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 INTERVENOR 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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I. APPELLANTS ADEQUATELY PRESERVED THE ISSUE THAT PASSAGE OF RESOLUTION 14-2017 WITHOUT A PUBLIC HEARING WAS ILLEGAL.

The Appellees complain that "Appellants did not argue[below] …that Resolution 14-2017, through which the City Council approved the ZSA, is illegal *under LUDMA* because it was a legislative, land use regulation that was not submitted to the planning commission." (Intervenors' Br. at 17 (emphasis added); City Br. at 12.) As the City admits, however, Appellants clearly "argued for a public hearing *under the Moab ordinance*." (City Br. at 14 (emphasis added).) This, alone, made passage of Resolution 14-2017 without a public hearing before the planning commission illegal under MMC § 17.65.080 and MMC § 17.65.130, as explained more fully below.[1] The issue, then, is whether this Court can or ought to consider whether *LUDMA* required planning commission review and a public hearing *in addition to* whether *the MMC* imposes the same requirements, an issue Appellees concede to have been preserved.[2]

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[1] This is because the MMC provides that "[a]mendments that change the character, basic design, building density and intensity, open space or any other requirements and conditions contained in the MPD shall not be permitted without prior review and approval by the planning commission[,]" *id.* § 17.65.130, after a public hearing, *id.* § 17.65.080 (table).

[2] *See also, e.g.,* City Br. at 12-13 (emphasis in original) ("Living Rivers' sole argument was that the Moab MPD *ordinance* compelled a classification of the Lionsback change application as a 'major change' requiring a public hearing."); Intervenors' Brief at 17 n. 2 (admitting all of the record references cited by Appellants that preserved the MMC-required hearing issue).

This Court can and should also reach the LUDMA-mandated hearing issue for three main reasons. First, whether Resolution 14-2017 was a "legislative, land use regulation" (Intervenors' Br. at 17) was placed at issue by the City in the proceedings below, both in the briefing and at oral argument. Second, Appellants *did* argue below that LUDMA (R. at 1463-64; 1974-75) required the City to follow the mandatory provisions of its own code, making the issue of whether passage of Resolution 14-2017 also violated LUDMA entirely subsumed within the issue of whether its passage violated the MMC. Third, because the MMC-required planning commission review and a public hearing requirements were admittedly argued below *and* on appeal, the trial court's failure to follow the MMC stands on its own two legs, rendering Appellees' LUDMA preservation issue moot.

A. Whether Resolution 14-2017 was a legislative land use regulation was placed at issue by the City.

Ironically, the City argued below (and on appeal) that Resolution 14-2017 was a legislative "land use decision, ordinance, or regulation" under "U.C.A § 10-9a-801(3)(a)-(b)" and therefore entitled to a presumption of validity and a more deferential standard of review. (R. at 1629; *see also* R. at 1638 & 1638 n. 10.) It not only contended that Resolution 14-2017 was "legislation" under LUDMA but also directly invoked the other provisions and purposes of LUDMA by contending, "[a] decision, ordinance, or regulation involving the exercise of legislative discretion is valid if it is reasonably debatable that the

decision promotes the ***purposes of the Utah Land Use Development and Management Act (LUDMA)***." (R. at 1629 (emphasis added).)[3]

At the summary judgment hearing, the City contended "this particular decision, the zoning status agreement[,] involved questions of [a] kind of legislative discretion, policy discretion on behalf of the City Council …." (R. at 1960-61.) Therefore, whether the decision was "legislative" and whether it "promote[d] the purposes of … (LUDMA)" was squarely placed at issue by the Appellees. (R. at 1629.) Even now, the City contends on appeal, "[t]hese judgments are truly legislative in character[.]…." (City Br. at 30.) The Appellees admit, even now, that the City's enactment of Resolution 14-2017 was essentially, if not wholly, legislative.[4]

Appellants' point is that if Appellees claimed below that passage of Resolution 14-2017 was legislative for purposes of LUDMA, how could the decision be anything *but* the type of substantive amendment that required planning commission review and a public hearing under MMC §§ 17.65.130 and -17.65.080 (table)? It can't be the one without being the other. Certainly the trial court should have considered the Appellees' argument that

[3] It should be emphasized here that the "Purposes" section of LUDMA states that one of its purposes is "to provide fundamental fairness in land use regulation[.]" Utah Code Ann. § 10-9a-102(1). As elaborated by Appellants on appeal, allowing legislative land use settlement agreements that alter or amend land use regulations to be sanctified without a public hearing clearly does not promote *this* purpose—a purpose squarely placed at issue by the City.

[4] *See, e.g.* Intervenors' Br. at 22 ("In reality the City's decision to enter into the ZSA, while involving policy considerations best considered by the legislative body, was not strictly legislative.") City Br. at 30-31 (forcefully contending that passage of Resolution 14-2017 was legislative action).

Resolution 14-2017 was "legislative" under LUDMA and then resolved the dilemma of how an act can be both "legislative" but not significant enough to be subject to the planning commission and public hearing requirements under the MMC.[5]

An issue may be raised directly or indirectly, so long as it is "raised to a level of consciousness such that the trial judge can consider it." *James v. Preston*, 746 P.2d 799, 802 (Utah Ct. App. 1987). The Appellees placed the provisions and purposes of LUDMA at issue, both directly and indirectly. The trial court erred when it ignored them.

B. The issue of whether passage of Resolution 14-2017 violated LUDMA is subsumed within the issue of whether it violated the MMC.

Admittedly, the specific planning commission and public hearing requirements of LUDMA discussed in Appellants' brief, including Utah Code Ann. § 10-9a-205(1)(a),[6]

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[5] For example, as the City now concedes on appeal:

> The ZSA here exhibits same marks of legislative action as the master plan in issue in *Baker*. The ZSA acknowledges its purpose to specify the manner in which "future land use applications concerning the property and Project would be handled by the parties." R. 0572, ZSA, subsection O. The agreement contains important substantive changes at to future review of traffic and road infrastructure concerns, operation of sanitary sewer systems, and building code applicability. *Id.* at 0573-0574 (Sections 4,5, and 7).

(City Br. at 31-32.)

Unfortunately, the trial court altogether punted on this issue and held, instead, that the resolution was completely immune to review absent violation of the trial court's newly-formulated standard for reviewing municipal settlement agreements.

[6] *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." *Id.* § 10-9a-503(3).

were not discussed in the briefing or at oral argument in the proceedings below. The Appellants' chief argument below was that *the MMC* required planning commission review and a public hearing, and LUDMA, Utah Code Ann. § 10-9a-509(2), in turn, required compliance with such mandatory provisions. Therefore, violation of the mandatory MMC provisions would also constitute a violation of LUDMA. *That* was the Appellants' well-preserved argument below.[7]

All that is newly emphasized on appeal is the LUDMA subtext explaining precisely *why and how* LUDMA Section 509(2)[8] requires mandatory compliance with the MMC's

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Section 10-9a-502(1)(b) provides, in turn, "[t]he planning commission shall[] … hold a public hearing …." *Id.* § 10-9a-502(1)(b).

[7] These issues were discussed, at length, in the Amended Complaint (R. at 71, ¶¶ 77, 81-82; 72, ¶ 85; 73, ¶ a); 124-25, ¶¶ 47-49; 127, ¶ 62; 127-28, ¶¶ 62-63; 130, ¶¶ 77-82), in the summary judgment briefing (R. at 226-27; 1442; 1454; 1460-64; 1465; 1629; 1638 & 1638 n. 10; 1885), and at oral argument (R. at 1968-69; 1972; 1974-1975). In fact, the aforementioned provision of LUDMA that "a municipality is bound by the terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances" is discussed at least a dozen times in the pleadings and summary judgment record below. (R. at 10, ¶ 58; 10, ¶ 59; 70, ¶ 74; 70, ¶ 75; 446; 1462; 1463; 1464; 1968; 1969; 1972; 1975.) The Appellants' primary request below was that the trial court issue a writ of mandamus so that the Moab City Appeal Authority could hear their appeal. (R. at 72, ¶ 1 (Prayer for Relief).) This relief was premised upon the City's decision being an administrative one. In the alternative to the writ of mandamus, the Appellants asked for a determination that Resolution No. 14-2017 approving the ZSA be reversed as illegal and passed in violation of the City's own ordinances. (R. at 73 ¶ a).) Both theories were argued, in the alternative, in opposition to summary judgment. (*See, e.g,* R. at 1441-42; 1455-56 (arguing for remand to the appeal authority);

[8] Indeed, this Court *can't* just read Utah Code Ann. § 10-9a-509(2) of LUDMA, which Appellants relied upon below, in isolation from the other provisions of LUDMA. As the Utah Supreme Court instructed in interpreting LUDMA in *Foutz v. City of South Jordan*, 2004 UT 75, 100 P.3d 117, "'We 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.'" *Id.* at ¶ 11 (quoting *Miller v. Weaver*, 2003 UT 12, ¶ 17, 66 P.3d 592 (quotation

planning commission review and public hearing requirements. Far from introducing "an entirely new theory on appeal," as Appellees contend (Intervenors' Br. at 18), the Appellants have simply clarified that, "[t]o accomplish the purposes of [LUDMA,]" Utah Code Ann. § 10-9a-102(2),[9] the City enacted MMC §§ 17.65.080 and 17.65.130, requiring planning commission review and a public hearing for all ordinance modifications because, under LUDMA, "any modification of a land use regulation" requires a "public hearing" before the planning commission preceded by "notice of the date, time, and place of the first public hearing" to consider the modification. Utah Code Ann. § 10-9a-205(1)(a). *See also* n. 6, *supra*.

Simply put, the MMC reads the way it does because LUDMA, the MMC's enabling statute, *M&S Cox Investments, LLC v. Provo City Corp.*, 2007 UT App. 315, ¶ 34, 169 P.3d 789, mandates it. "Because cities and towns derive their zoning power from the state enabling act, their local zoning ordinances must comply and be consistent with that act." *Aegis of Arizona, LLC v. Town of Marana*, 81 P.3d 1016, 1025 (Ariz. App. Div. 2 2003); *see also id.* (citing *Bateman v. City of West Bountiful*, 89 F.3d 704, 707 (10th Cir. 1996) (Utah's Municipal Land Use Code "largely mirrors Arizona's")). *See also* Utah Code Ann. § 10-9a-501(3). Also, in Utah, interpretation of an ordinance is reviewed "for correction

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and citation omitted)). When interpreting LUDMA this Court should not view sections of LUDMA "in isolation," *id.* at ¶ 11, but strive for a "construction … consistent with the apparent purpose of the statutory scheme." *Id.* at ¶ 15.

[9] These overarching "purposes of LUDMA" couldn't have escaped the trial court or the Appellees. Even the Intervenor Defendants' Motion for Summary Judgment quoted the very enabling provisions of LUDMA here. (R. at 226-27 (quoting Utah Code Ann. § 10-9a-102(2).)

of error without affording deference to the decision of the trial court[,]" *State v. Souza,* 846 P.2d 1313, 1317 (Utah Ct. App. 1993), and Utah appellate courts have traditionally looked to LUDMA to make sure appellate interpretations of municipal ordinances are consistent therewith. *See M&S Cox Investments,* 2007 UT App. 315 at ¶ 35 (quoting *Souza*, 846 P.2d at 1317)).

The MMC remains the primary text at issue. The newly-emphasized LUDMA subtext drives the primary MMC text. This reality means the planning commission and public hearing requirements of MMC §§ 17.65.080 and 17.65.130 are (and always have been) mere proxies for the parallel requirements of LUDMA that require planning commission review and a public hearing for all legislative actions modifying or amending the land use ordinances. Violation of one is thus violation of the other because one is subsumed within the other.

Further, the "preservation requirement is self-imposed and … one of prudence rather than jurisdictional[,]" *Patterson v. Patterson*, 2011 UT 68, ¶ 13, 266 P.3d 828, and courts "will address" issues "subsumed in issues … properly preserved[.]" *In re G.D.*, 61 A.3d 1031, 1036 n.3 (Pa. Super. 2013).[10] Hence, inasmuch as LUDMA is the MMC's enabling statute, inasmuch as the Utah Legislature has directed that reviewing courts must evaluate whether a land use regulation was "enacted contrary to[] state or federal law" and

[10] *See also Morgan v. Hartford Hospital*, 301 Conn. 388, 394 n. 7, 21 A.3d 451 (2011) (reviewing an issue not raised at trial because it was properly within the scope of an issue that *was* raised at the trial court); *State v. Kim*, 519 P.2d 1241, 1245 (Hawaii 1974) (objection on grounds of the confrontation clause was sufficient "to preserve for appeal the subordinate issue of 'unavailability' within the larger confrontation question").

"is consistent with [LUDMA,]" Utah Code Ann. § 10-9a-801(3)(a)(ii), and inasmuch as Utah appellate courts have traditionally looked to LUDMA to make sure appellate interpretations of municipal ordinances are consistent therewith, *see M&S Cox Investments,* 2007 UT App. 315 at ¶ 35, it would be prudent and reasonable for this Court to reverse the trial court's interpretation of the MMC (or lack thereof), which was fundamentally at odds with LUDMA.[11]

But, at the end of the day (and as more fully explained below), as the Appellants' opening brief makes, clear, Appellants' chief complaint is that "what happened in this case was not what was outlined in the MMC." (Appellants' Br. at 22; *see also id.* at p. 20 (underlining added) (**A. LUDMA <u>and the MMC</u> require a public hearing.**")

C. Because Appellants admittedly argued below that *the MCC* required planning commission review and a public hearing, the MMC argument stands on its own two legs, mooting the Appellees' preservation issue.

With all of the foregoing said, the issue of preservation is, to a certain extent, extraneous because violation of the MMC was and is the Appellants' chief complaint[12]and

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[11] At the very least, this Court should consider the Appellants' LUDMA arguments if for no other reason but to make sure that it doesn't send an unintended message to Utah municipalities and the land use bar that local ordinances can be enacted or modified in contravention of the planning commission and public hearing requirements of LUDMA, as well as the mandatory provisions of LUDMA and municipal ordinances.

[12] As clearly explained in the Appellants' opening brief, the core issue asserted by Appellants below and on appeal remains the City's violation of MMC §§ 17.65.080 and 17.65.130. As stated in Appellants' opening brief:

> To begin, what happened in this case was not what was outlined **<u>in the MMC</u>**. By the City's own admission, **<u>under MMC Chapter 17.65</u>** (Addendum – Ex. 10) any modification to the MPD required "1. review of the application for completeness and notice to the applicant of any revisions

this violation can stand on its own two feet. Whether a violation of MMC §§ 17.65.080 and 17.65.130 would *also* constitute a violation of *LUDMA's* planning commission and public hearing requirements, as additionally pointed out by the Appellants, is, as they say, "gravy."

If this Court agrees with the Appellees and feels that it cannot address or analyze whether Resolution 14-2017 was "legislative" under LUDMA and/or the LUDMA subtext subsumed within the MMC's mandatory provisions due to prudential preservation guidelines, that's fine. It doesn't change the fact that the City violated *the MMC's* planning commission and public hearing requirements, which was unequivocally argued below and on appeal. Either way, the trial court completely ignored the fact that, in implementing

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> or additional submittals; 2. staff review; 3. public hearing (advisory review) before the Planning Commission; and 4. Decision by City Council (the land use authority)." (R. at 346; Addendum – Ex. 3.) ***See also*** **MMC § 17.65.130**.
>
> The process here skipped step three and went straight to the fourth step, without review by the planning commission or a public hearing. Hence, Resolution No. 14-2017 was, itself, a *de facto* modification of MMC § 17.65.130. It essentially ratified a modification to (or **violation of) MMC § 17.65.130** because it took the Developer's Amended MPD Application in the form of the ZSA, subjected it to staff review, and then approved it in a vote by the City Council without a public hearing, completely bypassing the planning commission.
>
> **That's *not* the process outlined in MMC § 17.65.130**, which provided that any proposed "[a]mendments that change the character, basic design, building density and intensity, open space or any other requirements and conditions in the MPD shall not be permitted without prior review and approval by the planning commission." MMC § 17.65.130 (R. at 289.)

(Appellants' Br. at pp. 22-23 (bold and underlining added).) To say that Appellants have abandoned this issue is simply not accurate.

what it felt was an untouchable settlement agreement between the City and the Intervenors, the City, in fact, passed Resolution 14-2017, which, in fact, the Appellees claimed was a "legislative" action which, in fact, amended the MMC *without planning commission review or a public hearing*, and which, in fact, is a violation of the MMC—*and* LUDMA, if this Court wants to go there.

The trial court erred by allowing the king to be crowned without the public coronation required by the MMC. Even if this kingly and noble settlement agreement is as untouchable as the trial court and Appellees believe, the MMC (and sound public policy) *still* dictated that the coronation (the public hearing before the planning commission) couldn't be skipped or bypassed.

As the Appellants tried to explain to the trial court:

> The City's procedures for processing "Major Changes" to master planned developments are mandatory and require public hearings. City Code provides, "Major changes, such as alterations in structural types, in the shapes and arrangements of multiple lots and blocks, in the allocation of open space or other land uses which increase density and/or intensity of the project, in project phasing, and all other changes which significantly affect the overall design or intent of the project **shall be referred** to the land use authority…" for review, which review includes a public hearing. *See* MMC §§ 17.65.080 & 17.65.130.
>
> Given the mandatory nature of the "Major Change" review process, even in contract, the City is not free to disregard this process…. [T]he City remains bound to follow its ordinances as a public entity in the administration of public business and is not free to make land use decisions or enter into contracts in derogation of its mandatory ordinances. The City cannot abandon the procedure mandated for the approval and processing of a master planned development, even if denying the public the right to participate in government is less "risky" for SITLA and the developer. Defendants' [sic] ignore the City's obligation to comply with the mandatory provisions of its ordinances. Indeed, if a city could disregard its zoning ordinances every time it entered into a settlement agreement, developers would have no reason to

> abide by City ordinances and could effectively rewrite the duly enacted ordinances of a city, depriving citizens their voice, through entering settlement negotiations.

(R. at 1462-63.) *That* argument is, no doubt, preserved, and also asserts all of the public policies and public policy case law elaborated upon in the Appellants' opening brief, which the Appellees have largely ignored.[13]

II. "PUBLIC REVIEW" IN REGULAR CITY COUNCIL *MEETINGS* DOES NOT SATISFY PUBLIC *HEARING* REQUIREMENTS.

Appellees make a novel, no-harm-no-foul argument that essentially says a public

[13] The Appellees refuse to acknowledge or discuss the many cases from Utah and other jurisdictions showing that these types of settlement agreements are either void as against public policy or must first be subject to a public hearing before the right tribunal to vindicate the public interest. This includes *Utah Dept. of Admin. Servs. v. Public Service Comm'n*, 658 P.2d 601, 613 (Utah 1983), which held that "[t]he policy in favor of settlements applies to controversies before regulatory agencies ***so long as*** the settlement is not contrary to law and ***the public interest is safeguarded*** by review and approval by the ***appropriate*** public authority" *after* public hearings. *Id.* at 604, 606, 613-15 (emphasis added). In other words, a public interest is always present with public entity settlements.

Appellees summarily claim these cases are inapposite because they each involve "an agreement to contract away future zoning discretion or to zone by contract" (Intervenors' Br. at 21), unlike the ZSA, which simply isn't accurate. It isn't accurate because that is not what the Appellants' cited caselaw says. It also isn't accurate because the ZSA does, in fact, contract away future police powers and it does so, most onerously, by allowing review of final plats and plat amendments, (R. at 574 § 7) as well as future amendments to city approvals (R. at 574 § 8), to be determined administratively by city staff instead of going through the normal public processes that require planning commission approval after a public hearing, as discussed in Appellants' opening brief.

hearing wasn't required because the City Council had four[14] really good public *meetings*[15] where information and studies presented by the developer and "every possible issue" (except those that would have been presented by the Appellants) "was discussed and debated at length in public." (Intervenors' Br. at 19; City Br. at 23-25.) Consequently, according to Appellees, this Court should ignore the fact that these were not the MMC-required public *hearings* in the required forum (the Planning Commission), because the City Council did a really good job of vetting the public interest. In reality, the Appellees' argument is inaccurate. The public meetings were woefully inadequate to supplant the required public hearings and vindicate the public interest.

Citing pages 1348-1426 of the record, Intervenors contend "[t]he minutes from the discussions alone total 78 pages." (Intervenors' Br. at 19.) This is inaccurate on many levels. Most of the 78 cited pages are duplicative, containing both the minutes *and* the recorded transcripts of the same meetings.[16] Moreover, only 8 pages (R. 1354-57; 1373-

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[14] Three of those meetings were merely "regular" city council meetings (R. 1354-57; 1373-77; 1400), which is inadequate to satisfy the public hearing requirement under LUDMA. *See, e.g., Call v. City of West Jordan*, 727 P.2d 180, (Utah 1986) ("we hold that because the statute calls for a public hearing our legislature contemplated something more than a regular city council meeting held, so far as the record here discloses, without specific advance notice to the public that the proposed ordinance would be considered").

[15] The City, noting LUDMA's distinction between public hearings and public meetings, concedes on appeal, "The approvals of the ZSA here occurred at 'public meetings[.]'" (City Br. at 15, n.8.) The City's reference to these meetings as "hearings" on page 24 of its brief is inaccurate. (*See* City Br. at 24.) There were no hearings.

[16] R. 1348-60 are *minutes* and R. 1361-72 is a *transcript* of the same 12/13/2016 meeting; R. 1373-77 are *minutes* and R. 1378-1397 is a *transcript* of the same 2/1/2017 meeting; and R. 1398-1403 are *minutes* and R. 1404-14 is a *transcript* of the same 2/14/2017meeting.

77; 1400) of the cited minutes (R. 1348-1360; 1373-77; 1398-1403) discussed the project. The transcripts regarding the ZSA were culled from the minutes and do not contain any matters other than discussion of the ZSA. But, importantly, these transcripts reveal that, while these meetings were open to the public, there was no meaningful opportunity for the public to submit evidence or testimony on the record, either in favor or in opposition to Resolution 14-2017. Moreover, Appellees do not dispute the fact set forth in the Appellants' opening brief that no public comment or questions regarding the project were allowed until the last 10-12 minutes of the February 1, 2017, workshop meeting. (Appellants' Br. at 15-16.)

A "'[p]ublic hearing' means a hearing at which members of the public are provided a reasonable opportunity to comment on the subject of the hearing." Utah Code Ann. § 10-9a-103(45). Telling the public to essentially shut up—"that we're going to keep the conversation … for the council members for now and then … figure it out for the public" (R. at 517; 1381)—and then cramming the public down to the last 10-12 minutes of a City Council workshop meeting is not "a reasonable opportunity to comment on the subject of the hearing." Utah Code Ann. § 10-9a-103(45).

The Appellees "poo poo" the distinction between a public meeting[17] and a public hearing as largely immaterial. However, the distinction was obviously known and material

[17] In contrast to a public hearing, a public meeting merely "means a meeting that is required to be open to the public under Title 52, Chapter 4, Open and Public Meetings Act." Utah Code Ann. § 10-9a-103(46). In contrast to a hearing, there is no right to be heard at such a meeting.

enough to the Intervenors that their major impetus for entering into the ZSA was precisely to avoid any public *hearings*, as asserted by the Appellants' opening brief. (Appellants' Br. at 13-14.) This, too, is uncontested by the Appellees.

To this end, the irony of the Appellees' point about Councilmember Ershadi wanting to immediately change her vote being somewhat misplaced or irrelevant (*e.g.,* City Br. at 24 n.13) shouldn't be lost. The point is, had the Appellants been given the opportunity to present the evidence[18] it wanted to in a public hearing there is a reasonable likelihood Ms. Ershadi's swing vote would have gone the other way to begin with, thereby changing the council's decision. Thus, the Appellants suffered prejudice. *See, e.g., Potter v. South Salt*

[18] Speaking of the evidence the Appellants would have presented at a public hearing, the Appellees' essential contention is that they didn't need it because they had enough. (City Br. at 24-25.) But this sort of trust the all-wise and benevolent state to make the best decisions smacks of Stalinism, Nazism or communism more than democracy. Appellees also note "that many of the claimed impacts which Appellants argue that they wished to speak to … are not incrementally affected by the plan modification under the ZSA." (Intervenors' Br. at 20.) Besides being disputed, this is pure speculation since *we don't have the Appellants' evidence*, which is the entire point to begin with. But even taken at face value this comment—that "many" impacts are not affected—suggests that at least *some* of the claimed impacts *are* affected by the ZSA.

With regard to the evidence presented to the City Council, Intervenors cite a power point presentation (R. 897) prepared by some unidentified person, claiming the ZSA does not "circumvent the City's final platting and permitting processes going forward." (Intervernors' Br. at 21 (citing R. 897).) It is actually very troubling to think that this was part of the allegedly adequate information presented to the City Council because what the ZSA *actually* says is that "future final plats, permits and other reviews required to be undertaken by the City pursuant to the City Code" will now "occur administratively by the City Planning Department, without a requirement for a public hearing." (R. at 574 (quoting ZSA § 7).) As pointed out in the Appellants' opening brief, normal city review processes would require planning commission review and a public hearing. (*See* Appellants' Br. at 23-24 (citing MMC §§ 16.08.050; 17.65.080).) So whoever prepared this power point slide was simply wrong about the future impact of the ZSA.

Lake City, 2018 UT 21, ¶ 2, 422 P.3d 803, 804 ("we conclude that a party can establish prejudice by showing a *reasonable likelihood* that the error changed the land use authority's decision").

III. INCORPORATIONS BY REFERENCE.

Point III of the Intervenors' brief is addressed in Points II and III of the Appellants' Reply to Brief of City Appellees.

CONCLUSION

The issue of whether Resolution 14-2017 was a "legislative" "land use regulation" under LUDMA Sections 10-9a-103(29) and -801(3)(a) was squarely before the trial court. It was directly and indirectly raised by the Appellees. It was subsumed within the question of whether the MMC required planning commission review and a public hearing. LUDMA's mandatory trial court standard of review provisions required the trial court to evaluate whether Resolution 14-2017 was a "legislative" "land use regulation"[19] or an "administrative" "decision of a land use authority", as Appellants alternatively asserted.[20] Unfortunately, the trial court ignored the mandatory standard of review provisions in LUDMA, holding that Resolution 14-2017 was immune to review absent a showing of

[19] And, if so, whether it was "properly enacted" in compliance with the MMC within the meaning of Section 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).

[20] And, if "administrative" under LUDMA Sections 10-9a-103(27) and -801(3)(b), thus 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 § 17.72.130).

"collusion or bad faith between the parties to the agreement[] … to use a settlement process to completely eviscerate the ordinances" (R. at 1920, ¶ 4), a standard found nowhere in LUDMA or Utah case law.

Rather than follow the mandatory *processes* of the MMC and LUDMA, the trial court erroneously rushed ahead to sanctify Resolution 14-2017 with its newly-crafted crown of nearly non-reviewable immunity for municipal settlement agreements, completely ignoring the Appellants' complaints (and the law) concerning the required process. This was error that should be reversed. If Resolution 14-2017 was "legislative" 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, 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.

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

I hereby represent that I prepared the Reply to Brief of Intervenor Appellees with the Microsoft Word word-processing system and, relying on the word count features of that program, hereby certify that the brief (including 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 Intervenor Appellees in a searchable PDF format and I also caused two paper copies of the Reply to Brief of Intervenor 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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