

2016

## **Jeramery McElhaney and Mary McElhaney, Appellees, v. The City of Moab and Moab City Council, Appellants**

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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**JERAMEY McELHANEY and  
MARY McELHANEY,**

Appellees,

v.

**THE CITY OF MOAB and THE  
MOAB CITY COUNCIL,**

Appellants.

District Case No. 140748  
Appellate Case No. 20160142-CA

THIS IS A DIRECT APPEAL FROM AN ORDER ENTERED IN THE  
SEVENTH JUDICIAL COURT IN AND FOR GRAND COUNTY,  
STATE OF UTAH, THE HONORABLE, LYLE R. ANDERSON,  
PRESIDING

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**ORAL ARGUMENTS/ PUBLISHED OPINION REQUESTED**

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Addendum “A”	<i>Order on Appeal of Moab City Council Decision to Deny Conditional Use Permit entered on February 3, 2016 (the “Decision”)</i>
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Appellants.

District Case No. 140748  
Appellate Case No. 20160142-CA

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**JURISDICTIONAL STATEMENT**

This appeal is taken from the *Order on Appeal of Moab City Council Decision to Deny Conditional Use Permit* (the “**Decision**”) entered on February 3, 2016, by the Seventh Judicial District Court, Judge Lyle R. Anderson presiding. Appellants, the City of Moab, the Moab City Council, *et al*, (hereinafter, the “**City**” or “**Council**”) appeal from the Decision to reverse the City’s denial of the application and proposal filed by Appellees, Jeramey McElhaney and Mary McElhaney (hereinafter, the “**McElhaney**s”) to obtain a conditional use permit (the “**Permit**”) for the operation of a bed and breakfast on real property located in the R-2 zone in Moab City. The Council denied the Permit on November 25, 2014, pursuant to vote, and the McElhaney’s timely appealed in the district court. This Court has appellate jurisdiction pursuant to UT. CODE ANN. § 78A-4-103(2)(a)(ii).

**STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW**

The Council has raised the following issues; however, the McElhaney's issues raised before the district court are found in the record at R414-416.

- ISSUE I:** *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 mandatory by ordinance?*
- ISSUE II:** *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?*
- ISSUE III:** *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?*
- ISSUE IV:** *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?*

**STANDARD OF REVIEW:** "In fact, '[w]e review the administrative decision just as if the appeal had come directly from the agency' and accord no particular deference to the [district] court's decision." *Thompson v. Logan City*, 2009 UT App 335, ¶15, 221 P.3d 907 *citing* *Rogers v. West Valley City*, 2006 UT App 302, ¶ 12, 142 P.3d 554 (*quoting* *Wells v. Board of Adjustment of Salt Lake City Corp.*, 936 P.2d 1102, 1104 (Utah Ct.App.1997)). "Thus, we 'determine only whether or not the decision ... is arbitrary, capricious, or illegal.'" *Id. citing* UTAH CODE ANN. § 10-9a-801(3)(a)(ii) (2007); *see also* *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 604 (Utah Ct.App.1995) ("The Board will be found to have exercised its discretion within the proper boundaries unless its decision is arbitrary, capricious, or illegal.").

**PRESERVATION:** The issues are not subject to the preservation rule. The statute governing this appeal presumes the Council's denial is valid if it is supported by substantial evidence and is not arbitrary, capricious, or illegal. UTAH CODE ANN. §10-9a-801(3).

## **DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS**

- A. MMC 17.09.530
- B. MMC 17.09.531(9)
- C. UTAH CODE ANN. §10-9a-507
- D. UTAH CODE ANN. §10-9a-801

### **STATEMENT OF THE CASE**

#### **A. Proceedings with the Planning Commission.**

The McElhaney's proposal for a bed and breakfast conditional use permit (the "**Proposal**" or "**Application**") sought the construction of a 3,721 square foot home with attached structures covering 1,152 square feet and 864 square feet on real property located at 100 Arches Drive, Moab (the "**Property**"). R085. The structures for two (2) stories and five (5) rooms for short-term rental use would be constructed on the second floors of the attached buildings. *Id.* The larger structure would consist of a four (4) car garage on the ground level, with three (3) rental units above and the smaller structures to serve as the ground level two (2) car garage/shop area with two (2) rental units on the second floor. *Id.* The McElhaney's stated there would be a noticeable decrease in neighborhood traffic when the daycare ceased operation. *Id.* The Proposal included five (5) off-street parking spaces and six (6) for the dwelling with at least four (4) spaces for trailer parking. *Id.*

On September 11, 2014, the matter convened for the first public hearing before the Planning Commission (the "**Commission**"). R205. The McElhaney's explained their efforts to protect the privacy of the neighborhood. R206. The design would shield the parking on the lot from the street and the design would insulate noise for the residents behind the lot. *Id.* The parking would be shielded by either a fence or landscaping in order to conform to the rest of the homes in the neighborhood. *Id.* Another retaining wall would be built to

retain the water on the property. *Id.* A plan for drainage that included landscaping, gravel, etc., was also presented. *Id.*

The McElhaneys also addressed how traffic would be affected. *Id.* The McElhaneys recently counted the neighbors coming and going on the street during one (1) period from 8 am to 5 pm and that one individual came and went 17 times, resulting in 34 total trips during that period. *Id.* Parking would involve garage parking for every McElhaney owned vehicle and up to seven (7) spaces for guest parking on the lot. R207. Lighting would be installed pursuant to code requirements. *Id.*

At the time of this public hearing, there were six (6) bed and breakfasts inside Moab city limits – one in residential-commercial, one in RA1, which is residential-agricultural, two (2) in the R2 zone, and two (2) in the R3 zone. *Id.* The Proposal was situated on a 0.57 acre lot, would result in the largest custom-home in the neighborhood with tremendous curb appeal. R208. Real estate studies evidenced a bed and breakfast in the neighborhood would increase surrounding property values. *Id.*

The public raised concerns with the daycare, drainage on the Property, traffic, parking, noise, employment, a description of the typical bed and breakfast guest, and whether the owners reside on the premises. R208-211. In response to concerns raised at the public hearing before the Planning Commission, the McElhaneys wrote a letter to the Council, which indicated the bed and breakfast would include off-street parking, decreased traffic due to the closure of the daycare once the bed and breakfast was operational, and the operation would increase property values, with drainage not being a factor due to manner in which the structures would be constructed. R254.

After receiving public comment in opposition to the Application, the following issues were raised at the first public hearing and the staff was directed to investigate the concerns and report back to the Commission with the results. R260. Those concerns and results of the investigation are as follows:

1. The Daycare as an additional business while the bed and breakfast operates – this was addressed by Sarah Atherton of the Utah Department of Health, Bureau of Child Development. *Id.* The McElhaneys stated they would no longer operate the daycare upon operation of the bed and breakfast. *Id.*
2. Drainage – This issue was addressed by the McElhaneys; however, this issue was not a main point of contention as the proceedings progressed. *Id.*
3. Increase in traffic – this issue was researched by City staff, who determined that the ITE trip manual indicated a bed and breakfast can generate up to 8.9 average daily trips per unit. R261. However, a single family residence can generate 10-12 average daily trips. *Id.* However, independent local studies show that trips for a bed and breakfast are lower than the ITE information and that a single family residence is actually much higher. *Id.* This finding states, “[i]ndividual local single use studies are rarely completed and usually are conducted on a more regional context. The average trips are low because of the way that B&B’s function.” *Id.* The staff stated that a bed and breakfasts functions differ from an inn in how meals are provided. *Id.* Bed and breakfasts provide only breakfast so it is more likely a lodger at a bed and breakfast will not return until evening; however, an inn that serves lunch and dinner will see more daily trips, resulting in additional trips for the traffic count. *Id.* Furthermore, termination of the daycare would also result in less daily trips to the address. *Id.*
4. Parking – code requires one parking space per rented room and two (2) off-street parking spaces for the owner of a residence. *Id.* The McElhaneys submitted a parking plan that showed five (5) required parking spaces for the five (5) proposed rooms as well as areas for four (4) or more trailer spaces. *Id.* Additionally, the ground floors of the rental structure will provide up to six (6) more spaces for the residential use. *Id.*
5. Noise – city code requires the owners of a bed and breakfast to reside on the premises. *Id.* “A B&B is not a nightly rental run by a manager who has no connection to the ownership of the property.” *Id.*
6. Potential Employees – the Small Business Development Center studies shows that an inn employs an average of 4.6 people; however, a bed and breakfast is typically family owned and family managed, thus resulting in no employees. *Id.*

7. Potential Bed and Breakfast Guests – A Michigan State study indicated that B&B travelers are middle-aged, well educated, (moderately) high income, married professionals. *Id.* Recent studies indicated 82% of bed and breakfast guests are married with less than 50% having children at home. *Id.* The average age for a bed and breakfast guest is 40 years old with 60% below this age, indicating that many bed and breakfast guests are at a mid-point in the traditional family cycle, when raising children is a primary activity.” *Id.* Further, “Newlyweds and ‘empty nesters’ account for a smaller proportion and, only 9 percent of the market is attributed to adults over 59 years of age.” *Id.*
8. Complaints About the Daycare – numerous complaints about the daycare were voiced at the public hearing; however, the City staff had never received a complaint since the daycare had been in operation. *Id.*

Subsequent to the public hearings held on September 11 and 25, 2014, by the Planning Commission, the Commission voted 3-0 in favor of referring the application to the Council for approval, with four (4) additional conditions established by the Planning Resolution #11-2014, which included appropriate lighting, fencing and landscaping, and discontinuation of the daycare upon operation of the bed and breakfast. R266-267.

The Agenda Item containing the Proposal set forth the process of obtaining a conditional use permit, which is continued in MMC 17.09.530 and which included the following applicable criteria, in pertinent part:

1. The conditional 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 use is consistent with the city of Moab General Plan as amended.



R267. The Commission considered the public comment to the above criteria, and determined to adopt a resolution stating findings the McElhaney's could meet the criteria. R267-268.

### **B. Proceedings with the Council.**

At public hearing held October 28, 2014, similar concerns raised in the prior public Commission hearings were raised. R286. Through counsel, the McElhaney's neighbors argued the following main points of adverse public comment:

1. The use and scope of the Proposal would change the quality of the surrounding neighborhoods;
2. The McElhaney's had failed to demonstrate clearly minimal negative impacts;
3. The neighborhoods north of 400 East Street are higher quality neighborhoods as there are no overnight rentals in the immediate vicinity of the Proposal;
4. The increased traffic will be uphill on 200 South Street and commercial traffic on a hill increases wear and tear on the streets and will lead to increased speeding;
5. The Proposal is located on a dead end street and thus, traffic cannot be adequately diffused and, being last on the dead end street the in- and outgoing traffic will pass by all the houses on the street;
6. The Proposal is a "new built" bed and breakfast and the City has not approved a "new built" bed and breakfast in years;
7. The scope of the Proposal is including two (2) garages, which raised concerns that the lot is inadequate to accommodate such a large project;
8. The community does not need additional strife;
9. The changes the City has made to municipal code indicates a trend in public policy to limit overnight rentals;
10. Traffic will increase in the neighborhood as the existing day care is a fraction of the traffic and the nature of the traffic will change;
11. The one (1) year review period is not consoling because the City will have a hard time taking the permit away;
12. Overnight rentals will create traffic issues at night;
13. The Proposal provides for four (4) parking spaces for utility trailers, and;
14. The scope of the site plan is incompatible with the surrounding neighborhood.

R287<sup>1</sup>. These points were additionally raised in a written letter. R315-319. The public hearing was thereafter closed after similar concerns were raised by the public. R290.

The Council later voted to deny the Permit, which is detailed *post*. The *Agenda Summary* for the City Council meeting held on November 25, 2014, indicates the meeting was for the “Decision on Resolution #39-2014 Approving a Requested Conditional Use Permit for a Bed and Breakfast Located in the R-2 Zone at 100 Arches Drive as Favorably Referred to Council by the Planning Commission” (hereinafter, the “**Agenda**”). R0292. The Agenda detailed the history of the Application and the criteria the Council must use to evaluate the Application. *Id.* The Agenda stated each requirement pursuant to MMC 17.09.530, and determined the Application was compatible with surrounding uses, including appearance, site design and scope, additional landscaping, parking and maneuverability, and the fact the McElhaney’s would reside on the Property, which “...is the greatest and best deterrent to noise and other undesirable issues.” R0293. The Agenda indicates the McElhaney’s planned to develop the Property, which would curtail runoff and provide drainage. *Id.* Further, “[t]he 5 units will generate traffic that is equal to one single family residence of ten trips per day. During the public hearing it was *erroneously* stated that a previous memo said that it would be nearly 10 trips per unit per day.” *Id.* The remaining criteria of MMC 17.09.530 were recommended as met. R0293-0294. As to the requirement the use is consistent with the General Plan, the Agenda states, “[t]he Plan discusses mixed uses and mitigating the impacts on adjacent residential uses that may be created.” R0294. As to the additional requirements contained in MMC 17.09.531(9) for bed and breakfasts, the

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<sup>1</sup> A full summary of Negative Public Comments are attached hereto as Addendum “B” and incorporated herein by this reference.

Agenda indicates the bed and breakfast would generate “the equivalent traffic per day of one single family residence”, and that the structure would be built regardless of the issuance of the Permit. R0294-0295. The Agenda indicates the parcel was of sufficient size, ample parking was planned, the units were “well under” ratio for the size of the lot, five (5) rooms would be used for the bed and breakfast, the rooms were designed to house two (2) persons, a sign would be permitted under a sign permit, the property would be subject to applicable taxes and water and sewer rates, and the structure would be required to be inspected in order for a Certificate of Occupancy to issue. R0295.

At this meeting described by the Agenda, the Conditional Use Permit was denied after a vote of four (4) council members in a vote of 1-3 (hereinafter, the “**Denial**”). R409. However, there is no written decision rendered by the Council denying the McElhaney’s application for a conditional use permit. *See*, R366.

### **C. Public Comment In Support.**

Despite adverse public comment, there was also positive public comment in support of the Application, which is summarized as follows:

Joe Kingsley, a prior owner of a bed and breakfast in Castle Valley and a realtor with Arches Realty, signed a written letter indicating his personal experience with bed and breakfast lodgers. R221. Kingsley shared his professional opinion that bed and breakfasts increase the surrounding home values. *Id.* Kingsley also stated, “[t]raffic should actually drop as pointed out during the exchange [public hearing].” *Id.*

Tom Lacey, who had managed residential real estate in three resort areas of Colorado and had served on the Summit County Affordable Housing Advisory Committee, submitted

a signed letter with his experiences in positive support that bed and breakfast lodgers are quiet. R225. Lacey indicated small business owners are the backbone of economy, particularly in small towns. *Id.* A bed and breakfast allows residents a chance to run a small business by increasing spending for local goods and services along with growing public revenues such as license fees, room taxes and property taxes; *Id.* A bed and breakfast will contribute to the local economy. *Id.*

Tom Nixon, a neighbor who is a Sargeant with Moab City Police, shares a corner of his back yard with the Property, wrote a letter of support as well. He believed traffic will decrease in the neighborhood if the Application is granted, and stated a. R323. An allegation from the adverse public comments that traffic offenders on the street were from the daycare was inaccurate. *Id.* Additionally, noise in the neighborhood was not resulting from the McElhaneys but a different home in the neighborhood. *Id.* Additionally, the numbers of rooms for rent in the bed and breakfast are limited and it will decrease traffic and also cause it to be safer, as lodgers will be looking for the address and will not be speeding to pick up their child from the daycare. *Id.*

The McElhaneys submitted a letter outlining the public concerns and how the Proposal mitigates or defeats the negative public concerns entirely. R320-322.

#### **D. District Court Appellate Proceedings.**

On December 23, 2014, the McElhaneys filed a *Complaint*, requesting review of the Denial (hereinafter, “the **Complaint**”). R0001-0006. The Complaint alleged the Denial violated UTAH CODE ANN. §§10-9a-507 and 10-9a-509(1)(a)(i), (ii),(A) and that the vote was arbitrary and capricious, based on insubstantial evidence and public clamor, and was illegal.

R003-005. The Council filed its *Answer* on January 29, 2015, which denied the claims made in the Complaint, arguing the decision was made in good faith, was based on the substantial evidence, and was not based on public clamor. R011-012. The parties agreed and stipulated to follow the standard appellate briefing schedule, no further fact-finding was necessary, and to hold oral arguments before the district court. R0436.

On September 30, 2015, the McElhaneys filed their *Brief on Appeal of City of Moab Denial of Condition Use Permit Resolution #39-2014* (the “**McElhaney Brief**”), wherein they argued they complied with the MMC in order to obtain the Permit, the Council relied solely on public adverse comments/public clamor to deny the Permit, and the denial was illegal. R0436. On November 10, 2015 the City of Moab and Moab City Council filed the *City of Moab’s Brief in Opposition to Petitioners’ Brief on Appeal of City of Moab Denial of Conditional Use Permit Resolution #39-2014* (hereinafter, the “**Council’s Brief**”), wherein they argued that a land use authority is entitled to hear and receive testimony from neighbors who may be affected by an application, which is not public clamor, the use was incompatible with the neighborhood, and the McElhaneys could not show minimal impact. R0481, 0483, 0487.

After oral arguments held on December 15, 2015, (R0503), the parties submitted additional citations to the record concerning traffic for the district court’s convenience, since the district court indicated this appeared to be a main issue in the controversy. R506-527; 530-534. The district court issued its *Ruling* on January 22, 2016 (hereinafter, the “**Ruling**”). R537. The district court determined there were two (2) points of disagreement between the parties, which were whether the Application would have a minimal negative impact on the adjacent residential properties and whether the Application would unduly increase local

traffic in the immediate neighborhood. R539-540. Based on evidence in the record, the district court determined the adverse comment was speculative, there was no substantial evidence to support the Denial, and the Denial was based on public clamor. R0546-0548. The district court thus ordered the City issue the Permit without delay. R0548.

On February 3, 2016, the district court entered its Decision, which reversed the Denial of the Permit and ordered the City to issue the Permit. R573. The Council filed its *Notice of Appeal* on February 29, 2016. R0990-0991.

### **STATEMENT OF THE FACTS**

#### **A. Facts from October 28, 2014, City Council Public Comment Hearing.**

The Planning Commission previously held two (2) public hearings and it determined to add four (4) additional conditions of approval, which were read into the record, to wit: (1) the bed and breakfast shall be reviewed each year for code compliance, which is already pursuant to city ordinance; (2) all lighting shall be downward directed and full cut off, as required by city ordinance; (3) fencing and/or landscaping will be used to buffer the parking area and the entrance from the street, as well as the adjacent lot; and (4) the daycare will cease operation once the bed and breakfast was operational. R327-328. The matter was then opened for public comments. R328-329.

Kris Hurlburt gave the following reasons regarding how the bed and breakfast would not have a minimal impact on the neighborhood: (1) a decrease in property values for nearby homeowners, stating, "I'm a real estate broker. I know this"; (2) substantial increase in traffic and noise (lodgers will slam doors on rooms and vehicles, more yelling and talking); (3) strangers in the neighborhood; (4) increase in lighting and shielded lighting is inadequate for

homes that sit above the site, and; (5) the neighborhood is quiet and peaceful, which will change with a bed and breakfast. R330-332.

Christina Sloan was hired by the residents of Arches Drive to represent them at the public hearings, and she argued similar to the points of contention listed *supra*. R287; 332.

Vicki Webster stated her primary concern was the traffic volume and noise. R342-343. Webster stated a commercial level of UTVs and motorcycles noisily decelerating and accelerating will have a definite negative impact and a change from what is currently heard in the neighborhood. R343. Webster stated there was another empty lot on Arches Drive and the City could not deny the owner of that lot to do a similar project if it granted the permit to the McElhaneys. R344. Webster suggested the bed and breakfast allow only passenger vehicles to park on the premises, with trailers to be parked elsewhere. R344-345.

Cheryl Decker stated her concerns were similar to those already stated and addressed her comments to safety. R0345. Decker stated families play in the streets because there are no sidewalks, with fear that guests would not be sufficiently cautious. R345-346.

Rick Donham stated he moved to his residence for a long-term residential setting and did not think a bed and breakfast was appropriate in a residential neighborhood. R346-347. Donham expressed concerns about no sidewalks in the neighborhood with additional guests at a bed and breakfast. R0347. Donham expressed worry the McElhaneys' bed and breakfast would be similar to the experience his sister had, who opened a nightly rental marketed to bicyclists in Heckla with the intention of keeping her neighborhood quiet and peaceful; however, recreational vehicles, Jeeps, ATVs, and UTVs, were brought by her lodgers



anyway, which was a difficult situation for his sister to escape short of selling her home. R0347-0348. Donham liked that his neighborhood was quiet. R0349.

Sasha Reid stated her neighborhood is friendly, and did not think tourists could navigate the neighborhood safely. R0350-0351.

Mike Duncan stated his residence was located near the McElhaneys. R0351. Duncan stated he could hear traffic din above Arches Court and could hear UTVs individually in the residential areas below, which caused him concern about noise. R352. Duncan requested a gate on the utility access corridor in order to prevent off-road vehicles from going up the hill, which could be prevented with a simple gate. R352-353.

Dean Nebergall stated he resides in a great neighborhood where children play in the street. R353. Nebergall is a retired licensed traffic engineer. R354. Nebergall did not believe there was a justified finding of minimal impact to the neighborhood. *Id.* Nebergall stated the information the Council had regarding traffic was inapplicable. *Id.* Nebergall stated the ITE manual is a good book for a general reference, but the uniqueness of Moab rendered the ITE inapplicable to the neighborhood or the street. *Id.* Nebergall stated he went into the planning department to find the local study referenced by the Commission, but could not find it, and it is not the information packet for the Council meeting. *Id.* Nebergall stated that he could find no other local study. R354-355.

Nebergall stated he would support Jim Webster's traffic projections than the projection in the staff report. R355. Nebergall stated there would be an increase in ATV and motorcycle use in the neighborhood from his personal observation, and such use is rare in the neighborhood right now. *Id.* Nebergall stated the average vehicle has a decibel rating of

75, new motorcycles have 80-85 decibels and new ATVs are 90-100. *Id.* Nebergall opined that most motorcycles are modified in their exhaust systems to be louder than a new one. R355-356. Nebergall stated there would likely be a hundredfold increase in noise levels in the neighborhood. R356. Nebergall additionally stated the grade of the road will have an impact on the noise and safety in the neighborhood since the Property is on the top of a hill. *Id.* However, Nebergall never provided any authority or any specific studies for any of his assertions. *See*, 355-359.

Mike Steele stated they have resided in the neighborhood for 25 years and, upon learning of the proposed bed and breakfast, had spent significant time and money researching the City Code. R357-358. Steele stated the Application would affect the character of the neighborhood. R358.

Kathy Cooney stated she has lived in the neighborhood for 28 years and described the neighborhood as “crazy unique” because it is quiet, which was not the right fit for a bed and breakfast. R360-0361.

The McElhaney also addressed the Council. R362. McElhaney stated they were in the process of building the new construction, having met the building codes and permits and obtained authorization for the construction regardless of whether it would be allowed to be used as a bed and breakfast. R363. McElhaney stated the only way to access the Property would be to enter through the driveway and the entire property will be fenced, which will prevent access to the utility access by lodgers. R364-365. The McElhaney undertook ways to mitigate impact on the neighborhood in the design of the structures. R365-366. The lodgers will be shielded from the street by the main home, which will be the residence. R

366. The McElhaney's stated this will maintain the quiet and privacy in the neighborhood and for the lodgers. R366-367.

Whereupon, the meeting was concluded for public hearing; however, the Council indicated it would take additional public comment until November 25, when the Council would make its decision regarding the permit. R367-368.

#### **B. November 25, 2014, Council Discussion and Vote.**

On November 25, 2014, the Council met and the approval of Proposed Resolution 39-2014 was raised. R371. Jeff Reinhard ("**Reinhard**"), the city staff advisor to the Planning and Zoning Commission, set forth how McElhaney's had met every requirement of the Moab Municipal Code. *See*, R0293-0295. Councilmember Stucki moved to approve and discuss the Resolution, which was seconded. Councilmember Stucki stated he operated a bed and breakfast with no connection to the one at issue, which he hoped would be helpful to the Council. R371-372. Councilman Stucki stated as follows:

And although public hearings are important and provide an opportunity for us to hear feedback and concerns from the public, they're not the time when public policy is changed or set. That has taken place previously. Our goal then becomes to govern by the rules that are in place and not our own personal preferences or public opinion polls. People with concerns sometimes work themselves up over an issue to where all they can see are the potential negative what-ifs.

R372-373. In discussing the negative effects public comment had raised, Councilman Stucki stated, "[w]ith all the speculation about what might happen, we have yet to see or hear any evidence presented that demonstrates these kinds of negative, harmful, disruptive influences that are taking place anywhere else where there's a bed and breakfast." R0377-0378. Councilman Stucki thus lent his support to issuing the conditional use permit. R373-380.

Contrary to Reinhard's advisement that the requirements were met and Councilmember Stucki's support of McElhaney's request, Councilwoman Peterson stated that, in looking at the conditions to meet approval, the Proposal's use would have to be consistent with the City of Moab's general plan. R0381, ln. 11-15. Councilwoman Peterson stated "[a]nd 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." R0381, ln. 11-15. Councilwoman Peterson based this upon the specific and unique characteristics of the neighborhood and that the impacts on the neighborhood were unknown. *Id.*

Councilwoman Ershadi stated that, in her campaign, the primary concern voiced by residents to her at that time was the character of the town. R382. Councilwoman Ershadi stated the character of the town was tied with economic opportunity because a huge concern was the nightly rentals in town were taking over and less space belonged to the local residents. *Id.* Thus, "it is with that overwhelming sentiment in mind that I don't feel like I can't support it at this time, and in fact, I think we need to take a really hard look at our zoning in general to make sure that local spaces are protected as that." R382-383, ln. 24-25, 1-5.

Councilman Bailey stated he was the chairman of the land commission that wrote the ordinance allowing bed and breakfasts to be allowed in the R-2 zone. R383. Councilman Bailey stated they allowed overnight rentals in the R-3 zone and "we tried to open it so that there was some opportunity for R2s to get into a business, a bed and breakfast". *Id.* Councilman Bailey stated the clear intent behind the zoning ordinances was to "listen to the

people in the neighborhoods and to do what the neighborhoods wished and that's why we had that – clearly minimal negative impact on adjacent residential areas, so I think we've seen what this is going to be an impact on the neighborhoods and I can't support this." *Id.* ln. 13-18. Councilman Stucki stated the zoning ordinance ought to be addressed because, if it was left in the form it was currently in, "people are going to come up against kind of a brick wall and it would be better for both parties involved for people to know either in zone it's not even a question instead of having it be an option but it's not something they can actually do." R383-384, ln. 25, 1-6. Mayor Sakrison then called for a vote, and the Application was denied after a vote of four (4) council members in a vote of 1-3. R385; 409.

### **C. December 15, 2015, Oral Arguments Hearing.**

On December 15, 2015, this matter convened for oral arguments in the district court appeal. The parties outlined their positions from their respective briefs. R1033-1102. The district court indicated it was zeroing in on the concern of traffic, and requested the parties to provide citation to the traffic in the record. R1108; 1112-1118. Whereupon, the proceedings adjourned. R1118.

### **SUMMARY OF THE ARGUMENT**

The City has applied the incorrect standard of review in this appeal. The City has framed all of its issues in this appeal as an attack on the district court's Ruling and Order, when this Court reviews the Denial directly from the Council. Accordingly, the City has failed to properly argue its case on appeal.

Regardless, the Council's Denial of the Permit was arbitrary and capricious. The McElhaneys complied with the MMC in order to obtain the conditional use permit;

however, the Council denied the Permit without any justification from the MMC, which resulted in an arbitrary and capricious decision. The Council relied on public adverse comments to deny the request for the conditional use permit, contrary to the substantial evidence in the record, with the decision based solely upon public clamor.

Moreover, the Permit was not inconsistent with the General Plan. It is unknown what part of the General Plan the McElhaney's cannot comply with when they have substantially mitigated the reasonably anticipated detrimental effects of a bed and breakfast on Arches Drive; however, the Application is not inconsistent with the General Plan.

Lastly, the City argues application of the public clamor doctrine requires a finding of improper purpose or motive; however, this is an expanded reading of this Court's holdings, and is meritless when public clamor was the main reason cited by the Council in denying the Application.

## **ARGUMENT**

### **I. THE CITY HAS APPLIED THE INCORRECT STANDARD OF REVIEW IN THIS APPEAL.**

"In fact, '[w]e review the administrative decision just as if the appeal had come directly from the agency' and accord no particular deference to the [district] court's decision." *Thompson v. Logan City*, 2009 UT App 335, ¶15, 221 P.3d 907 *citing* *Rogers v. West Valley City*, 2006 UT App 302, ¶ 12, 142 P.3d 554 (*quoting* *Wells v. Board of Adjustment of Salt Lake City Corp.*, 936 P.2d 1102, 1104 (Utah Ct.App.1997)). "Thus, we 'determine only whether or not the decision ... is arbitrary, capricious, or illegal.'" *Id. citing* UTAH CODE ANN. § 10-9a-801(3)(a)(ii) (2007); *see also* *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602,

604 (Utah Ct.App.1995) (“The Board will be found to have exercised its discretion within the proper boundaries unless its decision is arbitrary, capricious, or illegal.”).

In this appeal, the City has framed all of its issues on appeal as attacks upon the district court’s Ruling and Order. *See, Brief of Appellants* at pp. 1-2. The City correctly presents the standard of review for this Court. *See, Brief of Appellants* at p. 14. However, the City goes on to argue every point of contention with the district court’s Ruling and Decision. *See, id.* at pp. 14, 17, 20, 23-26. The only portion of the City’s brief that does not appear to attack the Ruling is whether the Denial was inconsistent with the General Plan and parts of the argument respecting public clamor.

The *Brief of Appellant* argues the district court 1) improperly labelled the Denial as yielding to public clamor, 2) failed to remand for a clearer record, and; 3) failed to correctly apply the standard of review. *Ibid.* at pp. 20-26. Further, the City makes much of the district court’s alleged hostility towards the City, which is inappropriate to argue on appeal. *See, id.* at p. 25. Should these arguments even have merit, they are rendered harmless from this Court’s standard of review in this appeal. Thus, inasmuch as these arguments do not apply the correct standard of review for an appeal before this Court, the McElhaney’s do not address them because the City’s arguments are meritless in their application herein.

This Court reviews the Council’s Denial, an administrative decision, just as if this appeal had come directly from the Council and affords no particular deference to the district court’s Ruling and Decision. *Thompson* at ¶15. Accordingly, this Court determines only whether or not the Denial from the Council is arbitrary, capricious, or illegal. *Id.* The



McElhaneys accordingly argue the standard of review pertinent to this Court, and presents their arguments pursuant to the appropriate standard of review.

## **II. THE COUNCIL'S DENIAL OF THE PERMIT WAS ARBITRARY AND CAPRICIOUS.**

“A land use authority’s decision is arbitrary or capricious only if it is not supported by substantial evidence in the record.” *Pen & Ink, LLC v. Alpine City*, 2010 UT App 203, ¶16, 238 P.3d 63 *citing Pacific W. Cmts., Inc. v. Grantsville City*, 2009 UT App 291, ¶ 22, 221 P.3d 280 (*quoting Fox v. Park City*, 2008 UT 85, ¶ 11, 200 P.3d 182). “Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.” *Id. citing Pacific W. (quoting Caster v. West Valley City*, 2001 UT App 212, ¶ 4, 29 P.3d 22). “In determining whether substantial evidence supports [the City Council’s] decision we will consider all the evidence in the record, both favorable and contrary[,] and determine whether a reasonable mind could reach the same conclusion as the [City Council].” *Id. citing M & S Cox Invs., LLC v. Provo City Corp.*, 2007 UT App 315, ¶ 36, 169 P.3d 789).

In order to establish the Denial was not supported by the substantial evidence in the record, the McElhaneys hereby present arguments to counter the Council’s main reasons to deny the Permit. Based upon these arguments, the Decision should be affirmed.

### **A. The McElhaneys Complied With Local Ordinances To Obtain The Permit.**

Under the Moab Municipal Code (“MMC”), a bed and breakfast requires a conditional use permit in the R-2 zone. MMC 17.09.530(B). The MMC continues as follows:

“Conditional use” means a land use that, because of its unique characteristics or potential impact on the city, 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 detrimental impacts. If the reasonably anticipated detrimental effects of a proposed conditional use cannot be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards, the conditional use may be denied. Conditional use permits may be approved for the uses indicated in the use regulations of the zoning district of the property for which the conditional use permit is requested.

17.09.530(A). The planning commission and City Council are required to use the following criteria in reviewing conditional use permit requests and it is specifically understood that certain criteria may not apply to a particular application; however, failure to meet one or more of the applicable criteria may be cause for denial of the application:

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, policies 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. The planning commission and the city council, respectively, may establish additional conditions of operation, location, arrangement and construction in the issuance of a conditional use permit if deemed to be in the public interest or to assure compliance with other aspects of the Moab Municipal Code.

MMC 17.09.530(H).

Herein, in the Agenda presented for the November 25, 2014, hearing before the Council, the Agenda indicates Reinhard's report to the Commission plainly found the McElhaney's had complied with the requirements to obtain the Permit pursuant to MMC 17.09530 and the additional requirements pursuant to MMC 17.09.531(9). *See*, R0293-0295. After the first public hearing before the Commission on September 11, 2014, the City staff undertook an investigation into the main concerns raised by the public, which were: (1) operation of the daycare and bed and breakfast at the same time; (2) drainage of the property; (3) increase in traffic; (4) parking; (5) noise; (6) potential employees; (7) potential bed and breakfast guests; (8) fairness of the application to the other residents, should it be granted; (9) prohibition of boarding houses, and; (10) complaints regarding the daycare. *See*, R101-103.

The results of this investigation was as follows: (1) the McElhaneys agreed the daycare would cease operation upon the opening of the bed and breakfast, thereby negating any concern with dual operation; (2) the McElhaneys and neighboring property owners were encouraged to address this issue and the staff further indicated appropriate measures were in place to retain water, which is the responsibility of the property owner; (3) termination of the daycare would lower traffic and a bed and breakfast generates less average daily trips pursuant to the ITE manual than a single family residence; (4) the plans for the project included the appropriate number of parking spaces required by code – the McElhaneys also added more spaces after additional public comment; (5) since property owners are required to reside on the premises, the owner of a bed and breakfast has more of a vested interest in noise levels; (6) studies indicate bed and breakfasts tend to be family owned and operated and with only five rooms of the proposed bed and breakfast indicated there would not be need for employees outside of the McElhaneys; (7) the typical bed and breakfast lodger is 40 years old who are in the mid-cycle of raising their family; (8) the suggestion that, if the McElhaneys were granted the Permit, that every resident should be allowed to market their homes as a bed and breakfast, was negated by the MMC, which allows every resident to apply for a conditional use permit; (9) a bed and breakfast is different from boarding houses, which were removed from residential zones entirely because they do not have a managerial presence unlike bed and breakfasts, where the owners reside on the premises, and; (10) the City had never previously received a complaint regarding the daycare. *See, id.*

Subsequent to the public hearings held on September 11 and 25, 2014, by the Commission, the Commission voted 3-0 in favor of referring the application to the Council

for approval with four (4) conditions established by the Planning Resolution #11-2014, which included yearly review for code compliance, appropriate lighting, landscaping, and fencing, and the daycare would cease to operate upon operation of the bed and breakfast. R068-069; *see also* R195. However, after receiving the Commission's recommendation and holding public hearings, the Council determined to deny the McElhaney's application for a conditional use permit. The Council gave varying reasons for the Denial: the neighborhood was "clearly not interested in creating a commercial zone" (R0362), the impacts to the neighborhood were unknown (*Id.*), fulfilling a campaign promise not to allow overnight rentals to take over the town (R0363-0364), and the clear intent behind the zoning ordinances was to listen to the people in the neighborhoods and to do what they wished, which is why the ordinance requires clearly minimal negative impact on adjacent uses, (R0364). However, these reasons cannot be justified by the MMC.

The McElhaney's reside in the R-2 zone, which requires a conditional use permit for the operation of the bed and breakfast. MMC 17.09.530(B). By virtue of a conditional use permit, the McElhaney's were required to show that, because of the Property's unique characteristics or potential impact on the City, surrounding neighbors, or adjacent land uses, the operation of the bed and breakfast may be incompatible in some areas but may be compatible only if certain conditions are met to mitigate or eliminate detrimental impacts. MMC 17.09.530(A). The McElhaney's therefore had to determine the ***reasonably anticipated*** detrimental effects of a bed and breakfast on the Property and whether they could be ***substantially mitigated***. *Id.* The Council's Denial applies MMC 17.09.530(A) &

(B) in such a manner that an applicant would never be able to obtain a conditional use permit.

The Commission found the McElhaneys could substantially mitigate reasonably anticipated detrimental effects of a bed and breakfast on the Property with additional conditions (yearly review of code compliance, downward lighting, fencing and/or landscaping, and discontinuation of the daycare upon the opening of the bed and breakfast). The Commission determined the reasonably anticipated detrimental effects of the bed and breakfast could be substantially mitigated by these reasonable conditions to achieve the compliance with the applicable standards pursuant to MMC 17.09.531(9).

After public hearing before the Commission on two (2) separate occasions, and the City staff conducting an investigation into the public's concerns, the McElhaneys obtained the approval of the Commission and proceeded to the Council. The McElhaneys presented evidence that the bed and breakfast was compatible with the adjacent one- and two-family dwellings on Arches Drive. MMC 17.09.530(H)(1). The McElhaneys presented pictures and plan for the project, which indicated the main home in which the McElhaneys would reside would shield the bed and breakfast from the street and also insulate noise due to the hills behind the Property. R187. Jaremy McElhaney is a contractor, experienced in design and construction, and thus had the requisite expert experience to design and create the project. *Id.* The McElhaneys addressed the issue of drainage in the design of the topsoil and landscaping, indicating gravel next to and behind the shop would retain the water on the Property, which is their responsibility to address as property owners. *Id.* As to traffic, the McElhaneys indicated that with 16 children in the daycare, there would be approximately 32

less daily trips to the address. *Id.* Further, there would be garage parking for every vehicle owned by the McElhaneys and up to seven (7) parking spaces on the lot for lodgers. R188. The McElhaneys stated they would have downward lighting pursuant to code. *Id.* As to property values, the McElhaneys indicated the lot the bed and breakfast would be built on is one of the largest lots in the Arches subdivision at 0.57 acres. R188-189. The proposed construction would result in the largest home in the subdivision and it would be custom-made with tremendous curb appeal. R189. The McElhaneys also presented these claims in written form. R235.

The McElhaneys presented evidence to the Commission that the bed and breakfast was compatible with the adjacent uses in the neighborhood in terms of appearance, architectural scale and features, design and scope, landscaping, and that any adverse impact would be mitigated or eliminated in terms of noise, vibration, smoke, fumes, gas, dust, odor, lighting, glare, traffic minimization or circulation, parking issues, etc. MMC 17.09.530(H)(1). The McElhaneys also demonstrated the bed and breakfast would have design features sufficient to protect the adjacent uses including service areas, pedestrian and vehicular circulation, safety provisions, access ways to and from the site, buffering, fencing and site building placement. MMC 17.09.530(H)(2). The McElhaneys showed the bed and breakfast was 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. MMC 17.09.530(H)(3). The McElhaneys demonstrated there was adequate public services such as streets, off-street parking, pedestrian facilities, water, sewer, gas, electricity, police, fire, and EMS protection that would not reduce these services to other existing users.



MMC 17.09.530(H)(4). The McElhaney's provided provisions relating to the property maintenance of the building, parking and loading areas, drives, lighting, signs, and landscaping. MMC 17.09.530(H)(5). The McElhaney's demonstrated the site impacts within the Property as well as the adjoining properties would be fully mitigated appropriate to the topography of the site – the slope retention, flood potential and possible drainage was all addressed in the McElhaney's plan. MMC 17.09.530(H)(8). Thus, after public hearing, the Commission adopted a resolution with their findings that the McElhaney's had demonstrated compliance with all criteria for obtaining a conditional use permit. MMC 17.09.530(H)(9); *see also*, the Agenda. The Commission established additional conditions of operation due to the public concerns, which the McElhaney's demonstrated they could comply with. *Id.*

As to whether the use was consistent with the General Plan, the McElhaney's argue this point *post*. However, the McElhaney's complied with all of the requirements of the MMC, and the Council's denial of the McElhaney's request for the Permit was arbitrarily and capriciously denied.

**B. The Denial Is Not Rationally Related To The Legitimate Goals And Purposes Of The General Plan, And Is Therefore Not Based Upon The Substantial Evidence.**

“Generally, ‘a zoning ordinance or other police power land use restriction must be reasonably related to serving the public health, safety or general welfare. If a land use restriction is unreasonable or irrational, it may be found to violate the substantive component of the due process clause.’” *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 252 (Utah App. 1998) *citing* 1 Kenneth H. Young, *Anderson's American Law of Zoning* § 3A.04 (4th ed. 1996) (footnotes omitted); *see also Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606

(Utah Ct.App.1995) (“All ... ordinances enacted through the exercise of police power are considered valid unless they ‘do not rationally promote the public health, safety, morals and welfare.’ ” (Citation omitted.)). “Municipal zoning authorities are bound by the terms and standards of applicable zoning ordinances and are not at liberty to make land use decisions in derogation thereof.” *Springville Citizens for a Better Community v. City of Springville*, 1999 UT 25, ¶ 30, 979 P.2d 332; see *Thurston v. Cache County*, 626 P.2d 440, 444–45 (Utah 1981).

“In order to accomplish the purposes of this chapter, each municipality shall prepare and adopt a comprehensive, long-range general plan for: (a) present and future needs of the municipality; and (b) growth and development of all or any part of the land within the municipality.” UT. CODE ANN. §10-6a-401(1). Further, “...a municipality may enact an ordinance imposing stricter requirements or higher standards than are required by this chapter.” UT. CODE ANN. §10-9a-104(1). “Except as provided in Section 10-9a-406, the general plan is an advisory guide for land use decisions, the impact of which shall be determined by ordinance.” UT. CODE ANN. §10-9a-405. “After the legislative body has adopted a general plan, no street, park, or other public way, ground, place, or space, no publicly owned building or structure, and no public utility, whether publicly or privately owned, may be constructed or authorized until and unless it conforms to the current general plan.” UT. CODE ANN. §10-9a-406.

Utah law states as follows concerning conditional use permits:

- (1) A land use ordinance may include conditional uses and provisions for conditional uses that require compliance with standards set forth in an applicable ordinance.
- (2)(a) A conditional use shall be approved if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated

detrimental effects of the proposed use in accordance with applicable standards.

(b) If the reasonably anticipated detrimental effects of a proposed conditional use cannot be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards, the conditional use may be denied.

UT. CODE ANN. §10-9a-507.

The planning commission and City Council are required to use certain criteria in reviewing conditional use permit requests and failure to meet one or more of the applicable criteria may be cause for denial of the application. MMC 17.09.530(H). However, the use must also be consistent with the Moab General Plan as amended. MMC 17.09.530(H)(7).

The purpose of the General Plan is generally stated as follows:

Moab is a dynamic community that has experienced tremendous fluctuations in growth, population, and economy. In the last decade, the economy of the City has shifted from relying on resource extraction to one based primarily on tourism. Concomitantly, there is a trend of migration from urban areas to Moab by populations seeking an improved quality of life. With this renewed growth and transformation has come increased land use conflicts, increased traffic and increased demands on City services. The General Plan is a tool to minimize land use problems and to facilitate healthy, orderly growth while maintaining the natural integrity of the area and improving the quality of life in Moab.

R0605. The Moab General Plan summarizes its purposes as follows:

1. To improve the physical environment of the community as a setting for human activities, without negatively impacting the natural beauty or natural resources of the area;
2. To protect the public interest, the interest of the community at large, as well as the interests of individuals or groups within the community;
3. To facilitate public involvement and the democratic determination and implementation of public policies which guide the community's physical development;
4. To effect political and technical coordination in community development;
5. To inject long-range considerations into the determination of short-range actions; and

6. To provide a technical and rational basis for political decision-making.

*Id.* The General Plan indicates an overall community vision for Moab that has evolved, stating, “[t]he picture is one of a thriving, healthy community that saves what is best from the past and carefully integrates the best of what is new and innovative.” R0606. A goal for the future of Moab states, “[s]eperate and buffer conflicting land uses, especially where commercial abuts residential.” R0607, ¶7. However, another goal states, “[p]reserve Moab’s surrounding landscapes and other natural resources to enhance the quality of life for community residents and in order to continue to attract people to the area who contribute to economic stability.” *Id.* at ¶9. Further, “[d]evelop a community and resort destination that is designed for people where walking and biking are the cornerstone of the transportation system.” *Id.* at ¶10.

Economic development is the first element of the General Plan. R0609. The General Plan states, “[e]ncourage diversity in new businesses and seek to attract business that will strengthen the economy, enhance the rural character of the community, and prove year-round employment without compromising the natural environment.” R0611. The General Plan strives to implement economic development as follows:

- a. Support organizations that promote economic development for the community.
- b. Support development of a business incubator.
- c. Consider carefully adjusting zoning rules as they relate to economic development.
- d. Support efforts to enhance communicates and access to the information highway.
- e. Target industries that meet the guidelines of the above outlined policy.
- f. Monitor and research business trends that may potentially allow for the development of other programs that will economically benefit the community.

- g. Analyze the flow of local goods and services, use and misuse of energy and resources, and identify business opportunities through substitution, conservation and recycling.
- h. Consider off-site directional signs to advertise businesses located off Highway 191.

R0612.

The general goal of the growth and urbanization of Moab is, “[t]o encourage the orderly growth and development of Moab within the City’s ability to provide services. Emphasis should be on balancing land use: Guiding growth to locations that are safe and sensible for the City to service, while maintaining the character of the town and the beauty of its surrounding landscapes.” R0613. A policy of growth and urbanization states, “[s]olicit public input on decisions regarding land use.” R0613. Further, “[p]rotect the economic base of Moab by identifying areas where desired and appropriate growth can occur and emphasizing diversity in growth.” *Id.* “Minimize impacts between transitions in types of land use, especially between commercial and residential land uses.” R0614. However, in order to minimize such impacts between commercial and residential land uses, implementation of this goal states, “[r]equire appropriate visual, light, and sound buffers on new commercial developments that impact residential lots.” *Id.*

Respecting land use decisions, the General Plan states as follows:

Land use decisions are, in many respects, the most important and far reaching actions taken by municipal government. Land use decisions dictate the town’s physical appearance, its compatibility with the environment, and, in large part, its livability and its economic health. Because land use decisions lead to permanent alterations of the landscape, their effects endure long after the terms of the officials who make them. Land use decisions are the physical manifestation of the community’s vision of itself. This section of the Moab General Plan is intended to bring consistency, predictability, and a cohesive vision of the future to Moab’s land-use decision making.

This section of the Moab General Plan is intended to leave room for reasonable interpretation in light of specific plans, mitigation measures, and the realities applicable to any given land use proposal. The Land Use Section is also intended to give the City a basis for rejection or modification of proposals that clearly conflict with the Plan's goals for growth and urbanization.

R0618. The goal for Land Use in general states, “[t]o encourage a balanced mix and rational organization of land uses that enhances Moab’s distinctive small-town character, economic health, and natural environment, allows economic provision of public services, and meets the needs of residents.” R0618. For residential zones, the goal states, “[t]o achieve attractive, stable, and safe residential areas, and to achieve a balanced mixture of residential uses and densities.” R0621. As an implementation of “walk-able” neighborhoods, the General Plan indicates an implementation shall be to, “[i]nstall traffic-calming devices such as street medians and traffic circles planted with trees and native shrubs and by the narrowing of street widths.” R0621, ¶1(d). Further, a policy of residential zones states, “[r]estrict commercial development in residential zones.” R0621.

In this case, McElhaneys were also required to demonstrate the bed and breakfast was consistent with the General Plan as amended. MMC 17.09.530(H)(7). However, it is unknown which portion of the General Plan Councilwoman Peterson determined the McElhaneys could not comply with since MMC 17.09.530(H)(7) only states the use must be consistent with the Moab General Plan. *See*, R0381. Councilwoman Peterson stated that, in looking at the conditions to meet approval, the Proposal’s use would have to be consistent with the City of Moab’s general plan, “[a]nd 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.” R0381, ln. 11-15. Thus, it appears

the General Plan was cited in order to appease adverse public comment since the McElhaneys had complied with the MMC.

The Council applied the General Plan in such a manner that the General Plan must be reasonably related to serving the public health, safety or general welfare. *Smith* at 252. However, the General Plan is subjective in its encouragement of local economy that preserves the rural nature of the town and the natural environment that attracts tourism in the first place. The Council could therefore deny any application for a conditional use permit for any subjective reason found in the General Plan without actually pinpointing the inconsistency. Regardless, the Council is bound by the terms and standards of applicable zoning ordinances and is not at liberty to make land use decisions in derogation thereof. *Springville* at ¶30.

The General Plan is intended to address the present and future needs of Moab and the growth and development of the land within Moab. UT. CODE ANN. §10-6a-401(1). The Council therefore enacted MMC 17.09.530, which is stricter than the requirements of UT. CODE ANN. §10-9a-507. UT. CODE ANN. §10-9a-104(1). The General Plan is an advisory guide for land use decisions, and its impact is determined by MMC 17.09.530(H), which requires a conditional use to be consistent with the General Plan or it may be denied. UT. CODE ANN. §10-9a-405. Accordingly, the Permit is required by ordinance and statute to conform to the General Plan as amended. UT. CODE ANN. §10-9a-406. However, the Council's decision is silent as to how the Permit is inconsistent with the General Plan and is also a subjective interpretation of the General Plan to fit the desires of the Council to yield to public clamor.



The General Plan indicates Moab is a dynamic community, where the economy has shifted from reliance on resource extraction to one based in tourism. R0605. Thus, the General Plan is a tool to minimize land use problems and facilitate healthy, orderly growth while maintain the natural integrity of the area and improving the quality of life in Moab. *Id.* The McElhaneys bed and breakfast is therefore in line with Moab's reliance upon the tourism industry, which will have no impact on the natural integrity of the area. *Id.*

The bed and breakfast's appearance and location is pleasing to the eye, with no negative impacts upon the natural beauty or natural resources of the area. *Id.* A local business, owned and operated by on-site owners, is in the public interest and the interest of the community at large, because it keeps the economy stimulated by residents and not off-site owners, companies, and franchises. *Id.* A bed and breakfast that is locally owned and operated, is in step with a thriving, healthy community that "saves what is best from the past and carefully integrates the best of what is new and innovative." R0606. Even though the bed and breakfast is not located in a commercial zone, it can be granted conditionally in the R-2 zone, and can be found to be in harmony with other residences. R0607. There is no actual evidence that the bed and breakfast is in conflict with residential use. *Id.* Rather, there is only speculation that the bed and breakfast is a conflicting use in this area of the R-2 zone. *Id.*

The McElhaneys' bed and breakfast will not interfere with the surrounding landscapes or other natural resources but will enhance the quality of life by increasing property values of the surrounding properties. R0607 at ¶¶7, 9. A bed and breakfast will attract people to the area who contribute to the economic stability of Moab. *Id.* at ¶9.

Moreover, the location of the bed and breakfast will contribute to the goal to develop a community and resort destination that is designed for people where they could walk and bike to the downtown areas of Moab. *Id.* at ¶10.

The bed and breakfast encourages diversity in new business, seeks to attract business that will strengthen the economy, enhance the rural character of the community, and provide year-round employment without compromising the natural environment. R0611. The Denial by the Council has stifled new business on a whim by caving to adverse public comment for political gain, and refusing to allow economic development where a conditional use permit is allowed in the R-2 zone pursuant to ordinance. *See*, R0612.

A bed and breakfast is allowed by conditional use permit at the Property; however, the General Plan does not single out bed and breakfasts as insensible in its balance of competing land uses. R0613. The Commission required the McElhaneys to comply with each requirement of MMC 17.09.530(H), and no party has pointed to which section of the General Plan that the proposed use would be inconsistent. The General Plan does allow for the solicitation of public input on decisions regarding land use; however, Utah caselaw makes clear adverse public input cannot be the sole basis to deny a conditional use permit. Thus, the General Plan must be in uniformity with Utah law when it allows for public input on decisions regarding land use. R0613. By allowing conditional use permits in the R-2 zones, the General Plan allows for appropriate growth to occur, particularly since the McElhaneys complied with all other requirements of MMC 17.09.530(H) to obtain the Permit. *Id.* The McElhaneys therefore substantially mitigated the reasonably anticipated detrimental effects of the bed and breakfast, which constitutes a minimized impact between

the residential use of the Property (with a daycare) and a commercial use of the Property, which will decrease the concerns of the adjacent landowners. R0614. The McElhaneys also minimized the impact of their commercial nature of the bed and breakfast by installing the appropriate visual, light, and sound buffers on the Property, which will substantially mitigate, if not fully mitigate, any detrimental effect on the neighbors. *Id.*

The application of the General Plan by Councilwoman Peterson to support the Denial when also citing to adverse public comment fails to bring consistency, predictability, and cohesiveness to the vision of land-use decisions in Moab. R0618. Further, as pointed out by the district court, upon granting the Permit, should the guests of the bed and breakfast torment the residents of Arches Drive, the City would have abundant grounds to deny the renewal of the yearly Permit. *See*, R0547. Accordingly, the City is not without recourse should the residents' fears become founded at a later date; however, those grounds are without basis at this time.

The Denial failed to leave room for reasonable interpretation of MMC 17.09.530(H) in light of the McElhaneys' specific plans, mitigation measures, and the realities of the Permit to the Property. R0618. Moreover, the General Plan allows the Council to modify the McElhaneys' plans in order to improve them to substantially mitigate reasonably anticipated detrimental effects in the neighborhood. *Id.* No attempt by the Council to do so was made, even though adverse comment included suggestions to mitigate their concerns that are beyond the McElhaneys' ability to control.

The bed and breakfast is a balanced mix and rational organization of land use that enhances Moab's distinctive small-town character, economic health, and natural

environment, which would also meet the needs of the McElhaneys, who desire to make a living in order to support their family from their own home. R0618. The bed and breakfast is attractive and has yet to be proven unstable or unsafe in the residential area. R0621. The Council did not explore options of traffic-calming devices or possibly installing sidewalks on Arches Drive; rather, the Council denied the Permit without a rational basis. *See*, R0621, ¶1(d). While commercial development is restricted in residential zones, the McElhaneys have complied with MMC 17.09.530(H) in order to obtain the conditional use, and have not been given a legal ground upon which to justify the Denial.

The Agenda clearly indicates how the McElhaneys had complied with the MMC and overcome any potentially detrimental effects to the neighboring landowners. *See*, R0293-0295. The Agenda found the Application was consistent with the General Plan, stating, “[t]he Plan discusses mixed uses and mitigating the impacts on adjacent residential uses that may be created.” R0294. Additionally, Councilman Stucki indicated any negative connotation associated with a bed and breakfast was speculative, and the Council had yet to see or hear any evidence it was applicable to the Application. R0377-0378. Furthermore, while there was ample adverse comment, none of the persons giving it provided the authority they relied upon in arriving at their conclusion that the project was or would be harmful to the neighborhood.

The permit in this case should have been approved due to the reasonable conditions presented, which could be imposed to mitigate the reasonably anticipated detrimental effects of the proposed bed and breakfast. UTAH CODE ANN. §10-9a-507(2)(a). A large amount of adverse public comments were unreasonable and speculative and unsupportable, to wit:

potential lodgers in Moab do not correspond to the average lodger at a bed and breakfast, lodgers are strangers, might be sex offenders, and may talk to children in the neighborhood, lodgers might work on their vehicles at all hours, which will light up the street, loud parties (this is unreasonable due to the McElhaney's residing on the premises), lodgers might cross neighboring yards, that some residents choose to live away from their home in the summer months to avoid the daycare's traffic and noise when no prior complaint about the daycare had ever been lodged previously, lodgers would not pay attention to pedestrians, particularly on Halloween in a neighborhood without sidewalks, the driveway is too narrow to accommodate trailers, that residents would sell their properties if the permit was granted, a resident purchased a new home in a different neighborhood merely due to the proposal of the bed and breakfast, the new structure would interfere with the view (the construction was not dependent upon the approval of the permit and therefore, any interference with the view as a result was moot), the neighborhood will be open to events that attract tourists to Moab, etc. The McElhaney's adequately evidenced before both the Commission and the Council that any *reasonably* anticipated detrimental effect of the bed and breakfast were mitigated and eliminated, and further that they could abide by reasonable conditions to overcome any detrimental effects. UTAH CODE ANN. §10-9a-507(2)(b).

The City relies upon *Tolman v. Logan City* to argue that, where a city denies a land use application because the application is incompatible with a city's general plan, the decision is neither arbitrary nor capricious. *Ibid.*, 2007 UT App. 260, ¶18, 167 P.3d 489. However, *Tolman* does not address a city council's reliance upon public clamor as the sole reason to deny the application to justify its determination that a conditional use permit application

does not conform to the general plan. Rather, *Tolman* analyzes whether the denial of a rezoning application was an arbitrary and capricious act that denied the appellants' substantive due process rights. *Id.* Thus, *Tolman* does not apply to this case.

The City also relies upon *Barton Contracting Co., Inc., v. City of Afton* to argue a city may properly deny a conditional use permit for a gravel pit when the comprehensive city plan favors preservation of rural area. *Ibid.*, 268 N.W.2d 712 (Minn., 1978). However, *Barton* also holds, “[w]e hold that community opposition to Barton’s application was not a legally sufficient reason, in and of itself, for denying Barton a special use permit.” *Id.* at 718. *Barton* undertook analysis of all the reasons the city council gave to deny the conditional use permit, adverse comment and inconsistency with the general plan being two (2) of those factors. *See, id.* at 717-719. In its determination that a gravel pit mine was inconsistent with the comprehensive city plan, the city was given evidence that geological and soil conditions would not allow residential use following gravel mining, despite Barton’s proposal to return the property to light industrial or agricultural use after mining. *Id.* at 719. This proposal was deemed insufficient because there was evidence residential use would be incompatible with the property after mining. *Id.* Accordingly, “[t]his incompatibility between Barton’s proposed use and the residential end use specified in the zoning ordinance was a legally sufficient reason for denying Barton a special-use permit.” *Id.* Moreover, four of the five reasons given by the city in *Barton* to deny the use were legally sufficient to deny the application for a conditional use permit.

The circumstances in *Barton* are unrelated to the facts herein. The McElhaneys were given no written order to detail the reasons the City were denying the Permit. The Council’s

oral statements from the final vote indicate the reasons to deny the Permit were based on adverse public comment and perhaps inconsistency with the General Plan; however, any inconsistency with the General Plan was also rooted in adverse comment.

The City also relies upon *Land Waste Management v. Contra Costa Cty. Bd. Of Supervisors*, 222 Cal.App.3d 950 (Cal.App. 1990). However, reliance thereon is without merit, inasmuch as *Land Waste* determined, “[t]hus, a land-use permit which is inconsistent with existing zoning ordinances can be issued by a responsible administrative entity only after the applicable ordinances have been amended by the legislative process.” *Id.* at 958. “In turn, where the proposed changes in the zoning ordinance are inconsistent with the general plan, the two must also be brought into conformity.” *Id.* In preparing this brief, counsel herein was unable to locate any holding in *Land Waste* to support the City’s argument that, “[i]ssuance of an adjudicatory land use permit which is inconsistent with mandatory provisions of a general plan is invalid, and may be set aside.” *Brief of Appellants* at p. 18.

Accordingly, the Application is consistent with the General Plan, particularly since the McElhaney’s have substantially mitigated the reasonably anticipated detrimental effects of a bed and breakfast on Arches Drive. Accordingly, the Decision should be affirmed.

### **III. THE PUBLIC CLAMOR DOCTRINE DOES NOT REQUIRE IMPROPER PURPOSE OR MOTIVE.**

“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.” UT. CODE ANN. 10-9a-801(3)(c). “We have defined substantial evidence as ‘that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.’” *Bradley v. Payson City Corp.*, 2003 UT 16, ¶15, 70 P.3d 47 *citing First Nat’l Bank of*



*Boston v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990). “While it is true that the consent of neighboring landowners may not be made a criterion for the issuance or denial of a conditional use permit, there is no impropriety in the solicitation of, or reliance upon, information which may be furnished by other landowners in the vicinity of the subject property at a public hearing.” *Thurston v. Cache Cty.*, 626 P.2d 440, 445 (Utah, 1981).

In the case of *Ralph L. Wadsworth Construction, Inc. v. West Jordan City*, the Utah Court of Appeals determined as follows:

In denying appellants’ application, the City Council relied on its finding that “[t]he city has made a significant investment in bringing Dannon to the area and ... [o]utdoor storage is detrimental to the area ... and injurious to the goals of the city.” However, the only evidence in the record supporting this finding are the concerns expressed by neighboring landowners. The record does not reveal whether the Commission’s staff actually investigated the concerns raised at the public hearing or why they concluded that outdoor storage on appellants’ property—which is located in an M-1 zone—would be adverse to the city’s goals. Because the decision to deny an application for a conditional use permit may not be based solely on adverse public comment, *see Davis County v. Clearfield City*, 756 P.2d 704, 711-12 (Utah Ct.App.1988), we conclude this finding is insufficient to support the City Council’s denial of appellants’ application.

*Ibid.*, 2 UT App. 49, ¶ 17, 999 P.2d 1240. *Ralph* similarly determined that the allegation that outdoor storage may be considered a nuisance was only supported by neighboring property owners’ concerns regarding potential increases in rodent traffic and dust, the city council therein did not actually find the storage would actually constitute a nuisance. *Id.* at ¶18. Thus, *Ralph* determined the city council acted arbitrarily and capriciously by denying the conditional use permit. *Id.*

In the case of *Uintah Mountains RTC, L.L.C. v. Duchesne County*, the county denied an application for conditional use permit on the basis of safety concerns, which involved

concerns that the proposed facility for troubled youth are types of facilities that sometimes have escapees who may cause injury to persons and property and that there was no evidence addressing this issue that would be compatible with the permitted uses in the area. *Ibid.*, 2005 UT App. 565, ¶ 32, 127 P.3d 1270. This Court therefore determined as follows:

This finding is the product of public clamor. The record before the County concerning this issue consists of submissions and comments from neighboring landowners, including letters raising safety concerns and news stories of other similar residential treatment centers that did have safety issues. However, there is no record evidence detailing actual safety issues with Uintah RTC. To the contrary, there are numerous safety requirements with which Uintah RTC must comply to obtain a license to operate a group home. In addition, proposed residents would not have histories of violence or significant criminal backgrounds, and the conditional use permit granted by the Planning Commission required Plaintiffs to carry sufficient liability insurance to cover damages caused by Uintah RTC. Moreover, it is undisputed that the site factors for Uintah RTC regarding safety (utilities, medical and law enforcement response time, fire protection, distance to the hospital) are either identical to or more favorable than the same site factors for Cedar Ridge RTC. Therefore, the County's decision to deny Plaintiffs' application for a conditional use permit for a ten-person residential treatment center was arbitrary and capricious because it was impermissibly "based solely on adverse public comment."

*Id* (internal citation omitted).

In this case, the City argues the district court "...improperly labelled the council decision as yielding to public clamor in the absence of finding of improper purpose or motive." *Brief of Appellants* at p. 20. The City first incorrectly attacks the Ruling and Order by employing an erroneous interpretation of the standard of review. However, the City also seeks application of the public clamor doctrine in a flawed manner, which cannot stand. Accordingly, the McElhaneys address the City's position that public clamor requires "improper purpose or motive" but does not address the district court's application of public clamor because it is superfluous to this Court's standard of review to the Denial.

On November 25, 2014, the Council met for vote on the Permit. The Council gave varying reasons for the Denial: the neighborhood was “clearly not interested in creating a commercial zone” (R0362), the impacts to the neighborhood were unknown (*Id.*), fulfilling a campaign promise not to allow overnight rentals to take over the town (R0363-0364), and the clear intent behind the zoning ordinances was to listen to the people in the neighborhoods and to do what they wished, which is why the ordinance requires clearly minimal negative impact on adjacent uses, (R0364).

This Court has consistently upheld the Council’s Denial is valid if it is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal. UT. CODE ANN. 10-9a-801(3)(c). However, as argued throughout herein, the substantial evidence in this case does not meet the definition of that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support the Denial. *Bradley* at ¶15.

The consent of the neighboring landowners in this case is not a criterion for the approval of the Permit, even if the Council claims it can rely solely on adverse comment pursuant in the General Plan or city ordinance to deny the Permit. *Thurston* at 445. While there is some ability of the Council to solicit or rely upon information furnished by neighboring landowners, the question becomes when it is erroneous to rely solely on adverse public comment to justify denial of a conditional use permit. *Id.*

There is no evidence in the record to support how the Permit is inconsistent with the General Plan. *Ralph* at ¶17. The City staff investigated several concerns raised by residents (specifically noise and traffic), and concluded traffic would decrease. However, these concerns were not solidified by the Council in their comments in denying the Permit.

Rather, the comments suggest adverse public comments was the basis of the Denial, which were rooted in speculative objections to the Permit that had yet to become proof. Regardless, this Court has plainly stated, “[b]ecause the decision to deny an application for a conditional use permit may not be based solely on adverse public comment”, and has not expanded this holding to require a finding of improper purpose or motive. *Id.* Accordingly, the Council acted arbitrarily and capriciously by denying the Permit. *Id.* at ¶18.

Several comments from the Council relied on adverse public comment, which are the products of public clamor. *Uintah* at ¶32. The Council stated the bed and breakfast would be “forced” upon neighboring residents. The Council believed the neighboring residents were “clearly not interested” in creating a commercial zone; however, a conditional use permit was not creating a commercial zone. The Council stated that political sentiment prevented support because, during a campaign residents voiced concern regarding nightly rentals taking over the town, although it believed the MMC allowed for doing what the neighborhoods wished. Councilor Bailey’s statement that “clearly minimal negative impact on adjacent residential areas” allowed him to deny the application simply because the neighbors did not want the bed and breakfast. These comments erroneously allowed sole reliance on adverse public comment, although they were simply the product of public clamor. *Uintah* at ¶32.

There is no record evidence to support the adverse public comment herein. The Council instead required the McElhaney’s to completely mitigate every *unreasonable* complaint raised by the neighboring landowners rather than requiring them to substantially mitigate the reasonably anticipated detrimental effects. *See*, MMC 17.09.530(A). Accordingly,

this Court disallows land use decisions that are impermissibly based solely on adverse public comment, which constitutes public clamor. *Uintah* at ¶32.

Therefore, the Council's argument that there must first be a finding of improper purpose or motive is without merit, and constitutes an expanded reading of Utah caselaw that does not exist. The Council's argument on this point must therefore be denied, and the Decision should be affirmed.

### **CONCLUSION**

**WHEREFORE**, based upon the foregoing, the McElhaney's respectfully request this Court affirm the Decision entered by the district court.

DATED this 29th day of July, 2016.

\_\_\_\_/s/ Craig C. Halls  
CRAIG C. HALLS  
Attorney for Jeremy and Mary  
McElhaney, Appellees

### **CERTIFICATE OF COMPLIANCE WITH UTAH R. APP. P. 24(f)(1)(C)**

Counsel herein hereby certifies the foregoing *Brief of Appellee* complies with the type-volume limitation as follows: 13,999 words are contained herein, which is in compliance with UTAH R. APP. P. 24(f)(1)(A) and was determined by the word processing system used to prepare *Brief of Appellant*.

DATED this 29th day of July, 2016.

\_\_\_\_/s/ Craig C. Halls  
CRAIG C. HALLS  
Attorney for Jeremy and Mary  
McElhaney, Appellees

### **CERTIFICATE OF SERVICE**

I certify that I caused to be emailed an electronic version of the foregoing brief and its attachments on the 29th day of July, 2016, with two hard copies to follow by mail by first-class postage prepaid to the following:

Christopher G. McAnany  
Attorney for Appellants  
Dufford, Waldeck, Milburn & Krohn, LLP  
744 Horizon Court, Suite 300  
Grand Junction, CO 81506

/s/ Danielle Allison

# Addendum “A”

*Order on Appeal of Moab City Council Decision to Deny Conditional Use  
Permit entered on February 3, 2016 (the “**Decision**”)*



The Order of the Court is stated below:

Dated: February 03, 2016  
02:50:00 PM

/s/ LYLE R ANDERSON  
District Court Judge



**DISTRICT COURT OF THE STATE OF UTAH  
SEVENTH JUDICIAL DISTRICT  
GRAND COUNTY**

JERAMEY McELHANEY, and MARY McELHANEY,  Petitioners,  Vs.  The City of Moab and Moab City Council.  Respondents.	<b>ORDER ON APPEAL OF MOAB CITY COUNCIL DECISION TO DENY CONDITIONAL USE PERMIT</b>          Case No. 140700048 Judge Lyle R. Anderson
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This matter came on for hearing before the court on December 15, 2015. The court received a transcript of the proceedings of the Moab City Council, and the parties filed briefs on the issue. The court has heretofore issued its ruling in this matter:

The court hereby orders that the decision of the city to deny the application of the McElhaney's for a Bed and Breakfast is hereby overturned. The city is HEREBY ORDERED to issue the permit for the Bed and Breakfast on Arches Drive to Jeramey and Mary McElhaney without further delay. This resolves all disputed matters in this case. This judgment is therefore final.

END OF ORDER

*SIGNATURE FOR JUDGE ANDERSON TO BE ELECTRONICALLY AFFIXED TO PAGE ONE  
OF THE ORDER ABOVE THE CAPTION.*

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# **Addendum “B”**

Full Summary of Negative Public Comments

## **A. Negative Public Comments.**

The following concerns were raised by the public, some in written form:

1. Amount and timing of traffic; R0001978
2. Limited access on a dead-end street; R000197
3. Increased noise from high-density short-term lodgers; R000197; R000200
4. Possible all-night lighting; R000197
5. Effectively turn the end of Arches Drive into a nightly rental district; R000197
6. Requirements of bed and breakfast parking was insufficient –
  - a. Moab is marketed as an adventure destination and does not correspond to the average lodger at a bed and breakfast; R000197-000198.
  - b. Seven spaces is insufficient because they would not accommodate trailers; R000198
  - c. The current proposal includes two (2) spaces for trailers but there would not be space for trailers, ATV's, UTV's, or trailered Jeeps; R000198
  - d. The cul-de-sac would be used for the extra parking the trailer spaces will need; R000198
  - e. A proposal that the McElhaneys should restrict their lodgers' amount and/or sizes of trailers or an off-site location be utilized for non-conforming trailers; R000202
  - f. Ms. Vicki Webster offered a compromise to have the McElhaneys restrict parking to passenger vehicles only; R000269
7. Inability for other residents' guests to access on-street parking is not a minimal impact. R0001983
8. Increased hours of traffic because it would not be restricted to work hours like the daycare center; R000201
9. Ingress and egress is the same on a dead-end-street; R000203
10. With two businesses<sup>1</sup> on the same short street, the residents will have much more traffic and all the time; R000203
11. Lodgers might work on their vehicles at all hours, similar to the golf course condos, which will light up the street; R000203
12. There might be noisy machinery; R000269
13. There might be loud parties, which will change the character of the quiet neighborhood; R000203
14. Unfair for nearby residents to put up with increased traffic at night and possible overflow parking of large vehicles on the street; R000214
15. The bed and breakfast will unduly increase local traffic in the neighborhood pursuant to MMC 17.09.531(9)B.1 –
16. The bed and breakfast traffic will be required to travel the entire length of Arches Drive; R000198

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<sup>1</sup> This letter writer is presumably referring to the proposed bed and breakfast and daycare operating at the same time. *See*, R000203.

17. The Federal Highway Administration data states an average driver generates five (5) vehicle round trips per day and a bed and breakfast would increase traffic by 38% on Arches Drive; R000198
18. The daycare traffic should not be considered a benchmark or as normal traffic because it is already an undue impact on the neighborhood because the license for the daycare was granted without public hearing; R000198
19. Scott and Bonnie Carson of 105 Arches Drive live away from their residence in Moab during the summer months due to the increase traffic and noise from the daycare when school is not in session; R000198
20. The undue increase in speeding traffic that would result from B&B lodgers who have no vested interest in maintaining good relations with residents would result in increased dangers for residents in the neighborhood; R000198-000199.
21. Lodgers would not pay attention to children and pets in the streets as local residents; R000201
22. Operation of an ATV or OHV on Arches Drive would violate MMC 17.74.080 –
23. The operation of such machines by bed and breakfast lodgers would exceed the noise level prohibition, as Arches Drive is often mistaken as access to Sand Flats. R000199.
24. The bed and breakfast is incompatible with adjacent uses –
25. Arches Drive is a quiet neighborhood comprised of owner-occupied single family homes and two (2) duplexes under long term rental; R000204
26. A bed and breakfast would result in excess of 60-70 trips per day on the street, not including trips made by ATV's, UTV's, or motorcycles, according to recent transportation studies; R000204
27. The Property has a very narrow opening to the street, which will result in major parking difficulties, and thus, lodgers will park large trailers on the street and prevent residents from using any on-street parking; R000204
28. The lodgers will be noisy, coming at all hours of the day and night; R000204
29. Additional traffic and noise cannot be mitigated pursuant to city code;
30. Traffic to a bed and breakfast will be worse than the daycare's traffic – each room of the bed and breakfast will generate multiple vehicles; R000212
31. Traffic to a lodging destination has substantially greater impacts than local traffic to a daycare; R000213
32. Lodging traffic occurs randomly at all hours and "is likely to be augmented by additional traffic generated by employees, deliveries, etc."; R0002013
33. A bed and breakfast is no different than a small hotel; R00023
34. Drainage – R000202
35. Daycare –
  - a. The McElhaney's should not be allowed to run both businesses at same time; R000202
  - b. Neighbor not "terribly pleased" by the traffic generated by the daycare; R0002014
36. The McElhaney's refused to discuss the proposed bed and breakfast with Scott and Bonnie Carson and no information has been supplied by the McElhaney's to the residents; R000204-000205

37. The McElhaney's will have to renew their permit every year and they may lose it in the future despite any complaints; R000213
38. A bed and breakfast would change the dynamics of the neighborhood; R000218; 000267
39. Upon learning of the proposed bed and breakfast, a resident of Arches Drive determined to purchase a home in a different neighborhood, stating, "[w]ith Jemamey's [sic] dad on the council I think the B&B is a done deal." R000219. It should be noted this resident's email to another resident on Arches Drive, Scott Carson, was forwarded by Mr. Carson to the City, and was not sent directly by that resident to the City. *See, id.*
40. However, the owner of the home in which the resident determined to purchase a home elsewhere provided an account as to why the resident purchased a home in a different neighborhood due to the proposed bed and breakfast. R000236
41. A bed and breakfast will change the character of the neighborhood –
42. Nightly rentals increase traffic; R000228
43. Citizens are feeling "invaded" and residents in the neighborhood may sell their homes if it is approved; R000228
44. Neighborhoods are not places for commercial business; R000228
45. The proposed bed and breakfast will be a "significant size", which is contrary to the rest of the neighborhood's modest homes; R000233
46. A bed and breakfast of this size belongs on a larger piece of land that is isolated or shielded from others and/or a main thoroughfare that is already impacted by vehicular traffic; R000233
47. Current zoning does not allow for commercial uses in the R2 zone as they are incompatible uses; R000233
48. The new structure may interfere with the view; R000236
49. Other residents on the street should be allowed to rent their homes on a nightly basis of the application is granted; R000236
50. Approval of the application will set a precedence for other vacant lots on Arches Drive to commercialize their properties; R000269
51. The street is a dead end where families live; R000237
52. The residents live on Arches Drive because of the zoning regulations; R000237
53. Parts of the neighborhood does not have sidewalks and thus, having low traffic is a benefit to safety; R000238
54. The bed and breakfast will reduce enjoyment of the neighborhood; R000238
55. The possibility that a bed and breakfast would bring sex offenders as lodgers; R000252
56. The neighborhood will be open to events that attract tourists to Moab; R000252
57. Heavier traffic depending on the type of guest at the bed and breakfast; R000252
58. Property values will be negatively affected in the neighborhood; R000255; 000267
59. The McElhaney's statement that it will increase values is not based on evidential research to substantiate the claim; R000255
60. Increase in noise and light pollution; R000255; 000267
61. The neighborhood is the center of children gathering for Halloween; R000269

62. Significant increase in ATV and motorcycle traffic; R000270
63. "I specifically purchased a home in a neighborhood that was quiet; not expecting it would ever have a business located within it." R000286.
64. Granting the request would set the precedence for additional bed and breakfasts in the same general neighborhood; R000288.
65. "Residential concerns should trump requests for special treatment by developers." R000294.