A. § 78A-4-103(1)(a)(jurisdiction to carry into effect all of the Court of Appeals' judgments or orders). Necessarily, this requires review of the trial court decision.

## **2. ALL POINTS OF ERROR WERE PRESERVED FOR REVIEW.**

The City asserts four points of error. Opening Brief, pp. 1-2. In their Response Brief the Owners do not allege any failure to preserve these issues, stating instead that the issued are not subject to the preservation rule. Response Brief, p. 2. Accordingly, there is no dispute that all issues advanced by the City were preserved.

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<sup>1</sup> The Owners' argument is a tacit admission that the trial court judgment is erroneous, though Owners characterize that decision as "harmless." Response Brief, p. 20.



**3. DENIAL OF THE PERMIT BASED ON THE INCONSISTENCY OF THE APPLICATION WITH THE MOAB GENERAL PLAN IS RATIONAL, AND CONSISTENT WITH THE LEGITIMATE LAND USE POWERS OF THE CITY.**

The City contends that the denial of the conditional use permit in this case was rational and appropriate because the proposed use runs contrary to provisions in the City's General Plan, which discourage the expansion of commercial uses in residential neighborhoods. In response, the Owners assert that the General Plan is irrational, and beyond the legitimate powers of the City. Response Brief, p. 28. This argument was not presented to the City Council, and was therefore not preserved for review. *Pacific West Communities v. Grantsville City*, 221 P.3d 280, 286 (Utah App. 2009). In any case, the argument does not hold up under scrutiny.

**a. Any Facial Challenge to the General Plan is Untimely.**

Though the argument is not well defined, Owners appear to attack the content of the General Plan as unclear and "subjective" as to its terms. Response Brief, pp. 33-34. Owners rely upon *Smith Inv. Co. v. Sandy City*, 958 P.2d 245 (Utah App. 1998), for the proposition that land use restrictions which are irrational violate the substantive component of the due process clause of the United States Constitution. While this is a correct recitation of the law, *Smith* does not support

the Owners' claims.

*Smith* rejected a facial challenge to a rezoning ordinance which abolished a commercial use in a particular area. To the extent that Owners rely on *Smith* to claim that the Moab General Plan is facially invalid, such a claim would be untimely. See U.C.A. § 10-9a-801(5)(a challenge to the enactment of a general plan must be brought within 30 days of enactment); *Tolman v. Logan City*, 167 P.3d 489, 492 (Utah App. 2007)(facial challenge to land use ordinance becomes ripe for review upon enactment). Here, the General Plan was enacted in May, 2002. See R. 0646 (approval resolution accompanying the General Plan). Any facial challenge is thus time-barred<sup>2</sup>.

**b. The General Plan Rationally Advances the Public Welfare.**

Second, to the extent that the Owners assert a due process challenge to the General Plan as applied to their land use application, the Plan easily withstands such a challenge because it represents a permissible policy choice within the range of choices that are reasonably debatable, as required for validity of a legislative enactment. A municipal land use regulation does not violate the substantive

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<sup>2</sup> Similarly, the Moab conditional use permit ordinance has been on the books for many years. See R. 0717; 0738 (Editor's Notes showing dates of conditional use ordinance enactment). Any facial challenge to the ordinance would also be time-barred, though no such claim has apparently been advanced by the Owners.

component of due process unless it lacks a reasonable relation to the public health, safety, or general welfare. *Tolman v. Logan City*, 167 P.2d at 495; *citing: Smith Inv. Co. v. Sandy City*, 985 P.2d at 252. This Court previously recognized that the “exclusion of buildings devoted to business, trade, etc. from residential districts bears a rational relation to the health and safety of the community.” *Smith*, at 254, *citing: Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391-393 (1926). Indeed, protecting children from business uses, promoting quiet residential areas, and the prevention of congestion, disorder, and traffic are all legitimate municipal objectives. *Id.* Zoning regulations which promote the integrity of a neighborhood and preserve its residential character are related to the general welfare and, therefore, a valid exercise of municipal authority. *Smith* at 254-255; *citations omitted.*

Here, the Moab General Plan explicitly favors protection of residential neighborhoods. It announces a goal of promoting “..attractive, stable, and safe residential areas...” R. 0621. To “implement” that goal, the Plan provides that the City will “restrict commercial development in residential zones.” *Id.* The term “implementation” has meaning within the Plan, as that denotes “[r]ecommended courses of action to achieve goals in compliance with stated policies.” R. 0610. Thus, the General Plan includes both a proper subject for the

exercise of land use power—the protection of residential neighborhoods, and a reasonable and specific directive to achieve that goal—restricting the encroachment commercial uses in areas of zoned for residential development.

Although the Owners contend that it is unknown what portion of the General Plan was relied upon by the Council in reaching its decision, Response Brief, p. 33, that statement is belied by the fact that one of the Council members specifically referred to this provision of the General Plan in the discussion immediately prior to the Council vote:

“If you look at the general plan as it is right now, one of the five goals is to restrict commercial development in residential areas, or residential zones—sorry. And in this specific instance in this zone, I feel like what we’re being asked to do is to force a commercial business on a residential area that clearly is not interested in creating a commercial zone.” R. 0381.

Thus, it is clear in the record that the Council took note of, and relied upon, the policies and implementation steps recommended in the General Plan, as shown at R. 0621. These actions were entirely consistent with how the land use process is designed to work. *See Tolman*, 167 P.3d at 495 (city acted properly by rezoning property in a manner consistent with objective in comprehensive plan of preserving single family housing).

In their brief Owners point to provisions of the General Plan that encourage

economic development within the City of Moab as contradicting the City's decision that the application was inconsistent with the goals of the General Plan. Response Brief, p. 34. This argument again misses the mark because Owners cannot point to provisions in the Plan that, for example, would encourage the expansion of lodging or commercial uses in residentially zoned areas. In fact, the City of Moab has multiple zoning districts that are open to commercial development, while such development is constrained in other residential districts. The fact that the City encourages economic development generally does not mean that it is appropriate in every location, and the Plan agrees.

Ultimately, Owners cite to multiple provisions in the General Plan that actually support the City's decision. *Id.* at 30 (General Plan notes that growth has increased land use conflicts; that long-range considerations should apply to land use decisions); p. 31 (noting a community vision that conflicting land uses are separated and buffered); p. 32 (noting a goal of minimizing impacts between transitions in land use); p. 33 (noting that the General Plan provides a basis for the rejection or modification of land use proposals that clearly conflict with the Plan's goals). These provisions clearly buttress the Council decision which, at its core, rests on the notion that the City policies discourage uses which could create an unreasonable impact on residential neighborhoods.

c. **A Municipality Acts Rationally When it Acts Consistent With its Comprehensive Plan.**

Owners dismiss or attempt to distinguish the authorities cited by the City for the proposition that a conditional use permit may properly be denied due to lack of conformity with a comprehensive plan. In doing so, Owners ignore that the City is required to have a comprehensive plan, per U.C.A. § 10-9a-401; that the plan is an advisory guide to land use decisions, the import of which may be varied by ordinance, U.C.A. § 10-9a-405; and that the City of Moab made compliance with the General Plan a mandatory condition for issuance of a conditional use permit. MMC § 17.09.530(H)(7); R. 0716. Regardless, conformity of land use decisions with municipal comprehensive plans is a bedrock principal of land use law, in Utah and many other states. *See Tolman, supra; Krempasky v. Nez Perce County Planning and Zoning*; 245 P.3d 983, 989 (Idaho 2010) (county acted properly in granting conditional use permit where it found the use consistent with comprehensive plan); *Baker v. City of Milwaukie*, 533 P.2d 772 (Oregon 1975) (variance granted in violation of comprehensive plan is unlawful); *BBY Investors v. City of Maplewood*, 467 N.W.2d 631, 634 (Minn. 1991) (city acted properly to deny conditional use permit where use was contrary to comprehensive plan and plan compliance was mandatory). The weight of authority from this Court and others supports the conclusion that the City of Moab acted properly

here<sup>3</sup>.

**4. TESTIMONY FROM AFFECTED LANDOWNERS CANNOT BE DISMISSED AS MERE CLAMOR ABSENT SOME ELEMENT OF IMPROPER PURPOSE OR SERIOUS PROCEDURAL MISCONDUCT.**

In their response the Owners essentially argue that the public opposition to their application must be dismissed as mere “clamor” and, in the absence of this clamor, their application must be approved under the ordinance. They argue that there “is no record evidence to support the adverse public comment” of neighboring property owners. Response Brief, p. 45. Essentially, they argue that the testimony of neighboring property owners is incompetent, and must be excluded, unless confirmed by some other source. In effect, Owners’ formulation of the public clamor concept argues for an exclusionary rule, one that collides squarely with constitutionally protected right of neighboring property owners to speak, and to petition local government for redress of grievances.

A proper application of the “public clamor” doctrine requires that this Court enunciate a rule premised on respect for the rights of other parties to present evidence and arguments based on the substantive criteria of a land use ordinance.

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<sup>3</sup> Additionally, the fact that the Council relied upon the incompatibility of the application with the General Plan in reaching the decision rebuts the claim urged by the Owners that the decision was predicated solely on adverse public comment.

Properly understood, the Council decision was appropriate in light of this standard.

a. **The Right to Petition the Government for Redress of Grievances is Fundamental.**

The First Amendment to the United States Constitution guarantees to citizens the right to petition the government for redress of grievances. *Anderson Development Co. v. Tobias*, 116 P.3d 323, 332 (Utah 2005)(dismissing tort claims brought against persons who objected to commercial development). Under the so-called Noerr-Pennington doctrine the United States Supreme Court has recognized that persons engaging in petitioning activity are protected from tort claims and other forms of retaliation resulting from efforts to influence officials and agencies of the government. *Id.* (citations omitted). Indeed, the right to petition and assemble for redress of grievances are among “the most precious of the liberties protected by the Bill of Rights.” *United Mine Workers America v. Illinois State Bar*, 389 U.S. 217, 222 (1967). And, the importance of the right to petition has been repeatedly recognized in the zoning context. *Protect our Mountain Environment v. District Court*, 677 P.2d 1361, 1365-1366 (Colo. 1984)(identifying first amendment related zoning cases).

Given the significance of the interests at stake, it follows that any judicial rule which has the effect of excluding whole classes of speech from public debate



based on the identity of the speaker or the content of his/her speech is inherently suspect. *See Citizens United v. Federal Election Commission*, 558 U.S. 310, 341 (2010). To the extent that the so-called public clamor doctrine operates to discount or exclude the testimony of neighboring property owners from zoning decisions, such a holding would run contrary to the First Amendment to the United States Constitution.

**b. Public Clamor as a Basis for Invalidating a Zoning Decision Has Always Been Founded on the Concept of Improper Purpose or Procedural Impropriety.**

Public clamor as a basis for invalidating a land use decision has always rested on an implicit finding that the decision was cover for a discriminatory purpose, or that the governmental entity was acting in a procedurally suspect manner. For example, in *Davis County v. Clearfield City*, this Court noted a lack of any evidence to support the conditional use permit decision under review; that the city council engaged in secret closed-door meetings to discuss the application; and the near universal opposition to mental health treatment facilities as indicative of an improper purpose. *Davis County v. Clearfield City*, 756 P.2d 704, 711-712 (Utah App. 1988). The Court also noted that the County essentially abdicated its role as an independent decision maker by asking for a show of hands from persons attending the public hearing to gauge public sentiment for and against the

application. *Id.* at FN. 9. The case involved both improper purpose and serious procedural defects.

Likewise, in *Uintah Mountain RTC, LLC v. Duchesne County*, 127 P.3d 1270 (Utah App. 2005) this Court again reviewed a conditional use permit for a mental health treatment facility and, relying on *Davis County*, again noted that the decision was motivated by fear of persons with mental health problems—an improper purpose. *Id.* at 1277-1278. In *Uintah Mountain* the court also found that the county had acted improperly in applying criteria, such as whether the facility was economically viable, that had no foundation in the zoning code. *Id.* at 1275

Both *Davis County* and *Uintah Mountain* had an antecedent in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), another conditional use permit decision, this time involving a home for mentally handicapped persons. In *Cleburne* the United States Supreme Court held that mere negative attitudes or fear of handicapped persons, unsubstantiated by factors which are properly cognizable in a zoning ordinance, are not permissible grounds for denying a permit for a handicapped group home. *Id.* at 448. By inquiring into the motivations of the decision maker the court determined that the land use decision was based on fear of the handicapped and, therefore, that it lacked a rational basis for decision. *Id.* at

450.

The guiding principal from these decisions is that a zoning decision is improper, and the result of public clamor, where the decision rests on discriminatory motives—prejudice against a disfavored group, which are unrelated to the factors in an ordinance that are the proper basis for a decision. Improper public clamor is in reality a recognition of a decision based on pretext, rather than genuine zoning concerns. *Uintah Mountain RTC* 127 P.3d at 1277 (decision is improper where the “real reason” for denial is public opposition). Thus, the argument advanced by the Owners--that the City Council decision is deficient due to exclusive reliance upon public comment--misapplies the foregoing authorities, and fails to acknowledge the importance and constitutionally protected nature of that testimony.

A proper formulation for the rule that public clamor invalidates a land use decision must be premised on a finding that the local government: a) acted with an improper purpose or motive unrelated to the legitimate purposes of the zoning ordinance; or b) engaged in serious procedural irregularities which compromised the fairness of the proceeding or its role as an independent decision maker. This standard is entirely consistent with this Court’s prior holdings in *Davis County* and *Uintah Mountain*, and the Supreme Court’s holding in *City of Cleburne*. And, the

standard avoids the defect inherent in a rule that precludes a local government from relying upon constitutionally protected speech.

c. **Under the Appropriate Formulation of the Concept of Public Clamor, the Moab Council Acted Properly to Weigh the Evidence Focused on the Criteria of the Ordinance.**

There is no evidence in this case that the Moab City Council decision is the product of discriminatory motive or procedural irregularity. A bed and breakfast facility is a common commercial enterprise, and not the type of facility that typically provokes public outcry or prejudice. Bed and breakfast lodging (and other lodging types) are permitted uses in several commercial zoning districts within the City of Moab. See e.g. R. 0770, 0773, 0781 (Moab Municipal Code commercial zoning districts allowing bed and breakfast and lodging facilities). There is nothing in the record to suggest that the City acted as a result of personal animus or for reasons unrelated to the zoning code.

Rather, the dispute here focuses on the criteria in the Moab ordinance, and the conclusion that this use is not the right fit for the site. The rules for bed and breakfast uses in residential areas are strict in that an applicant must show “clearly minimal negative impacts on adjacent residential properties and neighborhoods.” MMC § 17.09.531(9)(A)(1); R. 0722. Similarly, the general rules for conditional uses require that the applicant show that the use is compatible with adjacent

existing uses, and that it does not pose unreasonable impacts in terms of such things as noise, traffic, parking, or the like. MMC § 17.09.530(H); R. 0715 (approval conditions). All of these requirements, which focus on promoting harmony between land uses and avoiding harm to existing uses, are legitimate subjects for the exercise of municipal zoning power. It is not surprising that an application may fail to meet this exacting standard due to site constraints.

Moreover, the public testimony in opposition to the application was, for the most part, focused on these approval criteria. For example, neighbors provided substantive comments referring to the criteria in the ordinance and noting impacts about the lack of parking, a projected 38% increase in traffic, and vehicle noise levels in excess of 80 decibels<sup>4</sup>. R. 0216-0219 (written comments addressed to criteria in ordinance); 0353-0357 (testimony about noise levels and street grades)<sup>5</sup>. Others testified to qualitative changes to the neighborhood and its traffic patterns that would result from a new commercial use. R. 0241-0242. The testimony offered specifics, including the observation that the use of Off Highway Vehicles,

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<sup>4</sup> The Owners failed to offer any traffic study to rebut these concerns.

<sup>5</sup> Several neighbors commented on the reference in design drawings to “trailer and secondary vehicle parking” and observed that the Owners might market their facility to off highway vehicle enthusiasts, who would create additional impacts in terms of noise, pollution, speed, pedestrian safety, and the like. R. 0220; 0252; 0242

a common recreational activity in Moab, would likely occur at the new development and result in noise emissions of between 75-80 decibels, a figure which exceeds the Moab noise ordinance. R. 0218. The Record is replete with genuine, substantive concerns about the compatibility of the proposed use with the existing qualities of the neighborhood. See Appellants' Opening Brief, Statement of Facts, pp. 4-9.

While there were admittedly some neighbor comments that amounted to unsupported opinion, these comments were more than overcome by testimony from others that was focused on the criteria in the ordinance, and based on personal observation of the neighborhood. The City, as land use authority, properly weighed this testimony and concluded that the Owners had not met their burden of proof. As the finder of fact, the Council had the duty to weigh this conflicting evidence to determine if the Owners had satisfied the requirements of the ordinance<sup>6</sup>. It is not this Court's prerogative to weigh the evidence anew. *Save our Canyons v. Board of Adjustment of Salt Lake County*, 116 P.3d at 983 (standard of review in appeal of adjudicative proceeding). Instead, looking at the

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<sup>6</sup> This was not a case of the local government blindly acceding to demands by the public. The vote was 3-1 to deny the application, with one Council member voting in favor, and another noting that the decision was a difficult call for her. R. 0371-0380; 0382-0383.

evidence on both sides, this Court should conclude that the decision was rational and based on a reasonable evaluation of the evidence.

**5. THE OWNERS CONCEDE THAT THE TRIAL COURT MISAPPLIED THE STANDARD OF REVIEW AND THAT IT IMPROPERLY ADDRESSED THE SUBJECT OF A REMAND FOR FINDINGS.**

The City brought two points of error which were not addressed by Owners in their response brief: a) that the trial court erred in failing to order a remand for additional findings; and b) that the court incorrectly applied the standard of review by engaging in its own fact-finding and shifting the burden of proof to the City. Opening Brief, pp. 23-26. Appellate courts have discretion to disregard the position of an appellee where it fails to directly address in its brief the arguments brought on appeal. *Broderick v. Apartment Management Consultants*, 279 P.3d 391, 393-394 (Utah 2012). Here, the Owners have essentially conceded points of error number three and four brought by the City. Opening Brief, pp. 1-2. Accordingly, this Court has discretion to accept the proffered arguments of the City on those points. *Broderick*, 279 P.3d at 396.

## **II. CONCLUSION**

The City of Moab respectfully requests that the judgment of the trial court be reversed and that the conditional use permit that is the subject of this appeal be

deemed void. The City additionally requests an award of its costs in this action to the extent permitted by law.

### **III. REQUEST FOR ORAL ARGUMENT**

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

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

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**CERTIFICATE OF FILING/SERVICE**

I hereby certify that on this 6<sup>th</sup> day of September, 2016, I served a true and correct copy of the foregoing ***APPELLANTS' REPLY 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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