IN THE UTAH COURT OF APPEALS

LUCY WALLINGFORD, KILEY MILLER, JOHN RZECZYCKI, CAROL MAYER, DAVID BODNER, MEECHE BODNER, SARAH STOCK, JOSEPHINE KOVASH, individuals, LIVING RIVERS, a nonprofit corporation, Plaintiffs and Appellants, v. MOAB CITY, MOAB CITY COUNCIL; Defendants and Appellees, and THE UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION and LB MOAB LAND COMPANY LLC, Intervenor Defendants and Appellees.	**REPLY TO BRIEF OF CITY APPELLEES** Appellate Case No. 201880524-CA (**Oral Argument is Requested)**

Appeal from the Seventh Judicial District Court, Grand County, State of Utah
The Honorable Lyle R. Anderson, Seventh District Court, Civil No. 170700009

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II. THE TRIAL COURT ERRED IN HOLDING THE CITY IS IMMUNE FROM FOLLOWING THE REQUIRED PROCESSES FOR VALIDLY REACHING LEGITIMATE AND ENFORCEABLE LAND USE AGREEMENTS.

The Appellees have attempted to frame the issues in this case as purely substantive when the issues on appeal are largely procedural. Appellants do not dispute the substantive conclusion that under that Land Use Development and Management Act ("LUDMA") cities have the authority to enter into development agreements and land use agreements like the Zoning Status Agreement ("ZSA"). Appellants do not dispute the substantive conclusion that the Interlocal Cooperation Act ("ICA") authorizes interlocal agreements. Appellants do not dispute the substantive conclusion that public policy favors the settlement of disputes. But the Appellees are simply wrong when they argue that cities have some type of inherent sovereign power to settle disputes, unbounded by enabling statutes such as LUDMA and in ways that are entirely immune from public participation or administrative review. (*See* City Br. at p. 14; Intervenors' Br. at p. 23.) The City must follow the correct procedures before it can lawfully exercise its substantive power.

A. Resolutions approving municipal settlement agreements are not exempt from classification as either "legislative" or administrative."

Citing *State v. Hutchinson*, 624 P.2d 1116, 1126 (Utah 1980), the City goes so far as to say, "[i]n Utah, local governments are deemed to have independent authority, separate

from specific grants in enabling legislation, to enact local laws deemed to be in the public interest, and courts will not interfere in those local choices unless it is arbitrary or directly prohibited by other law or constitutional provisions." (City Br. at p. 14.) Citing this same inherent authority concept, Intervenors contend that resolutions approving agreements like the ZSA are simply unclassifiable—neither fish nor fowl—and are "not bound by LUDMA." (Intervenors' Br. at p. 23.)

This is simply wrong. It is beyond question "that cities have no inherent sovereign power, but only those granted by the legislature." *Call v. City of West Jordan*, 606 P.2d 217, 218 (Utah 1979) (hereafter "*Call I*"). *See also Nasfell v. Ogden City*, 122 Utah 344, 345-46, 249 P.2d 507, 508 (1952) (same). In fact, even *Utah County v. Ivie*, 2006 UT 33, 137 P.3d 797, cited by Appellees, clearly acknowledges this. *Id.* at ¶¶ 10-11, 15. And *Hutchinson* actually holds that cities have no inherent or independent powers—only those "conferred by a general welfare or general grant of power clause" in state legislation (such as Utah Code Ann. § 10-8-84). *Hutchinson*, 624 P.2d at 1123 (citing *Call I*, 606 P.2d 217 (1979) and Utah Code Ann. § 10-8-84).

Importantly, "[t]he exercise of power conferred by a general welfare or general grant of power clause ***must be exercised*** by a municipal corporation … ***through an ordinance or other form of legislative enactment***." *Id.* at 1125 (emphasis added). Hence, if Resolution 14-2017 really was a legitimate exercise of the City's *general* welfare powers, it was inherently *legislative*. This reality by no means excuses the City from the requirements of due process and public hearings. It imposes them. You simply can't have public legislation without public participation.

Contrary to the City's erroneous contention that "[i]n this context [of enacting legislation pursuant to the general welfare powers] there are no express statutory or common law rules that require local governments to engage in any particular process prior to the settlement or resolution of legal claims[,]" (City Br. at pp. 14-15), the Utah Supreme Court has made it clear that "[s]pecific grants of authority" such as those found in LUDMA "may serve to limit the ***means*** available under the general welfare clause, for some limitation may be imposed on the exercise of power by directing the use of power ***in a particular manner***." *Hutchinson*, 624 P.2d at 1126 (emphasis added).

This principle points precisely to provisions such as LUDMA Sections 509(2) ("A municipality is bound by the terms and standards of applicable land use regulations and shall comply with mandatory provisions of those regulations."), -205(1)(a) (modification of a land use ordinance requires a public hearing)[1] or -302(5)(b)(ii) and -701 (1)-(2) (administrative appeals from land use decisions are mandatory), which dictate the *means* by which a city may exercise its powers. As made clear in *Call v. City of West Jordan*, 727 P.2d 180 (Utah 1986) (hereafter "*Call II*"), by enacting LUDMA (then codified at "U.C.A., 1953, §§ 10-9-1 to -30") "the legislature has set forth specific procedures that a municipality must follow to exercise the powers granted to it[.]" *Id.* at 181.

[1] *See also* Utah Code Ann. § 10-9a-201(1) ("At a minimum, each municipality shall provide actual notice or the notice required by this part."). Also, "The [municipal] legislative body shall comply with the procedure specified in Section 10-9a-502 in preparing and adopting an amendment to a land use regulation." Utah Code Ann. § 10-9a-503(3). Utah Code Ann. § 10-9a-502(1)(b) provides, in turn, "[t]he planning commission shall[] … hold a public hearing …." *Id.* § 10-9a-502(1)(b).

Hence, the Appellees' contention that their desired *end* somehow justified their abrogation of the proper *means* simply doesn't have the legal foundation in general welfare powers they claim it has. That means Resolution 14-2017 *was* subject to both LUDMA and the MMC, which means it was either a legislative act that required planning commission review and a public hearing or an administrative act that subjected it to administrative review under the jurisdiction of the City's Appeal Authority. It's as simple as that.

Whether those processes were legislative or administrative is in dispute and for this Court to decide. But to hold that land use agreements are "not bound by LUDMA" (Intervenors' Br. at p. 23) would open up an enormous black hole that circumvents LUDMA's mandated public processes, allowing local governments to avoid the limits of both general and specific delegated powers by the mere existence of disagreements between municipalities and owners/developers. Since such disagreements are a routine, existential reality present in nearly every development project, this Court should avoid the gravitational pull of such a treacherous and unbounded vortex.

B. While the goal of settling disputes is favored, legislative action is, nonetheless, subject to public participation and administrative action is subject to public review on appeal.

The Appellants realize that local governments in Utah routinely settle land use disputes and need the flexibility to settle land use disputes. When settlement of those disputes involves the mere exchange of money and does not enact, modify or interpret a land use ordinance, the Appellants would probably agree that nothing in LUDMA or general municipal law would necessarily require a public hearing or administrative appeal. However, when the alleged settlement involves either the modification or substantive re-

interpretation of municipal land use regulations, as it did in this case, both the MMC and LUDMA expressly require planning commission review and a public hearing or, alternatively, the right for aggrieved persons to pursue an administrative appeal, depending upon whether the action is "legislative" or "administrative."

i. Legislative action is subject to public participation.

Legislative action is subject to public participation. This is because land use ordinances are presumed to be enacted for the *general* welfare, which means they inherently impact the *general* population. Logically, then, the *general* population ought to have a chance to weigh in on enactments to or modifications of *their* ordinances enacted pursuant to the *general* welfare clause. Resolving land use disputes, whether through settlement agreements or development agreements or some other means, is undoubtedly an important function of local government. But so is public participation. And where, as here, the vehicle for implementing the resolution is legislative—as admitted by the City—it must be subjected to public participation either before or after the fact.

Public participation is required prior to the exercise of any legislative power. *See Call II,* 727 P.2d at 181 (municipalities "must follow" LUDMA to exercise land use powers). "In requiring a public hearing, our legislature contemplated that interested parties would have an opportunity to give their views, pro and con, regarding a specific legislative proposal, and thereby aid the municipal government in making its land use decisions." *Id.* at 183. Agreements are also subject to public participation after they have been approved by the legislative body.

For example, Ivory Development's 2018 proposed amendment to a 2007 site development master plan for redevelopment of the Cottonwood Mall was approved by Holladay City's Resolution 2018-16, which was ultimately held to be "legislative" and thus subject to a referendum vote in *Baker v. Carlson*, 2018 UT 59, ¶¶ 5. *See also id.* at ¶¶ 15-27. Likewise, the development agreements in *Suarez v. Grand County*, 2012 UT 272, 296 P.3d 688 and *Save Beaver County v. Beaver County*, 2009 UT 8, 203 P.3d 937, were similarly held to be "legislative" and thus subject to a referendum vote.

These cases soundly rebut the Appellees' contention that land use settlement agreements or development agreements like the ZSA are immune from the processes of public participation. They also demonstrate the trial court erred by holding that Resolution 14-2017 was immune from the normal public processes merely by virtue of the fact that it resolved an alleged dispute between the City and Intervenors.

ii. Administrative action is subject to public review on appeal.

As alternatively contended by Appellants, if Resolution 14-2017 wasn't legislative it was, at the very least, an administrative interpretation—or, more accurately, a re-interpretation—of the ZSA. For example, the Utah Supreme Court recently held in *Baker* that when a city enacted a resolution granting or clarifying specific rights pursuant to an already-approved site development master plan (SDMP) *via* an amended agreement for the development of land (Amended ADL), the "Amended ADL is simply a contract between [the] parties setting forth the obligations of those parties." *Baker*, 2018 UT 59, ¶ 30. Nevertheless, this did *not* exempt the Amended ADL from classification as "administrative." To the contrary, the Supreme Court characterized this as "fundamentally

administrative." *Id.* at ¶ 38 (quoting *Krejci v. City of Saratoga Springs*, 2013 UT 74, ¶ 34, 322 P.3d 662); *see also id.* at ¶ 40.

Hence, if this Court determines that Resolution 14-2017 and the ZSA in this case is more similar to the resolution and Amended ADL in *Baker*, it should classify the City's action as "administrative." But that doesn't mean Resolution 14-2017 is immune from review, as Appellees contend. To the contrary, it means the case should be remanded to the Moab City Appeal Authority because the trial court lacked subject matter jurisdiction, as explained more fully below.

C. The ICA is inapplicable and does not trump public processes.

While the ICA gives public entities the substantive right to contract with one another, it does not exempt them from following the required processes for doing so.[2]

D. SITLA is not exempt from local land use jurisdiction.

The so-called SITLA exemption is also inapplicable and does not exempt SITLA from local land use jurisdiction. It is found in Utah Code Ann. § 10-9a-304(1), which provides as follows:

[2] Appellees' discussion of the ICA provisions authorizing waiver of "permit or fee requirements" is inapposite because Resolution 14-2017 was not a waiver of a "fee" or a "permit." It involves modification of a land use regulation or, alternatively, a land use decision. Moreover, even if the ZSA could be considered a "fee" or a "permit" the ICA provides, "an agreement made under [the ICA] does not relieve a public agency of an obligation or responsibility imposed upon it by law." Utah Code Ann. § 11-13-208(1). The ICA also requires approval of ICA agreements through the normal approval processes of local government. *See, e.g., Id.* § 11-13-202.5 (1) & -(3) ("Each agreement … shall be approved by … [t]he officer or body required … before the agreement may take effect ….").

> *Unless otherwise provided by law*, nothing contained in this chapter may be construed as giving a municipality jurisdiction over property owned by the state or the United States.

Id. (emphasis added).

However, when a "specified public agency" such as SITLA, Utah Code Ann. § 10-9a-103(53) and -(55) "intend[s] to develop its land[,]" Section 305(8)(a) of LUDMA mandates that the agency "*shall* submit to the land use authority a development plan and schedule[.]" Utah Code Ann. § 10-9a-305(8)(a) (emphasis added). Section 305(8)(a) of LUDMA is thus one of those "[u]nless otherwise provided by law" provisions referenced in Section 304(1) of LUDMA, meaning that, yes, SITLA land is generally exempt from the jurisdiction of cities "[u]nless" it decides that it "intend[s] to develop its land" in a city.

Otherwise, how else would a public agency like SITLA ever be entitled to "vest[3] in the municipality's applicable land use maps, zoning map, hookup fees, impact fees, other applicable development fees, and land use regulations in effect on the date of submission" under Section 509(4) of LUDMA if the City has no jurisdiction to begin with? *See* Utah Code Ann. § 10-9a-509(4); *see also* City Br. at p. 24, n. 13 (admitting "local government approval results in a vesting of rights").

The use of the mandatory term "shall" as well as the term "submit" in Section 305(8)(a) means that, yes, in certain instances, such as the development of land, agencies

[3] The term "vest" is a term of art in land use and references the "vested rights" doctrine, "the body of law that addresses at what point development rights 'vest' such that subsequent zoning changes cannot be retroactively applied." *Keith v. Mountain Resort Development, LLC*, 2014 UT 32, ¶30, 337 P.3d 213, 222-23 (citing *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 390-96 (Utah 1980)).

such as SITLA ***shall*** ***submit*** to the jurisdiction. The terms "shall" "submit" and "applicable" in Section 305(8)(a) and "vests" in Section 509(4) would be rendered merely superfluous or meaningless if SITLA could just say "King's X" and negate their impact at any given moment. *See Salt Lake City v. Roberts*, 2002 UT 30, ¶ 26, 44 P.3d 767, 773 ("An interpretation of statutory language that renders other parts of the statute superfluous is to be avoided."). Under Appellees' interpretation "shall" means "may." "Submit" is eviscerated and inoperative altogether as there is never any jurisdictional submission. "Applicable" is rendered "inapplicable." And "vests" means SITLA obtains enforceable rights in ordinances without having the ordinances be applicable, which is simply an absurdity.[4]

The law requires that this Court "read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters" and avoid "any interpretation which renders parts or words in a statute inoperative." *Monarrez v. Utah Dep't of Transp.*, 2016 UT 10, ¶ 11, 368 P.3d 846. The only way to interpret Section 304(1) in harmony with Sections 305(8)(a) and -509(4) and Utah Code Ann. § 63A-5-206(6)(d), in any sensible fashion is the interpretation offered by Living Rivers: "The use of state property and any improvements constructed on state property, including improvements constructed by nonstate entities, is not subject to the

[4] There is nothing in the text of LUDMA to suggest the legislature intended the "applicability" of ordinances to be a one-way street, enforceable only by the public agency with vested rights. There is also nothing in the text of LUDMA to suggest that the municipal development review process is a mere perfunctory or advisory act, which is what it would become under the Appellees' interpretation.

zoning authority of local governments," *id.*; but once a state agency decides to submit a development plan to a local jurisdiction,[5] that local jurisdiction's "land use regulations" then become "applicable" and thus capable of "vesting" under Section 509(4) of LUDMA, which is wholly consistent with the "otherwise provided by law" preamble to the exemption language found in Section 304(1).

Moreover, SITLA voluntarily waived any exemption in order to have its land annexed into the City under the Pre-Annexation Agreement.[6] Also, SITLA is leasing its land to a private developer and there is nothing in LUDMA that suggests that, even if SITLA was exempt as asserted, this exemption is transferable to the private party that will actually use, occupy and develop the land. The interpretation urged by Appellees, if adopted, would mean that all entities leasing from the state would be entitled to exemption from local land use regulations—a sweeping application of the exemption which would undoubtedly undermine the important objectives of municipal zoning.

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[5] This fact also distinguishes this case from *Kempthorne v. Blaine County*, 79 P.3d 707 (Idaho 2003), where there was no voluntary submission. The other cited case law, *County of Santa Fe v. Milagro Wireless, LLC*, 32 P.3d 214 (N.M. App. 2001), is also distinguishable on this basis and the further basis that it did not involve school trust lands but state highway and transportation department lands.

[6] As the City relents, "it is obvious that SITLA and the Developer brought the Lionsback development into the City and subjected it to City ordinances[.]" (City Br. at p. 20.) Even Intervenors now admit that SITLA can submit itself to the jurisdiction of a city so that it can have the benefits the city affords and that, in that instance, "the developer is not freed from any substantive zoning requirements." (Intervenors' Br. at p. 33; *see also*, *e.g.*, R. at 548; 559; 1955-56.)

Finally, all of this talk about SITLA is really an irrelevant diversion because, regardless of whether SITLA is or is not exempt, the reality remains that the City exercised *its* legislative or administrative powers to enter into a land use agreement with the Intervenors, which required the City to follow *its* own processes, as well as the processes outlined in LUDMA. In other words, nothing in SITLA's so-called blanket exemption from LUDMA cloaked the *City* with the same immunity from following *its* required processes, which included planning commission review of the development changes with a public hearing or, alternatively, an administrative appeal by aggrieved parties.

E. Appellants have standing to contest the unlawful ZSA.

The Appellees misframe the primary issue on appeal as a challenge by Appellants to the City's substantive decision and power to settle a dispute when Appellants' real challenge is to the illegal processes (or lack thereof) for approving the agreement.[7] They then contest Appellants' standing to make such a challenge. Ironically, the only argument being raised for the first time on appeal is the Appellees' standing argument (Intervenors' Br. at p. 23, n.8; City Br. at p. 20), which they never asserted below.

With regard to standing, Utah case law is crystal clear on this point. In *Morra v. Grand County*, 2010 UT 21, 230 P.3d 1022, the Utah Supreme Court held that, whether an

[7] For example, the City claims Appellants argued that the City should have litigated SITLA's authority to pull out of local government jurisdiction. (City Br. at p. 20.) This is simply incorrect. The pages of Appellant's brief cited by the City, pp. 43-44, don't make that assertion. Rather, they discuss the fact that the irrelevant SITLA argument was mere pretext for "[c]ollusion to avoid statutorily-required public participation." (Appellants' Br. at p. 43.) Again, Appellants aren't saying the City should have litigated. They are simply saying the City should have held a public hearing on Resolution 14-2017 or let it be reviewed on an administrative appeal by the proper appeal authority.

action is characterized as administrative or legislative, *id.* at ¶¶ 23-25, citizens have standing to challenge agreements between developers and municipalities—in that case an amended and restated development agreement that supplanted a prior development agreement approving a preliminary planned unit development and master plan agreement. *Id.* at ¶¶ 18-19. The citizens had standing because, among other things, they alleged personal impact like Appellants did in this case (R. at 68, ¶¶ 62-63).

Also, as in this case, when "it is clear that a ruling reversing the Council's decision would redress the Citizens' alleged injuries … they have standing to challenge the Council's decision …." *Morra*, 2010 UT 21 at ¶ 22. Admittedly, reversing the Council's decision in this case won't prohibit the development altogether. However, it will redress the Appellants' alleged injuries because it will stop the increase in the magnitude and impact of the development, which is the source of the Appellants' alleged injury and is sufficient to confer standing. To hold that a citizen would have to show that its desired outcome would ban development altogether is *not* the holding of *Morra*. As *Morra* makes clear, "we find their allegations of injury relating to water quality and quantity to be sufficient to confer standing." *Id.* at ¶ 17 n. 13. *Compare also id.* at ¶ 15 (citing the county version of LUDMA) *with* Utah Code Ann. § 10-9a-801 (city version of LUDMA).

F. Whether the City and SITLA bargained at arm's length and reached a "Fair Exchange" is disputed and irrelevant.

The City's claim that it bargained in good faith to reach a valid substantive agreement with the Intervenors is disputed and irrelevant. As explained below, even if the trial court's erroneous "collusion or bad faith" standard is applied, colluding to avoid public

participation is illegal and not a good faith exercise of the City's powers. As explained above, even if the ZSA was reached in good faith, Resolution 14-2017 approving it was not immune from the normal processes of municipal government dictated by LUDMA.

III. THE DISTRICT COURT ERRED IN CREATING AND APPLYING THE WRONG STANDARD OF REVIEW.

If Resolution 14-2017 was a legislative act, as the City contends, then the trial court applied the wrong standard of review. LUDMA's mandatory trial court standard of review provisions required it to evaluate whether Resolution 14-2017 was "properly enacted" in compliance with the MMC within the meaning of Utah Code Ann. § 10-9a-801(3)(a)(i), whether it was "enacted contrary to[] state or federal law" under Section 10-9a-801(3)(a)(ii)(A), *and* whether it was "consistent" with LUDMA under Section 10-9a-801(3)(a)(ii)(B).

Alternatively, if Resolution 14-2017 was an administrative land use decision under Utah Code Ann. § 10-9a-103(27) and Utah Code Ann. § 10-9a-801(3)(b), then the trial court erred in assuming subject matter jurisdiction; it erred in concluding Resolution 14-2017 was not subject to the jurisdiction of the City's Appeal Authority under Sections 302(5)(b)(ii), -701(1)-(2) and -801(1) of LUDMA and MMC §§ 17.65.080.C, -17.67.090.B, -17.72.100, and 17.72.150 (now codified as MMC § 17.72.130); and, even if the trial court properly had subject matter jurisdiction, it erred by ignoring the mandatory standard of review in LUDMA Section 801(3)(b), and by creating and then applying its own "collusion or bad faith" standard instead. (R. at 1920, ¶ 4).

Unfortunately, the trial court ignored all of these mandatory LUDMA standard of review provisions. These mandatory standards of review in LUDMA Section 801(3) (which uses the mandatory term "shall"), and the required *processes* under both the MMC and LUDMA, completely escaped the trial court, which rushed ahead to sanctify Resolution 14-2017 with its newly-crafted crown of nearly non-reviewable immunity for municipal settlement agreements, ignoring the Appellants' complaints (and the law) concerning the required processes. This was reversible error, not only because it violated the law but also because it was fundamentally unfair.

LUDMA's purpose is "to provide fundamental fairness in land use regulation[.]" Utah Code Ann. § 10-9a-102(1). By applying the new, extra-LUDMA "collusion or bad faith" standard of review for the first time in its ruling—a standard that was not even briefed by the parties—the trial court defeated this purpose in a way that took the Appellants by surprise.

Contrary to the Appellees' assertions, there was nothing in the administrative record or lower court briefing to give Appellants fair warning that this standard would be applied by the trial court. In fact, the word "collusion" doesn't appear anywhere in the entire 1985-page record until it was used at oral argument. (R. at 1954.) The phrase "bad faith" shows up for the first time in the proposed order on summary judgment. (*See* R. at 1915.) The City's response brief cites *Clayton v. Salt Lake City*, 15 Utah 2d 57, 387 P.2d 93 (1963),

which discusses a collusion or bad faith standard.[8] But this case was not cited below and was actually raised by Appellants' opening brief *on appeal*.[9]

Since this "collusion or bad faith" standard took Appellants by surprise, the only fair thing to do—if this Court concludes the standard is, in fact, legitimate and that there is presently insufficient evidence of collusion or bad faith—is to remand the case so Appellants have a fair opportunity to meet it. To this end, the Appellees' arguments (City Br. at p. 28; Intervenors' Br. at p. 27) that no discovery should or would be allowed to Appellants on remand, because "review is limited to the administrative record" under Utah Code Ann. § 10-9a-801(8)(a), make no sense. The whole point of the Appellees' neither fish-nor-fowl position (and apparently the trial court's extra-LUDMA immunity ruling) is that LUDMA doesn't apply to settlement agreements.[10] If municipal settlements and the "collusion or bad faith" standard are truly not subject to or confined by LUDMA, as

[8] The *Clayton* case is distinguishable because it did not involve a land use decision but competitive contract bidding, which invokes substantially different public policy concerns. (*See* Appellants' Br. at p. 39 n.12.)

[9] The other cases now cited by the City in an effort to support the trial court's admitted creation of a wholly-new standard for reviewing municipal settlement agreements are unhelpful and not germane because they deal with federal agencies such as the EPA or FDA and/or never actually applied the bad faith or collusion standard to municipal zoning or land use decisions.

[10] Again, Appellants question whether the ZSA is, in fact, a "settlement agreement." It's not called a settlement agreement. The words "settle" or "settlement" are nowhere to be found in the ZSA. There was no pending litigation. The agreement also has none of the hallmarks of a true settlement agreement—things such as a general release, covenants not to sue, etc.

contended, then LUDMA's Section 801(8)(a) limitation, confining district court review to the municipal record, also wouldn't apply.

Further, the trial court's holding "that the Court's review is limited to circumstances where it appears *from the record* that there's been collusion or bad faith between the parties to the agreement" (R. at 1920, ¶ 4 (emphasis added)) sets up a nearly impossible standard for parties like the Appellants to meet because it would be quite easy for parties like the Appellees to "sanitize" the administrative record, which would inevitably *not* include the kinds of private, off-record discussions and back-room maneuverings that are part and parcel to any type of truly "collusive" effort. Also, without discovery, how could parties like the Appellants ever discover "bad faith" when "bad faith" is, by definition, the very difference between another's public-facing posture and their concealed subjective intent? *See, e.g., Research-Planning, Inc. v. Bank of Utah*, 690 P.2d 1130, 1132 (Utah 1984) ("bad faith" is "defined as that which imports a dishonest purpose"); *Salt Lake County v. Butler, Crockett & Walsh Dev. Corp.,* 2018 UT App 30, ¶ 27, 297 P.3d 38, 44 ("finding of bad faith turns on a factual determination of a party's subjective intent").[11]

Finally (and alternatively), even if the "collusion or bad faith" standard is applicable, the Appellees do not dispute the clear record in this case[12] that their

[11] In reality, the "collusion or bad faith" standard should be an area where "there is no record" under LUDMA Section 801(8)(b) and, consequently, "the court may call witnesses and take evidence." Utah Code Ann. § 801(8)(b).

[12] The record shows that the Intervenors' desire to avoid a public hearing is what was "driving" the entire ZSA. The Intervenors unabashedly stated "the concern is this potential reopening of the whole thing" (R. at 532) and the City Attorney said "[t]hat's really been the main bone of contention." (R. at 558.) So, to avoid the requirement of a public hearing,

predominant motivation for entering into the ZSA was precisely to avoid any of the otherwise required public hearings, as asserted by the Appellants' opening brief. (Appellants' Br. at pp. 13-14; 42-23.) This accord to avoid statutorily-required public participation is "illegal" because it is repugnant to the very foundations of democracy and the legitimate exercise of the police power, thereby meeting the definition of "collusion", particularly when viewed through the inferential prism of the Rule 56 summary judgment standard. *City of Kansas City v. Ku*, 282 S.W.3d 23, 32 (Mo. App. W.D. 2009) ("collusion" is defined as an agreement to accomplish an illegal purpose"). *Accord Commonwealth v. Parisi*, 873 A.2d 3, 9 (Pa. Cmwlth. 2005) (quoting Black's Law Dictionary 281 (8th Ed. 2004) ("The term 'collusion' is defined as '[a]n agreement to defraud another or to do or obtain something forbidden by law.'").)

CONCLUSION

The City's admission that Resolution 14-2017 was "legislative" means the case should be remanded for a public hearing in compliance with LUDMA and the MMC. Alternatively, if it was an administrative land use decision, the case should be remanded to the Moab City Appeal Authority because the trial court lacked subject matter jurisdiction. Finally, if Resolution 14-2017 eludes classification as either "legislative" or "administrative" the case should nevertheless be remanded to the trial court to allow Appellants the chance to conduct discovery and present its case under the newly-created,

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the Appellees agreed to a process in the ZSA that eliminated all public hearings and altered the processes for approval otherwise required by law. (*See also* R. at 389, 499, 525-26, 532, 558, 1364, & 1389-90.)

extra-LUDMA "collusion or bad faith" standard of review unless this Court determines the ZSA was, in fact, collusive or entered in bad faith, in which case, complete reversal is required.

DATED this 15th day of February, 2019.

/s/ Daniel J. McDonald
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Attorneys for Plaintiffs and Appellants

CERTIFICATE OF COMPLIANCE WITH RULES 24(g)(1) AND 21(g)

I hereby represent that I prepared the Reply to Brief of City Appellees with the Microsoft Word word-processing system and, relying on the word count features of that program, hereby certify that the brief (excluding the table of contents, table of authorities, addendum, and certificates of counsel) contains less than 7,000 words and therefore complies with Utah R. App. P. 24 (g)(1). I also represent and certify pursuant to Utah R. App. P. 21 (g) that nothing in the brief or the addendum consists of non-public information.

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CERTIFICATE OF SERVICE

On the 15th day of February, 2019, I emailed the foregoing Reply to Brief of City Appellees in a searchable PDF format and I also caused two paper copies of the Reply to Brief of City Appellees to be mailed, first-class United States mail, postage prepaid, within 7 days after filing and service by email, to each of the following, who have stipulated and agreed to accept service by email:

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