

**IN THE UTAH COURT OF APPEALS**

<p>MOAB LOCAL GREEN PARTY; LIVING RIVERS; JULIANNE FITZGERALD AND NATALIE MCDOWELL,</p> <p>Petitioners/Appellants,</p> <p>v.</p> <p>CITY OF MOAB; CITY PLANNING COMMISSION and the CITY OF MOAB BOARD OF ADJUSTMENT,</p> <p>Respondents/Appellees</p> <p>MOAB LAND, LB</p> <p>Intervenor/Appellee.</p>	<p>Utah Court of Appeals No. 20100931</p> <p>District Court No. 080700176</p>
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**BRIEF OF APPELLANTS**

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Appeal from the Judgment and Order of the Seventh Judicial District, the  
Honorable Lyle Anderson, Presiding.

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Requesting Oral Argument

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## STATEMENT OF JURISDICTION

Jurisdiction is conferred by Utah Code Ann. §78-4-103(2)(j) based upon transfer from the Supreme Court.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

**Issue No. 1** Did the Moab City Board of Adjustment and District Court err when it found that there was substantial evidence supporting the approval of the Lions Back Resort Preliminary Master Plan Development in accord with the Moab City Code?

**Standard of Review** This issue is reviewed under the arbitrary and capricious standard in that the land use decision is considered valid if it is supported by substantial evidence in the record. Utah Code Ann. §10-9a-801(8)(a) and §801(3)(c).

“[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.” 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)). This determination "depends on a proper interpretation and application of the law [,which] are matters for our determination, and we accord no deference to ... the Board." Vial v. Provo City, 2009 UT App 122, ¶ 9, 210 P.3d 947 (omission in original) (internal quotation marks omitted). In interpreting the meaning of ... [o]rdinance[s], we are guided by the standard rules of statutory construction.’ ” Rogers, 2006 UT App 302, ¶ 15, 142 P.3d 554 (omission and alterations in original) (quoting Brown v.

Sandy City Bd. of Adjustment, 957 P.2d 207, 210 (Utah Ct.App.1998)).

In the land use context, an initial determination of whether the decision was legislative or administrative determines the correct standard of review. Bradley v. Payson City Corp., 70 P. 3d. 47, 50-51 (Utah 2003). While legislative decisions are reviewed under the highly deferential reasonably debatable standard administrative decisions are reviewed under the “substantial evidence” standard. Id. At 50-52. Substantial evidence is “that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.” First Nat'l Bank of Boston v. County Bd. Of Equalization, 799 P. 2d 1163, 1165 (Utah 1990). In determining whether substantial evidence supports the Board's decision we will consider all the evidence in the record, both favorable and contrary to the Board's decision." Id. at 604. A legislative decision would include the enactment of a zoning ordinance. Bradley, 70 P. 3d. At 50-51. Administrative decisions generally include a Board of Adjustment's decision. Xanthos v. Bd of Adjustment of Salt Lake City, 685 P. 2d 1032, 1034 (Utah 1984).

### **Preservation of Issue**

The above issue has been preserved through briefing in the District Court.

## **STATEMENT OF THE CASE**

### **I. Nature of the Case**

This appeal is taken from a decision of the Moab City Board of Adjustment decision approving the preliminary Master Planned Development for the Lions Back Resort. The Lions

Back Resort is a proposed mixed use resort located in a newly annexed section of Moab City. The issue on appeal is whether the administrative record demonstrates that this decision was supported by substantial evidence and was made in compliance with the land use ordinances of the Moab City Code.

## **II. Course of Proceedings**

The approval of the Lions Back Resort (“LBR”) Preliminary Master Planned Development (“MPD”) followed a series of meetings between the Moab City Planning Commission, city staff, and various development consultants for the LBR. On June 12, 2008 the Moab City Planning Commission held a meeting in which it considered Resolution 16-2008-- “A resolution recommending the conditional approval of the LBR Preliminary MPD located on property in unincorporated Grand County<sup>1</sup>.” DEF1402<sup>2</sup>. In summary, at this meeting several presentations were given, one commission member recused herself, and five proposed conditions were presented as a requirement for approval of the LBR MPD. One Planning Commission member moved to conditionally approve the Resolution for the LBR MPD subject to the satisfaction of the five conditions, and this motion prevailed by a 4-0 margin. During the regular Moab City Council meeting on July 8, 2008 conditional approval of the preliminary MPD occurred, and the MPD was approved also subject to satisfaction of the five conditions.

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<sup>1</sup> The land has since been annexed within the boundaries of Moab City pursuant to a pre-annexation agreement. DEF777-818.

<sup>2</sup> The Administrative Record is attached as a CD and each page is preceded by “DEF”. The pleadings are included in paper form in the Court of Appeals file and will be referred to with an “R” for record.

Petitioners timely appealed the approval of the LBR MPD to the appropriate appeal authority, the Moab City Board of Adjustment (“BOA”) on July 23, 2008. A hearing on the appeal was held on August 20 and 28, 2008, and shortly thereafter a resolution was drafted denying all of the petitioner's claims. A written decision was issued on September 11, 2008 summarizing the BOA's decision. R. 27.

On October 9, 2008 petitioners filed a timely petition in District Court against the City of Moab and its BOA seeking review of the approval of the LBR MPD. R. 3-25. Petitioners filed an amended petition on October 17, 2008. R. 29-51. Petitioners sought review under the Municipal Land Use, Development, and Management Act. Utah Code Ann. §10-9a-801(2)(a) (“Any person adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local land use decision is final”). On December 15, 2008, a Motion to Intervene was brought by LB Moab Land Company, LLC, the developer proponent for the LBR. R. 57. This motion was granted on January 16, 2009. R. 97. Petitioners initially filed an opening brief on September 23, 2009, the date stipulated to by all parties. R. 130-156; Stipulation R. 124. Petitioners later filed a second amended opening brief to reflect the subsequent supplementation of the record. R. 317-344. City of Moab filed its memorandum in opposition, as did Intervenor LB Moab Land Company, LLC. R. 381-416; R. 345-357. Petitioners also filed a reply brief. R. 359-369.

### **III. Deposition in District Court**

After a hearing on the motion to supplement the administrative record, extensive briefing on the merits, but no hearing on the merits, the District Court denied Petitioner's request to overturn the Moab City BOA's decision, approving the LBR Preliminary MPD. In its five-page decision, the Court stated that it considered each of Petitioners' claims, but it did not set forth the basis and evidence on which it rejected those claims. R. 419. The Court held that the City had substantially complied with the ordinances, and was not inclined to “nit-pick” for purposes of exposing any error. R. 420. In conclusion, the court held that “nothing in the record persuades this court that the approval of the LBR plat was illegal, based on arbitrary or capricious determinations or resulted from substantial failure to comply with proper processes”. R. 421.

#### **IV. Statement of Facts**

##### **A. The Lions Back Resort (LBR)**

1. The LBR is a 175 acre proposed commercial and residential luxury development located at the trailhead of the Slick Rock Trail in a newly annexed section of Moab, Utah. DEF803. The LBR is a proposed “mixed use resort” that features a hotel, meeting center, restaurant, spa, sporting facilities, housing condominium units termed “casitas,” employee housing, storage units, maintenance facilities, and open space. DEF776. Casitas would be built in various sizes including smaller club casitas, medium sized village casitas, and the larger hillside casitas. DEF699.

2. Other facilities include resort amenities such as a hotel, health club, restaurant, swimming pools, convention center, eighteen units of worker housing, and a five-six thousand square foot service station with washing bays. DEF804, 812.

3. The project area environment, including site and subsurface conditions, were analyzed in a general site assessment conducted by Buckhorn Geotech, Inc. DEF1300. The site is located on a bench above Moab City on the east side of the Moab-Spanish Valley. DEF1301. The area is said to be “well cemented” in an area of dominant features such as rounded cliffs, domes, and arches, and includes the “Lionsback”, “an undulating fin on the north edge of the property, composed of Navajo Sandstone. Many similar red-colored sandstone features stand throughout the parcel. Id.

4. LB Moab Land of Telluride, Colorado is the developer of the proposed LBR and filed its MPD Application on February 19, 2008. DEF536. This developer is the leaseholder of the property and a party to a development agreement with the state agency that owns the fee title, the State Trust Lands Administration (SITLA). DEF533; Development Agreement DEF819-835.

#### **B. The Administrative Record**

5. The Petition was originally filed on October 9, 2008. During the Spring of 2009 Petitioner's counsel made several communications to Counsel for Moab City inquiring when the administrative record would be completed and filed. Separate inquiries through email and telephone were made on February 23, 2009, March 24, 2009, and April 17, 2009 about the

status of the administrative record. R. 160. Finally, on May 15, 2009, due to the lack of response, Petitioner's counsel filed formal discovery in the form of interrogatories inquiring when the administrative record would be produced. R. 161. This prompted City of Moab and Moab Land LB to file various protective orders related to the interrogatories in June 2009. R. 104, 112. On June 29, 2009 Petitioners served notice that discovery was to be withdrawn since the City disclosed that the index of the administrative record had been completed or was close to completion, rendering the discovery moot. R. 122.

6. After the parties had conferred and stipulated to the contents of the administrative record it was filed with the District Court on September 22, 2009. This was nearly a full year after the Petition had been filed with the Court. R. 128. Also at this time the parties stipulated to a briefing schedule for the case. R. 124.

7. Pursuant to the stipulated briefing schedule and administrative record Petitioners filed its opening brief on the scheduled date. R. 130. Shortly before the respondents brief was due instead of filing their briefs on the scheduled date City of Moab filed a "status report" indicating that there were several documents inadvertently omitted from the previously submitted record. R. 157-158. City of Moab indicated that the parties would need to confer to determine the contents of the record and that the briefing should be held in abeyance while the dispute was resolved. *Id.* City of Moab filed a compact disc that contained the records that were said to have been omitted from the administrative record as it existed at the time of BOA deliberations. *Id.* Because Petitioners' counsel was scheduled to be overseas, and based on the

expressed intent of the City of Moab to supplement the record, Petitioners filed a preemptive objection. R. 159; 291-293. City of Moab formally moved to supplement the record with the records on the compact disc. R. 259-266. LB Moab Land formally offered its support to this motion. R. 279-284.

### **C. The Supplemental Administrative Record**

8. In an October 14, 2009 email, City of Moab counsel sent the parties a 49 page electronic file that comprised the first amended record. The explanation provided was that these amended records were submitted to the City as a part of the LBR application, and were a part of the record of decision, but the documents on the CD were pulled from the project file and was not forwarded to Moab counsel's office. R. 163. Various documents and maps were included, such as a preliminary street plan, preliminary grading plan, preliminary water and sanitary sewer map, and a signage and lighting plan. *Id.*

9. A second version of the proposed supplemental record was sent from City of Moab's counsel to the parties on a CD that included the previous amended portions of the administrative record "DEF01487-01515" and "DEF01516-01533". Pages 1516-1533 were entirely new documents including a Phase Preliminary Site Plan and the City of Moab Planning Resolution No. 13-2008. R. 165.

10. In support of its motion, City of Moab offered the affidavit of City of Moab City Recorder/Asst City Manager Rachel Ellison, who accepted public record requests from a representative of the petitioner, Harold Shepherd. R. 175. Miss Ellison stated that Mr.

Shepherd made several GRAMA requests for the LBR application. She testified that he only requested inspection of the materials as opposed to copies and never withheld any of the materials requested. R. 176.

11. In addition City of Moab also offered the affidavit of its Planning Director, Jeffrey Reinhart. R. 186. This affidavit describes how documents that were contained within the original BOA administrative record were inadvertently omitted from the one originally provided to the district court. *Id.* The records thought to have been offered to the administrative body but omitted from the original record given to the court were attached. R. 188-258.

12. Attached to the City of Moab's motion to supplement the record was a transcript from the BOA hearing where one representative of the developer stated that:

“Let me say there are like 34 exhibits. They range from engineering drawings, they range from architectural drawings, they range from site plans and....”. R. 268. “Open space, this is the open space drawing. It basically defines the various types of open space.” R. 269. One developer staffperson stated that we have traffic and trails and engineering drawings. R. 270. He stated that original drawings have been shown for every meeting. *Id.*

13. In addition, the City of Moab offered a memo drafted by the Architect of the developer Calvin L. Wilbourne. R. 271. The architect responded to Petitioners claims that preliminary plat standards were not met by stating that LBR Preliminary Site Plan and Site Plan-Open Space were materials submitted showing that these standards were met. *Id.* For petitioners other claims, the Architect lists other materials and application materials that were submitted.

R. 271-278. Mr. Wilbourne also offered an affidavit. R. 286-289. Mr. Wilbourne listed the drawings that he prepared for preliminary plat approval. R. 287. He stated that these materials were acknowledged to have been received by Moab City. R. 288. He also stated that the open space drawing was specifically discussed and that he had personal knowledge that documents on pages 1487-1536 were submitted to Moab City, were consistently available at all public meetings, and were available to the BOA. Id.; R. 289.

#### **D. Petitioner's Objection**

14. References to the record during the BOA hearing were non specific. For example, the site assessment for cultural and historic sites was said to be located in a “big book”. DEF463.

15. Also at the BOA hearing on the issue of designation of open space, it was stated that “not one document can have everything on it”. DEF464.

16. Confusion as to what was contained in the record occurred at the BOA hearing when Petitioner representative Harold Shepherd discussed compliance with local ordinances based on his review of the record

“All submittals made by the developer or proponent of the Lion's Back Resort Development entered on 175 acres near the head of the Slick Rock trail in Moab, Ut.....I assumed that I received in response to that again, everything submitted by the developer in relation to the preliminary plat and the development itself. So we cannot prove and I do agree that the appellants have the burden of proof in this case but we cannot prove what is not in the record and that's what our narrative says is that none of this information that the city claims is simply citing the code, none of that was in the record.....”. DEF406.

17. Later in the hearing, Mr. Shepherd stated that many records were not in the plat and were

not in the records provided to the public and it was therefore difficult for members of the public to prepare for the hearing. DEF469.

18. In response a representative from the developer stated that:

“All these documents, large scale were on exhibit and you can't--the word plat is a misnomer when you do a preliminary subdivision. I mean you can't put everything on one “plat”. When we get to the final plat all that needs to be on there will be on there but right now it's proposed many drawings, engineering, and everything that's going into this.” Id.

19. A hearing on the motion to supplement the record was requested and held on February 24, 2010 in front of the Honorable Lyle Anderson. This motion was granted by the Court at the end of the hearing.

#### **E. Archaeological and Cultural Resources**

20. An objective within the MPD process is to:

*“[p]reserve, to the greatest extent possible, the existing natural and cultural landscape features and amenities that may not otherwise be protected through conventional development”.*

Moab, Utah, City Code §17.65.010(D).

21. In reviewing a MPD, the land use authority shall determine whether:

*“The site plan accommodates and preserves any features of historic, cultural, or archaeological value”.*

Moab, Utah, City Code §17.65.030(A)(6).

*“The Significant Features Plan shall include natural and cultural features from the concept site inventory that will be protected through delineation of open space or have been integrated into the design of the MPD by other means. Areas of natural or geologic hazard shall be delineated in the Significant Features Plan”.*

Moab, Utah, City Code §17.65.100(A).

22. During the BOA hearing a member of the development team claimed there are no historically or culturally significant sites based on a site assessment. DEF463. However, there is no survey, inventory, or any other evidence in the record supporting this claim. To the contrary, a LBR “Site Inventory/Vicinity Map” identifies the lionsback sandstone fin as historic or culturally significant. DEF1511.

#### **F. Traffic, Trails, and Circulation**

23. The rule relating to Traffic, Trails, and Circulation include that:

*“The Traffic, Trails, and Circulation Plan shall incorporate the location and design features of all motorized and nonmotorized streets, trails and parking areas; including:*

- 1. Circulation of automobile traffic;*
- 2. Cross-sections of all street types;*
- 3. Emergency vehicle access areas;*
- 4. Parking areas and total number of spaces;*
- 5. Proposed trails or other pedestrian infrastructure; and*
- 6. Proposed links to off-site trails and public access areas.”*

Moab, Utah, City Code §17.65.100(C).

24. In support of this requirement, a Traffic Impact Study was drafted that analyzed impacts to the project at baseline levels and at the project implementation level at key intersections and roadways in the proposed LBR area. DEF1061. The study set forth current traffic volumes, mitigation, project description, trip generation, the effect of project conditions on existing traffic conditions, and future conditions including the primary connector to LBR, Sand Flats Road. DEF1062.

25. A “Preliminary Street Plan” includes a map that indicates the location for street design features along Sands Flat Road, such as guardrails, road shoulders, road striping, and other new road safety measures such as new signage. DEF1487. Within the Plan approximate locations of parking spaces<sup>3</sup> are depicted, the dimensions and cross sections of typical road sections, including the proposed hotel entrance, elevated road section, Sands Flat road, and a typical emergency access section. DEF1487-1490.

### **G. Trails**

26. The project area known as the “Sand Flats Area”, contains the Slickrock Bike Trail, numerous four wheel drive trails, bike trails, that are an important part of Moab's tourist economy ever since mountain biking became a popular sport in the mid 1980s. DEF1540.

27. Concerns about trail access were expressed during a public hearing by a Moab resident where the transcript states that:

“there are times right now when she cannot get across the street and that one of the beauties of this town is being able to walk and go down to the park and access the trail system, which is wonderful, and that she won't be able to do that anymore”. DEF1417  
Statement of Kris Hurlburt.

There was testimonial evidence of potential loss of access to one of the most popular mountain bike trails in the west, the Slick Rock Trail. DEF386.

28. As set forth in the Preliminary Design Guidelines, a fundamental principle guiding the

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<sup>3</sup> The Preliminary Guidelines document also states that each residence must include parking space for at least two autos in an enclosed garage. DEF705. At least two additional exterior parking spaces must be provided, no on street parking except for special events. Id. It also appears that parking and road acreage is included in a chart. DEF1515.

development of the LBR is to provide a pedestrian friendly community where all facilities are connected by pedestrian and bike trails. DEF699.

29. At the BOA hearing evidence was presented where it was stated that:

“we have presented in front of the public has been these drawings and there are plenty of trails on these drawings.” DEF461. ....[i]n other words the trails are going through the passes. That's the only place where we can have trails and then we have which is very limited...” Id. Another developer staff member explained that the trails are the sidewalks and that there would be trails coming through and going to houses. DEF466.

30. It was also explained that the there was no intent to have a map legend for trails, but that the map was only designed to show how much square footage is devoted to trails. DEF470.

On the phasing plan you could “clearly see the trails and roadways running through there”.

DEF473. “Now I have to admit that one that reduced in that-- the reduced set did not have all the trails on it”. DEF462.

31. In terms of trail design and surfacing it was unclear whether they would be gravel, paved or dirt. As one developer stated, “We've been trying to figure that out exactly.....We've been looking at various things. That will be submitted in our final plan”. DEF480-81.

32. A Lionsback Resort Preliminary Site Plan for Phasing is a topographical map that displays the proposed locations of casitas. DEF1525. The map's legend includes symbols for locating proposed sporting facilities, picnic areas, storage units, internal trail system, and other features of the resort. Id. Next to the words “trail system” there is nothing and on the map there are no trails depicted. DEF457.

33. The Lionsback Resort Preliminary Street Plan includes a connector point to the Hell's

Revenge 4x4 trail. DEF1488. A Historic Basin map also includes the location of the Hell's Revenge Trail. DEF951. The Pre Annexation Agreement also stated that this trail may be subject to relocation slightly to the south. DEF805. It will persist in its rough, natural state and will continue to be a one way road, and some arrangement will need to be made to insure its usage, and address management and maintenance. DEF809.

34. Sands Flat Road will serve as an access point for bikers utilizing Slick Rock Trail or four wheelers accessing Hells Revenge Jeep Trail. Pre-Annexation Agreement DEF805. The Developer is to explore opportunities to create other hiker/biker trail connections in addition to Sands Flat Road. Id. The Pre Annexation agreement stated that trails will be extended from the property and are expected to connect to existing trails, allowing the public to travel to and from Moab. DEF806.

35. The Traffic Impact Study references a trail project that would entail construction of a bridge over Mill Creek that would allow for bicycle traffic that currently uses Sand Flats Road. DEF1071; also see DEF481.

36. The Moab Planning Director stated that “trails throughout the development link into a connection to the approved Grand County Non-motorized Master Trails Plan. DEF1544. The Raptor Report is a predatory bird survey that describes the project area: “heavily incised roads and trails crisscross the landscape, including the steep slopes of the Lions Back and adjacent sandstone formations”. DEF1182. A Development Proposal (from the Annexation Standards Report) indicates that a public walking trail on the east side of the property will result in a

small amount of disturbance to the property. DEF803.

## **H. Grading, Drainage, and Protection of Natural Features**

37. Grading and drainage design for the proposed development must be set forth in accord with the rules for Preliminary Master Planned Developments Grading and Drainage Plan and Report. These state:

*“The grading and drainage report shall include stormwater management, erosion control, and grading plans describing the methods by which surface water, natural drainages, flooding, erosion and sedimentation loss, and hydrological hazards will be controlled during and after construction. Individual plans shall include:*

- 1. Existing topography, including elevations, and the clearly delineated location and depth of all proposed fills and cuts of finished earth surfaces, as well as any mapped floodways or FC-1 zoned areas; and*
- 2. Locations and proposed details for storm sewers, detention/retention structures, diversions, waterways, drains, culverts and other water management or erosion control measures.*
- 3. All grading and drainage plans shall demonstrate that the proposed development will result in no net increase in off-site stormwater discharge and no net increase in the base flood discharge depth, as defined in the city's flood damage prevention ordinance”.*

Moab, Utah, City Code §17.65.100(E).

38. For purposes of evaluation of a MPD the Moab City Code requires that protection of natural features be provided primarily through buffer zones:

*“In reviewing a master planned development, the land use authority shall determine whether:.....The site plan establishes, where applicable, a consciously designed buffer to sensitive natural features, including natural drainages and visually significant ridges or other landscape features included in the required site inventory”.*

Moab, Utah, City Code §17.65.030(A)(4).

39. Concerns were expressed during the BOA hearing regarding drainage effects from the

proposed development on area residents, including a Ms. Fitzgerald, who felt it was being proposed in the wrong location. DEF1419. The transcript stated:

“that when it rains up there the erosion affects her driveway because the water comes down the hill and no matter what you do up there, the water affects the subdivision down below which has been proven over the years. She stated that someone took an earth moving machine there and moved the earth around and the next year Tusher was flooded and they had to go and put in a big drainage system. She stated that anything to do up there affects her subdivision”. Id.

40. The potential for erosion and how water may drain are described including:

“concerns with erosion and concentrated runoff are the loss of soil, contribution, of sediment to the stream systems, and loss of native vegetation. Fortunately, the watersheds are small and the concentrated runoff is localized. No evidence was observed of rainfall “pour-offs” from the sandstone fin outcrops adjacent to proposed home sites. Care should be taken to minimize and phase the disturbance of the native soil and vegetation during and after construction”. DEF1304

In order to deal with these issues careful soil and water management was recommended to control drainage and disperse runoff to minimize erosion. Id. Based on the large area to be disturbed and potential for dust/increased erosion the use of a dust palliative was to be considered as a dust suppressant and erosion control . Id.; also see DEF1321.

41. A Preliminary Drainage Basin map appears to divide the property into discrete drainage basins and other drainage features are shown including storm drains and culverts. DEF1495-1497. The Preliminary Grading Plan is another map that graphically illustrates drainage features such as culverts and storm drains. DEF1490-91.

42. The Lionsback Geotech Report states that there is a drainage divide near the west central portion of the property, and that the majority from the LBR drains southeast towards the Mill

Creek Drainage. DEF1303. There are no perennial drainages but there are shallow “washes”.

Id. The area west of the drainage divide drains south toward City of Moab. Id. Some minor flooding, debris flow, and mudflow hazard is expected in the immediate vicinity of the small natural drainages on the northern portion of the property. DEF1306.

43. The Geotech Report recommended various erosion control methods, including phased construction, use of soil binders, maintaining native vegetation, and construction of lath fences. DEF1316. It also recommended that the site drainage plan, landscape, and grading plans should ensure that construction does not impede drainage. DEF1317.

44. The Conceptual Drainage Report was drafted for approval of the development at the Conceptual Planning Stage. DEF932-952. In it are descriptions of the various major basins and subbasins in the project area. DEF935-939. This Drainage Report is summarized and further calculations were deferred for the final drainage study. DEF941.

45. The “Preliminary Drainage Report” for the most part contains the same information as the Conceptual Drainage Report. DEF1186-1203. The purpose of this report is to “clarify the preliminary drainage and demonstrate how this resort development can exist without major changes to the existing storm water runoff paths or intensities”. DEF1189. A listing of all the major subbasins including the predicted path of post development storm water runoff is predicted for most if not all basins is reported. This report states that “developed flows will not have a significant impact on existing drainage”.<sup>4</sup> DEF1202. There are also basin runoff tables

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<sup>4</sup> “Small settlement basins are proposed at the inlet of all culverts under the roadway. This basin will help lower the sediment transport downstream during initial and minor storm

for storm drain/culvert analysis. DEF1215-1296.

46. The Moab City Engineer stated that peak flows would not impact the Walker Subdivision and that increases in peak flows would not be detectable. DEF1538. He also praised the erosion control plan, saying that it will stabilize existing drainages, and repair existing ones.

Id.

### **I. Landscaping**

47. Requirements for landscaping planning at the preliminary MPD stage are as follows:

*“Landscape and Irrigation Plan. The landscape plan shall show all existing and proposed landscaping, planting details, and irrigation. The plan shall include information such as the total number of existing trees on-site, the trees to be removed, trees to be planted on-site, and a plant list that indicates plant quantity, spacing, size, and root type. The landscape plan shall be prepared by a licensed landscape architect”.*

Moab, Utah, City Code §17.65.100(F).

48. A Landscape Zone Diagram depicts the landscaping features in various areas of the development such as the open space, private space, and transitional space. DEF1526. Also included are graphics indicating erosion control measures and path lighting. DEF1527-1528.

49. There is also a Planting Plan, Water Zone and Lighting Plan that describes various methods to control erosion while the landscape is established and construction disturbance ends.

DEF1516-17. General plant guidelines for open spaces, transitional spaces, private

landscaping, and active recreation areas are described. Revegetation guidelines and planting

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events. A typical swale transition at the culvert inlet in the appendix section of this report.” DEF1202. Also, the Lionsback Preliminary Guidelines states that the goal is minimum disruption to adjoining lots from drainage control measures although liability from excess drainage from lot to lot is said to be the responsibility of individual lot owners. DEF 705.

suggestions are also provided. DEF1518-1524.

50. The Openspace Approved and Prohibited Plant list appears as an appendix to the

Lionsback Preliminary Guidelines.<sup>5</sup> DEF739-771, 744.

## **J. Covenants, Code, and Restrictions**

51. At the Preliminary MPD stage there is a Covenants, Code and Restrictions requirement:

*“An MPD shall submit a proposed set of codes, covenants and restrictions which shall be recorded following approval of their content and the approval of the final MPD. Covenants shall demonstrate compliance with the use restrictions, architectural plans, and attributes of the development, and shall provide a mechanism for enforcement of restrictions, as well as provisions for the ownership and maintenance of common areas, open space, and other project improvements”.*

Moab, Utah, City Code §17.65.100(K).

52. During the BOA hearing it was indicated that covenants, code, and restrictions would be submitted during the final phase. “We showed you where the open space is and as part of the final plan submission per the code sets of covenants, conditions and restrictions that will deal with how theres open space protected and preserved”. DEF463.

53. Instead of a Codes, Covenants, and Restrictions there is a “Preliminary Design Guidelines” document that describes the general philosophy of the development, has site development information, landscape guidelines, architectural design, lighting, construction regulations, and design review and approval processes. DEF696-737.

54. These Preliminary Design Guidelines specify that “in addition to these guidelines, each

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<sup>5</sup> Included as approved plants are trees, shrubs, forbes and perennials, grasses, yuccas, and cacti. Id. Approved and prohibited plants are segregated by plants appropriate in open space, transitional space, and private space.

owner must comply with the covenants, conditions, and restrictions contained in the Declaration....”. DEF730.

## **K. Subdivisions**

55. Ordinances relating specifically to subdivisions include the requirement under chapter 16 of the Moab City Code:

*“Before dividing any tract of land into two or more lots, a subdivider shall:  
A. Prior to or coincident with the submission of the preliminary plat, file with the zoning administrator a completed subdivision information form or forms to be furnished by the zoning administrator;  
B. File with the zoning administrator for examination and subsequent approval or disapproval by the planning commission, after a public hearing noticed according to the Utah State Code 10-9a-207 eight black and white prints of the preliminary plat prepared in conformance with the provisions of this title. Prints shall be filed at least fifteen days prior to the planning commission meeting at which time the plat may be considered, and shall be accompanied by a filing fee in conformance.....”*

Moab, Utah, City Code §16.08.010(A).

56. The proposed development would subdivide the property into separately platted lots, however none of the requirements from this chapter were fulfilled based on the presumption that only the requirements from Chapter 17 of the Moab City Code applied. DEF1460.

57. The proposed LBR is also subject to chapter 17.65 of the Master Planned Development regulations, which states:

*“The master planned development review process is intended to provide a means of consolidating various reviews for large scale projects into a single master plan application and review. A master planned development that has an approved preliminary development plan shall only be required to complete a final plat or site plan review for individual phases or portions of the development. Any master planned development without phasing shall complete a final development plan review”.*

Moab, Utah, City Code §17.65.080.

On the issue of conflicts within the City Code the Moab City Code states that:

“Conflicts. When provisions within this chapter expressly allow for a deviation from an existing city code, all provisions herein shall apply”.

Moab, Utah, City Code §17.65.020(F).

“.....Except as specifically herein provided, it is not intended by the adoption of this title to repeal, abrogate, annul or in any way to impair or interfere with any existing provisions of law or ordinance, or any rules, regulations or permits previously adopted or issued or which shall be adopted or issued pursuant to law relating to the erection, construction, establishment, moving, alteration or enlargement of any building or improvement.....”

Moab, Utah, City Code §17.03.040.

58. In accord with a pre-annexation agreement<sup>6</sup> SITLA, the fee title owner, and LB Moab

Land Company annexed the land proposed for development before preliminary planning on the LBR occurred. DEF776-791.

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6 The agreement covers many of the specific details regarding the proposed development, including water, utilities, roads and parking as several examples. *Id.* Several of the recitals relate to subdivision regulation including:

“....the City agrees in good faith to undertake the necessary and proper processes, public notices, notifications, and public hearings required by the City of Moab Code in order to determine whether to approve the Lionsback Resort Land Use Entitlements, to annex, zone, subdivide, and preserve the Property as applied for and in accordance with this Agreement”. DEF778.

“The parties agree to process the applications for MPD and final subdivision approvals and the granting of vested property right for the property associated therewith”. DEF779.

“Upon annexation of the property, MPD approval and subdivision plan approval of the project, those portions of land indicated on the Lionsback Resort Concept Plan as “Open Space” shall be dedicated as deed restricted open space, yards or trails”. DEF782.

## SUMMARY OF ARGUMENT

Petitioners seek appellate review based on the previous BOA decision that concluded that the LBR conditions for approval had been met. The administrative record for the LBR frequently does not provide the information required under pertinent provisions of the Moab City Code. While the record frequently mentions these issues, there is no substantial evidence in the record that many of the specific requirements from the Code were met. Accordingly, in ruling on a petition for review of the BOA's decision, the District Court never cited where in the record these requirements were met, and applied the wrong standard--concluding that they had substantially complied with the ordinances at issue. The actual standard of review to be applied is that there be substantial evidence supporting the land use decision.

The Municipal Land Use and Development Act includes unambiguous language that compliance must be shown by substantial evidence. The District Court, in its ruling found that coming close to compliance—that “substantially complying” with the ordinances is sufficient. This is not the law. For many of the various requirements it would be difficult even to show substantial compliance given that there is no evidence in the record that archaeological and cultural resources were protected. There is no evidence in the record that requirements related to the location and design features of trails, certain landscaping provisions, or the presence of a covenants, restrictions, and codes were met. For other ordinance requirements, notably drainage and grading the record supports the conclusion that the applicant only partially complied. Rules relating to proof that there would be no increase in off site stormwater runoff

has not been shown by substantial evidence.

In addition, the submission of this development application proposed to subdivide land, and would have triggered ordinances for subdivision under chapter sixteen of the City Code. Chapter seventeen states that the MPD process is designed to be all encompassing, but does not specifically exclude subdivision approval since this is to occur before the preliminary plat stage or at the same time.

## **ARGUMENT**

### **I. Moab City and the District Court Approved the Lions Back Resort MPD without substantial evidence indicating that Preliminary MPD requirements had been met.**

Petitioners first sought judicial and now appellate review to challenge the BOA's legal conclusions that many of the requirements under the Preliminary MPD ordinances were met. Under any interpretation of the applicable standard of review, a land use decision can only be upheld if there is “substantial evidence” in the record supporting that decision. Utah Code Ann. §10-9a-801(8)(a). This means that there at least should be some evidence supporting that the determinations that individual requirements have been met. In the case at hand, for some requirements, there is a complete lack of evidence in the record that supports the determinations that many of the ordinance requirements have been met.

Although this Court's review of the land use decision at hand is de novo it is instructive to look at the District Court's decision due to its application of the incorrect standard of review. Instead of determination of whether the individual requirements were supported by substantial

evidence in the record, the District Court relied on a markedly different standard, the “substantial compliance” standard—a standard that has no application to the situation at hand.

“The district court's use of the substantial compliance doctrine in the face of ordinances that are expressly mandatory was erroneous. While substantial compliance with matters in which a municipality has discretion may indeed suffice, it does not when the municipality itself has legislatively removed any such discretion. The fundamental consideration in interpreting legislation, whether at the state or local level, is legislative intent. See Board of Educ. v. Salt Lake County, 659 P.2d 1030, 1030 (Utah 1983). Application of the substantial compliance doctrine where the ordinances at issue are explicitly mandatory contravenes the unmistakable intent of those ordinances”.

Springville Citizens v. City of Springville, 979 P.2d 332, ¶29 (Utah 1999).

Under the statute that provides for judicial review it states that “a determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, a statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted”. Utah Code Ann. §10-9a-801(3)(d). Clearly the statutory scheme that allows for judicial review contemplates determination of whether a land use decision violates an ordinance. Independent from state law requirements that land use decisions must comply with local land use ordinances, the Moab City Code also requires compliance with the relevant ordinances: “In reviewing a master planned development, the land use authority shall determine whether: 1. The site plan satisfies the requirements pursuant to this and all other applicable ordinances.” Moab, Utah, City Code §17.65.030(A)(1). The requirement that local zoning ordinances are in fact binding is derived from the state's police power. It is established that an owner of property holds it subject to zoning ordinances enacted pursuant to a state's police

power. Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), Western Land Equities, Inc. v. City of Logan, 617 P. 2d 388 (Utah 1980).

**A. No Significant Features Plan or Site Assessment Indicates whether Archaeological and Cultural Resources were Preserved**

The key provisions of the City's Preliminary MPD rules establish that developments that proceed under this section are to accommodate and protect natural, archaeological, and cultural resources. First, the MPD rules require that developments “[p]reserve, to the greatest extent possible, the existing natural and cultural landscape features and amenities that may not otherwise be protected through conventional development”. Moab, Utah, City Code §17.65.010(D).

Second, in reviewing a MPD, the land use authority shall determine whether “[t]he site plan accommodates and preserves any features of historic, cultural, or archaeological value”. Moab, Utah, City Code §17.65.030(A)(6). The land use authority must also review the Significant Features Plan and determine that it meets the requirements of §17.65.100.

*“The Significant Features Plan shall include natural and cultural features from the concept site inventory that will be protected through delineation of open space or have been integrated into the design of the MPD by other means. Areas of natural or geologic hazard shall be delineated in the Significant Features Plan”.* Moab, Utah, City Code §17.65.100(A)(1).

The record does not establish that a Significant Features Plan exists or that any site plan accommodates and preserves historic, cultural, or archaeological resources. Respondents have claimed this is because none of said resources exist and during the BOA hearing referenced a

site plan that presumably supports the non-existence of these resources. DEF463. A representative from the development team stated that a site assessment in a “big book” shows this, however this does not appear in the record that is before this court, and is therefore arbitrary. Moreover, if there is no site plan, or no information that might be viewed collectively as constituting a site plan there is no basis or substantial evidence supporting a determination that no resources exist, and this determination is therefore arbitrary and capricious. The statement is otherwise in conflict with the record that shows that archaeological resources do actually exist in the project area. A Site Inventory/Vicinity Map identifies the “lionsback sandstone fin” as a historically and culturally significant feature. DEF1511.

**B. There is an Absence of Evidence Supporting Several of the Provisions for Traffic, Trails, and Circulation**

Moab, Utah, City Code §17.65.100 requires the preparation of a “Traffic, Trails, and Circulation Plan”. Under the ordinance this plan:

*“[s]hall incorporate the location and design features of all motorized and nonmotorized streets, trails and parking areas; including:*

- 1. Circulation of automobile traffic;*
- 2. Cross-sections of all street types;*
- 3. Emergency vehicle access areas;*
- 4. Parking areas and total number of spaces;*
- 5. Proposed trails or other pedestrian infrastructure; and*
- 6. Proposed links to off-site trails and public access areas.”*

Moab, Utah, City Code 17.65.100(C); See Springville Citizens, 979 P.2d at 337 (word "shall" in city ordinance was mandatory; district court's use of "substantial compliance doctrine" was erroneous). The preparation of this specific plan never occurred. However, even if the

documents that approximately relate to these issues is deemed to constitute the required plan under the rule, the requirements still have not been met since the information needed for each element is either missing or is inadequate.

The first requirement, circulation of auto traffic, is not addressed by any of these materials. The proposed development map displays streets that meander and curve in many different directions, as opposed to a grid system, but no indication is included in the plan that shows how and in which direction autos are proposed to move through the development.

DEF1487.

Secondly, with regard to the parking aspect of the required plan, the map indicates only where proposed parking is approximately located, but does not state the number of spaces to be provided or the design features of the parking areas as required. *Id.* This is important since the zoning regulations generally establish the minimum number of parking spaces within various zoning designations. Moab, Utah, City Code §17.09.220. The failure to provide this information makes it impossible to determine compliance with the parking requirements set forth in the ordinance.

On the issue of trails there is a high level of public concern about continued access to public trails since this area is considered a premiere area for off-road trails, including the Slick Rock Trail, a world renowned mountain bike trail. Yet the map that most closely resembles the required Traffic, Trails, and Circulation Plan fails to show where this trail and many other trails are located. The project area is one that includes many different types of trails including along

the slopes of Lions Back, the Hells Revenge Jeep Trail, and other trails that link to Moab City. The Pre-Annexation Agreement stated the Hells Revenge Trail may be relocated and other construction of a new bridge and bike trail would be included as a part of the project. DEF1071; 805. However, the record or record maps do not include any of the locational or design feature information about these trails as required.

The relevant maps do not include the most fundamental information about these trails—where these trails are located. The Phasing Plan map legend includes a blank space for “internal trail system” although there is no trail system display on the map. DEF1525. It was explained during the BOA hearing that the maps were not intended to show the trails or to have a legend for purposes of showing the trails. DEF470. In addition, although there is one map that indicates access to the Hells Revenge trail there are a number of other public trails where there is no indication as to where these trails are located or how they are accessed. The ordinance also makes it clear that the trail design features are to be included in the report. (“[s]hall incorporate the location and design features of all motorized and nonmotorized streets, trails and parking areas). Moab, Utah, City Code §17.65.100(C). However, representatives from the developers stated they would not make a final decision on trail design or surface until the final MPD stage. DEF480-81.

Petitioners have made considerable efforts in marshaling all evidence relevant to the issue of trails, traffic, and circulation aspects of the proposed development. The record includes information that roughly relates to these issues in many different parts of the record

instead of one report as is mandated in the Ordinances. §17.65.100(C)(“The Traffic, Trails, and Circulation Plan shall incorporate the location and design.....”). In addition to the failure to compile a report that comprehensively deals with this issue, the requirements for Traffic, Trails, and Circulation have not been met upon close inspection of many different parts of the record that roughly relate to this issue.

**C. The Limitation of Stormwater Drainage from the Proposed Development and other Related Requirements have not been Shown by Substantial Evidence**

The effects of the development on area drainage is also an area of high public concern since the development has potential effects on area public and private lands. Supra ¶35. Although there are documents in the record that discuss and analyze drainage and grading, these fail to set forth the information required by City Ordinances. The City's ordinance has very specific requirements in terms of control of and protection from increased drainage originating from developments.

“Individual plans shall include: Existing topography, including elevations, and the clearly delineated location and depth of all proposed fills and cuts of finished earth surfaces, as well as any mapped floodways or FC-1 zoned areas”;  
“[a]nd all grading and drainage plans shall demonstrate that the proposed development will result in no net increase in off-site stormwater discharge and no net increase in the base flood discharge depth, as defined in the city's flood damage prevention ordinance”.

Moab, Utah, City Code §17.65.100(E).

The record failed to provide evidence for concluding that the requirements relating to the clearly delineated location and depth of all proposed fills and cuts including mapped floodways had been met. The same can be said for record evidence supporting no net increase in off site

stormwater discharge. These are the most notable deficiencies since the record provides no basis that these requirements were met.

While there are proposals and draft declarations that various methods will be utilized to capture and control excess drainage the proposals are non specific as to when they would be applied. For instance the record states that phased development would be one mitigation measure so that native vegetation is not harmed to a great degree. “Care should be taken to minimize and phase the disturbance of the native soil and vegetation during and after construction”. DEF1304. The ordinance requires a very specific plan as to how drainage problems will be alleviated both “before and after construction”. Moab, Utah, City Code §17.65.100(E) (“The grading and drainage report shall include stormwater management, erosion control, and grading plans describing the methods by which surface water, natural drainages, flooding, erosion and sedimentation loss, and hydrological hazards will be controlled during and after construction...”).

A separate document on landscaping appears to be geared towards preventing runoff and erosion through various landscaping techniques. DEF1515-1524. However, the timing of these methods is never discussed since the landscaping report defers to other required plans for assurance that drainage would not be affected.<sup>7</sup> No single document in the record makes it clear how drainage is to prevent any net increase in drainage from the development both before

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<sup>7</sup> Various erosion control methods are discussed including phased construction, use of soil binders, maintaining native vegetation, and lath fences. DEF1316. It was also recommended that the site drainage plan, landscape, and grading plans should ensure that construction does not impede drainage. DEF1317.

and after construction, instead there are vague recommendations on how drainage is proposed to be limited, but without specificity as to timing.

The record does not indicate how the standard for preventing an increase in runoff was met. DEF1202. Rather, the record states that “developed flows will not have a significant impact on existing drainage”. R. 1202. The record therefore entirely fails to address the relevant standard. The second part of this ordinance, requiring prevention of any increase in base flood discharge, is wholly unaddressed in the record. In fact, the city's flood damage ordinance is never cited in the record.<sup>8</sup>

Lastly, this ordinance requires that the applicable plan include “existing topography, including elevations, and the clearly delineated location and depth of all proposed fills and cuts of finished earth surfaces....”. Moab, Utah, City Code §17.65.100(E). There are no application materials that fulfill this individual requirement delineating location and depth of proposed fills and cuts. The city therefore entirely disregarded this unambiguous requirement of the ordinance.

#### **D. Required Information for Landscaping was not Provided**

With regard to the landscaping aspect of the proposed development the record contains reports and other information relating to the general need for landscaping, however the specific landscaping directives from the code were not met. First, the Moab City Code requires the

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<sup>8</sup> “no net increase in the base flood discharge depth, as defined in the city's flood damage prevention ordinance”. Moab, Utah, City Code §17.65.100(E).

Landscaping Plan to be a singular document<sup>9</sup>, but in this case there are a variety of different documents that relate to landscaping, and the individual plans do not clearly demonstrate their purpose. For instance, the Landscape Zone Diagram, indicates which plants will be utilized in various types of lands within the proposed development, however the diagram says nothing about the total number of trees on site, which trees will be removed, and a plant list that indicates plant quantity, spacing, size and root type as the ordinances requires. Moab, Utah, City Code 17.65.100(F).

Additionally the Appendix A Plant list in the Lionsback Preliminary Guidelines lists many plants providing the latin name, its origin, the water use, and fauna that feed on the listed plants. DEF739-771, 744. Again, what the ordinance actually requires is that “*the plan shall include information such as the total number of existing trees on-site, the trees to be removed, trees to be planted on-site, and a plant list that indicates plant quantity, spacing, size, and root type....*”. Moab, Utah, City Code §17.65.100(F). The record in this case does not include the required information for landscaping. Therefore, even if the different submittals are considered to meet the plan requirement the documents still fail to provide required landscaping information.

#### **E. Covenant, Code, and Restrictions do not Exist**

The Covenant, Code, and Restrictions (CC&R) requirement applies at the preliminary stage:

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<sup>9</sup> “The landscape plan shall show all existing and proposed landscaping, planting details, and irrigation”. Moab, Utah, City Code §17.65.100(F).

*An MPD shall submit a proposed set of codes, covenants and restrictions which shall be recorded following approval of their content and the approval of the final MPD. Covenants shall demonstrate compliance with the use restrictions, architectural plans, and attributes of the development, and shall provide a mechanism for enforcement of restrictions, as well as provisions for the ownership and maintenance of common areas, open space, and other project improvements”.*

Moab, Utah, City Code §17.65.100(K).

The Preliminary Guidelines do not fulfill this requirement since guidelines implies a different set of legal obligations than a covenant, code, and restriction<sup>10</sup>. The guidelines itself make it clear that they were intended to constitute another layer of rules in addition to the CC&Rs.

These Preliminary Design Guidelines specify that “in addition to these guidelines, each owner must comply with the covenants, conditions, and restrictions contained in the Declaration....”.

DEF730. In short, the failure to include the CC&Rs constitutes a plain failure to comply with City Code 17.65.100(K). Since there are no CC&Rs in the record it cannot be shown by substantial evidence that this requirement was met.

#### **F. The Subdivision Ordinances Apply to the Development**

Although there appears to be no disagreement that the proposed LBR is in fact a proposed subdivision there is disagreement as to whether the MPD regulations would exclusively control in this situation. Respondents have maintained they have no obligation to

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<sup>10</sup> A covenant is a “[p]romise to or undertake in a covenant; to agree formally”. Black's Law Dictionary 421, (9th Ed., 2009). A code is a “[c]omplete system of positive law, carefully arranged and officially promulgated; a systematic collection or revision of laws, rules or regulations <the Uniform Commercial Code>.” Id. 292. Guidelines are not defined in Black's Dictionary but are defined as a “[s]tandard or principle by which to make a judgment or determine a a policy or course of action” in Webster's Dictionary. Webster's New World Dictionary 599 (3<sup>rd</sup> Ed., 1988).

comply with any subdivision ordinances in chapter 16 of the Moab Code since the MPD ordinances at chapter 17 state “the master planned development review process is intended to provide a means of consolidating various reviews for large scale projects into a single master plan application and review”. Moab, Utah, City Code §17.65.080. In fact, however, Chapter 16, the subdivision ordinances, do not apply in the alternative to Chapter 17 but are consistent with, and apply in addition to, the requirements of Chapter 17. The subdivision ordinance is an additional requirement that does not conflict with the MPD requirements in chapter seventeen since the subdivision requirements occur when an area of land is first divided, and occurs before the submission of a preliminary plat or at the same time.

“Before dividing any tract of land into two or more lots, a subdivider shall: A. Prior to or coincident with the submission of the preliminary plat, file file with the zoning administrator a completed subdivision information form or forms to be furnished by the zoning administrator.

Moab, Utah, City Code §16.08.010(A).

Furthermore there is no evidence that the provisions of chapter 17 supplanted the requirements of Chapter 16 since they do not expressly state that the subdivision requirements would not apply. Moab, Utah, City Code §17.65.020(F). (“When provisions within this chapter expressly allow for a deviation from an existing city code, all provisions herein shall apply”). Though respondents have claimed that there was never any intent to comply with the subdivision ordinances since they have consistently asserted that only the MPD rules applied, this was not the expressed intent within the pre-annexation agreement. This agreement

includes language that it was the intent that the subdivision approvals were to apply to the approval process for the LBR. The agreement and the annexation was necessary in this case, so that the LBR would be within the boundaries of Moab City, and have jurisdiction over this development. The agreement states in part that: “the parties agree to process the applications for MPD and final subdivision approvals and the granting of vested property right for the property associated therewith”. DEF779. This agreement provides clarity in this situation, that the subdivision approval process was to apply.

### **CONCLUSION**

The foregoing presents a comprehensive assessment of the individual failures of the LBR MPD application package. The record was thoroughly analyzed and the various shortcomings were identified according to an analysis of the relevant evidence. Substantial evidence does not exist in support of this application package and therefore a remand is requested to remedy the errors identified.

DATED this 1<sup>st</sup> day of April 2011

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Joel Ban  
Counsel for Appellants/Petitioners

**CERTIFICATE OF SERVICE**

I hereby certify that I caused two true and correct copies of the foregoing to be served by the method indicated below this 1<sup>st</sup> day of April, 2011, to the following:

<input type="checkbox"/> HAND DELIVERY <input type="checkbox"/> U.S. MAIL <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> FAX TRANSMISSION <input type="checkbox"/> E-MAIL TRANSMISSION		Jody K Burnett Williams & Hunt Attorney for LB Moab Land Company, LLC 257 E. 200 S. Ste. 500 PO Box 45678 SLC, Ut. 84145-5678
<input type="checkbox"/> HAND DELIVERY <input type="checkbox"/> U.S. MAIL <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> FAX TRANSMISSION <input type="checkbox"/> E-MAIL TRANSMISSION		Christopher G. McAnany Attorney for Moab City Dufford, Waldeck, Milburn & Krohn, LLP 744 Horizon Court, Ste. 300 Grand Junction, Co. 81506

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