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**IN THE SEVENTH DISTRICT COURT, GRAND COUNTY
STATE OF UTAH**

LUCY WALLINGFORD, KILEY MILLER,
JOHN RZECZYCKI, CAROL MAYER,
DAVID BODNER, MEECHE BODNER,
SARAH STOCK, JOSEPHINE KOVASH,
individuals, LIVING RIVERS, a nonprofit
corporation,

Plaintiffs,

v.

MOAB CITY, MOAB CITY COUNCIL,

Defendant.

**COMPLAINT AND PETITION FOR
REVIEW
(Tier 2)**

Case No. _____

Judge _____

Plaintiffs Lucy Wallingford, Kiley Miller, John Rzczycki, Carol Mayer, David Bodner, Meeche Bodner, Sarah Stock, Josephine Kovash, and Living Rivers (collectively “**Plaintiffs**”) for their claims against Defendants Moab City and Moab City Council and in petition of an administrative decision by the Moab City Council allege and complain as follows:

INTRODUCTION

1. This action seeks declaratory relief pursuant to the Municipal Land Use, Development and Management Act (“**LUDMA**”), Utah Code Annotated § 10-9a-101 *et seq.*

2. The basis for this action is the Defendants’ arbitrary, capricious, and illegal decision on February 28, 2017 by the Moab City Council approving a resolution to enter into a Zoning

Status Agreement regarding the Lionsback Development which illegally, and in disregard to Moab's Ordinances, and the advice of its attorney, classifies changes and amendments to the Master Planned Development ("MPD") as a "minor change" when the changes are actually "major changes" as defined by Moab City Ordinance, thereby denying the public and specifically the Plaintiffs the right to participate in public hearings on the changes, a right they are entitled to for any "major change" which the proposed changes certainly are given the nature and character of the changes.

3. Such amendments and changes include nearly doubling the square footage of the hotel and more than doubling the parking.

PARTIES

4. Plaintiff Lucy Wallingford is a real property owner, taxpayer, resident of Moab, and an owner of Utah Water Right No. 05-2283, whose property and point of diversion are less than one mile away from the Lionsback Development.

5. Plaintiff Kiley Miller is a real property owner, taxpayer, and resident of Moab whose property is located less than one mile away from the Lionsback Development.

6. Plaintiff John Rzeczycki is a real property owner, taxpayer, and resident of Moab whose property is located less than one mile away from the Lionsback Development.

7. Plaintiff Carol Mayer is a real property owner, taxpayer, and resident of Moab whose property is located less than one mile away from the Lionsback Development.

8. Plaintiff David Bodner is a real property owner, taxpayer, and resident of Moab whose property is located less than one mile away from the Lionsback Development.

9. Plaintiff Meeche Bodner is a real property owner, taxpayer, and resident of Moab whose property is located less than one mile away from the Lionsback Development.

10. Plaintiff Sarah Stock is a real property owner, taxpayer, and resident of Moab whose property is located less than one mile away from the Lionsback Development.

11. Plaintiff Josephine Kovash is a real property owner, taxpayer, and resident of Moab whose property is located less than one mile away from the Lionsback Development.

12. Plaintiff Living Rivers is a nonprofit corporation whose members have been and will be adversely affected by Moab's actions.

13. Defendant Moab City ("**Moab**" or "**City**") is a political subdivision of the State of Utah.

14. Defendant Moab City Council is the legislative body of the City.

ADMINISTRATIVE EXHAUSTION

15. Plaintiffs have made reasonable efforts to exhaust their administrative remedies by filing an appeal of Resolution No. 14-2017 with the Moab City Appeal Authority.

16. Moab's ordinances are ambiguous regarding the appeal authority for land use determinations and uncertainty exists as to the proper body to which an appeal of the City Council's decision relating to a land use determination.

17. This Complaint has been filed in a good faith attempt to timely comply with the requirement that a petition for judicial review be filed within 30 days of the City's final decision on this matter.

JURISDICTION AND VENUE

18. This Court has jurisdiction over the causes of action in this case under Utah Code Ann. § 78A-5-102.

19. Venue is proper in this Court pursuant to Utah Code Ann. § 78B-3-307.

20. Pursuant to Rule 8 of the Utah Rules of Civil Procedure, this is a Tier 2 discovery case, as defined by Rule 26(c)(5) of the Utah Rules of Civil Procedure, because the Plaintiffs seek non-monetary relief.

GENERAL ALLEGATIONS

21. The original approval of the Lionsback Resort's ("**Lionsback**"), Preliminary Master Planned Development ("**MPD**") followed a series of meetings between the Moab City Planning Commission, city staff, and various development consultants for Lionsback.

22. The Lionsback development is a project by LB Moab Land Company, LLC ("**LB Moab**") involving the State Institutional Lands Trust Administration ("**SITLA**").

23. 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 Lionsback Preliminary MPD located on property in unincorporated Grand County."

24. During the regular Moab City Council meeting on July 8, 2008 conditional approval of the preliminary MPD occurred, and the MPD was approved subject to satisfaction of the five conditions.

25. Lionsback 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.

26. Lionsback 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.

27. The site is located on a bench above Moab City on the east side of the Moab-Spanish Valley.

28. As originally proposed, Lionsback would include 50 commercial lodging units, among other residential units and facilities.

29. Certain injured parties brought a suit against the City relating to the MPD. *See Moab Local Green Party, et al. v. Moab, et al.* 2012 UT App 113, 276 P.3d 1230 (hereinafter “**Lionsback I**”).

30. Following the resolution of Lionsback I, LB Moab proposed making certain amendments to Lionsback.

31. In September 2013, LB Moab met with City Staff and presented a revised concept of the project.

32. In 2016, Moab’s City Manager requested that the project be reheard by Moab’s planning commission due to major changes contained in the revisions to the project.

33. LB Moab and the State Institutional Lands Trust Administration (“**SITLA**”) did not want the revisions to the MPD to be subject to public hearings.

34. The revisions to the MPD included changes to the configuration, building types, phasing, and total square footage of structures.

35. Specifically, the revisions to the MPD included:

1. nearly doubling the size of the hotel from 41,360 square feet to 81,668 square feet;

2. more than doubling the parking capacity from 104 spaces to 230 spaces; and
3. consolidating the 50 dispersed commercial lodging units, as originally proposed, into to a large 150 room hotel with nearly twice the square footage.

36. The proposed changes were not “minor” under the City’s Master Planned Development Ordinance, MMC §17.65.130, but instead were so characterized to in an effort to avoid the requirement of a public hearing under the City’s Master Planned Development Ordinance, MMC §17.65.130 for” major” changes.

37. Under MMC §17.65.130, major changes are 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.

38. To prevent the public from being able to engage in the public hearings required by Moab’s ordinances for major changes, SITLA and LB Moab pressured the City to characterize the revisions as minor changes.

39. On September 12, 2016, counsel for Moab sent a letter to LB Moab concluding that the revisions to the project should be processed as a “major change” under MMC § 17.65.130. (A true and accurate copy of the letter is attached as **Exhibit A.**)

40. In relevant part, the letter stated as follows:

The initial question was whether this concept would qualify as a “minor change” under the City’s Master Planned Development Ordinance, MMC §17.65.130. Although a revised plan containing the Deletion Option has not been submitted for review, I conclude that the scope of the changes contemplated under either scenario would likely be major changes under the Moab ordinance.

MMC § 17.65.130 provides that amendments “that change the character, basic design, building density and intensity, open space or any other requirements and conditions” require planning commission review and approval. The “minor change” provision, subsection A, allows staff approval of minor changes “in the location and placement of buildings” where these are the product of unforeseen circumstances – such as engineering difficulties. Changes as to “structural types” and the “arrangement of multiple lots and blocks” or the “overall design or intent of the project” are major changes requiring land use authority approval Id. at B.

Given the scope of the changes under either the Deletion Option or the June 30 submittal, it is my conclusion that this project should be processed as a “major change” under Section 130. Under either proposal the applicant would be substantially changing the configuration, building types, phasing, and total square footage of the structures. These are not minor changes due, for example, to site constrains [*sic*].

As you know, under Utah law municipalities are bound to adhere to their own land use ordinances. Although a minor change might appear to be expedient, in my opinion that would run contrary to the Moab ordinance...

41. Following this letter, in an effort to undercut the conclusion of the city’s counsel, SITLA and City Staff drafted a Zoning Status Agreement. (A true and accurate copy of which is attached as **Exhibit B.**)

42. The Zoning Status Agreement provides as follows:

2.1 An amendment to the MPD Approvals is governed by the amendment procedures set forth in Section 17.65.130 of the City Code and is handled as either a Major Amendment (which are reviewed and acted upon by the City Council and/or the City Planning Commission) or Minor Amendment (which are reviewed and acted upon by the Moab City planning department staff).

2.2 ***SITLA consents*** to the City’s exercise of its local planning and zoning jurisdiction relating to the Property and Project with respect to the review and action on the City Approvals Amendment Application, ***provided that the City Approvals Amendments Application is deemed to be a Minor Amendment***, which will be reviewed and acted upon by the Moab City planning department staff (“**City Planning Department**”) by and through the City Planning Director, not to be unreasonably delayed or conditioned, and reasonable conditions upon the approval of the Amendment Application which are generally consistent with the intent expressed in the MPD Approvals, applicable ordinances, and/or the needs of the Project. SITLA and Developer agree to be bound by

the results of that minor plan review process, subject to applicable appeal procedures. (emphasis added.)

43. Notwithstanding the Zoning Status Agreement, the City has no authority to enter into an agreement that is contrary to the City's Master Planned Development Ordinance and proposed for the sole purpose of avoiding the application of the City's Master Planned Development Ordinance and in order to benefit a single project. On their face the proposed project changes cannot be deemed minor, and a public hearing cannot be avoided.

44. Nevertheless, on February 28, 2017, the City Council adopted Resolution No. 14-2017, which authorized Moab's mayor to execute the Zoning Status Agreement and in effect categorizes the revisions and amendments to the MPD as "minor changes," when in fact and by definition, the revisions and amendments are "major changes".

45. The actions of the City Council in adopting the resolution to approve the Zoning Status Agreement is illegal, arbitrary, and capricious because the resolution has the effect of categorizing the revisions and amendments to the MPD as "minor changes," when in fact and by definition, the revisions and amendments are "major changes" as proposed.

46. No public hearing was held on Resolution No. 14-2017.

47. By adopting Resolution No. 14-2017, the City Council disregarded the definitions of "minor change" and "major change" as set forth in Moab's ordinances.

48. The City made the determination that the amendments and revisions to the MPD were "minor changes" in order to appease SITLA and LB Moab, but not based on an actual review of whether the amendments were in fact "minor changes" or based on substantial evidence.

49. The amendments to the MPD proposed by SITLA and LB Moab are major changes.

50. The amendments to the MPD include, but are not limited to, changes to structural types, arrangement of multiple lots and blocks, changes to configuration, building types, phasing, total square footage of structures, and changes to the overall design or intent of the project.

51. As noted above, the among the revisions to the MPD are an increase to the size of the hotel from 41,360 square feet to 81,668 square feet; an increase in the parking capacity from 104 spaces to 230 spaces; and the consolidation the 50 dispersed commercial lodging units, as originally proposed, into to a large 150 room hotel with nearly twice the square footage.

52. Additionally, these changes include related changes to the structures, design, landscaping, parking features, and traffic circulation necessitated by such a change.

53. Each plaintiff is adversely affected by the illegal, arbitrary, and capricious adoption of Resolution No 14-2017 in so far as it has denied them their right to present evidence at a public hearing regarding the substantial and major revisions to the MPD which in turn adversely impacts their property rights, water rights, and/or other interests.

54. Specifically, Plaintiffs' interests are impacted by the changes to Lionsback and Plaintiffs would have presented evidence at a public hearing regarding impact to water recharge rates for springs which are the primary source for Lucy Wallingford's water right, water quality issues, aquifer contamination, storm water runoff impacts, drainage impacts, ground water concerns, water conservation issues, drinking water contamination, sewer issues, increased contamination and leaching risks from the nearby landfill, recreational impacts, traffic flow and congestion impacts, road usage issues, public health and safety impacts, and construction impacts based on the proposed changes to MPD.

FIRST CLAIM FOR RELIEF

(PETITION FOR REVIEW OF AN ARBITRARY, CAPRICIOUS, OR ILLEGAL DECISION)

55. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

56. Plaintiffs have standing to appeal the decision of the City Council pursuant to Utah Code Ann. § 10-9a-801(2)(a).

57. Utah Code Ann. § 10-9a-801(3)(ii) establishes the proper standard of review in the District Court – Whether the decision is “arbitrary, capricious, or illegal.”

58. Under LUDMA, “a municipality is bound by the terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances.” Utah Code Ann. § 10-9a-509(2)

59. Pursuant to MMC §1.04.020(24), the term “shall” is defined as “mandatory.” Thus, whenever the word “shall” appears in the code, the City is required to undertake that procedure, regardless of whether that procedure involves the holding of a public hearing or considering certain criteria in reviewing an application and making a determination.

60. MMC § 17.65.140, states “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, after which the authority shall consider and shall either approve or deny the changes in the final development plan.”

61. When an approved MPD is amended, major changes shall not be permitted without prior review and approval by the planning commission, which review includes a public hearing. *See* MMC §§ 17.65.080 & 17.65.130.

62. A determination of illegality requires a determination that the decision violates a law, statute, or ordinance in effect at the time the decision was made. Utah Code Ann. § 10-9a-801(3)(d).

63. A decision is arbitrary and capricious if it is not supported by substantial evidence.

64. The decision to adopt Resolution No. 14-2017 was not supported by substantial evidence in so far as it determines that the revisions and amendments to the MPD are “minor changes” not “major changes” and thereby precludes a public hearing on the amendments to the MPD and was arbitrary and capricious.

65. The decision to adopt Resolution No. 14-2017 was illegal in so far as it determines that the proposed revisions and amendments, which facially meet the definition of major changes are “minor changes” and thereby deprives Plaintiffs and the public from being able to present evidence regarding major changes at a public hearing.

66. Moab is bound to comply with its own ordinances.

67. The City Council’s decision to adopt Resolution No. 14-2017 and thereby determine that the revisions and amendments to the MPD were “minor changes” and not “major changes”, was arbitrary, capricious and/or illegal for the reasons alleged herein.

SECOND CLAIM FOR RELIEF

(PRELIMINARY INJUNCTION)

68. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

69. Plaintiffs will suffer irreparable harm by being denied their right to present evidence at a public hearing unless the injunction issues;

70. The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;

71. The injunction would not be adverse to the public interest and in fact protects the public interest by preventing action on the Zoning Status Agreement until a Court has the opportunity to determine whether the amendments and revisions are major and public hearings are required.

72. There is a substantial likelihood that the Plaintiffs will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

1. Reversal of the decision of City Council adopting Resolution No. 14-2017 in so far as it determines or has the effect of designating the revisions and amendments as “minor changes” and not “major changes” and thereby deprives the public their right to comment and provide evidence at a public hearing on the major changes to the MPD on the grounds that Resolution No.

14-2017 arbitrarily, capriciously, and illegally ignores Moab's ordinances in determining that the revisions and amendments are minor.

2. An order declaring that Resolution No. 14-2017, is invalid and the Zoning Status Agreement is null and void in so far as Zoning Status Agreement has the effect of categorizing the major changes as minor changes.

3. An order enjoining the City from moving forward or taking actions described in the Zoning Status Agreement until public hearings are held as required for "major changes."

4. An award of attorneys' fees and costs as may be allowable by statute.

5. Such other and further relief as this Court deems just and equitable.

DATED this 30th day of March, 2017.

Respectfully submitted,

Barbara K. Polich (#2620)
George Poulton (#12378)
ANTCZAK POLICH LAW LLC
Attorney for Plaintiffs

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4841-8390-1224, v. 2

EXHIBIT A

to Complaint and Petition for Review (Tier 2)

Letter to LB Moab
(September 12, 2016)



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September 12, 2016

Thomas G. Kennedy, Esq.
P.O. Box 3081
Telluride, CO 81435

Re: Lionsback Resort, Moab Utah, Amended MPD Application

By: Email, tom@tklaw.net and First Class Mail

Dear Tom:

I write to respond to the letter of LB Moab Land LLC, dated August 12, 2016, and concerning the proposed amended plan for the Lionsback Resort. I was asked to review the proposal discussed in a meeting between the parties in which, among other things, Moab LB would agree to delete lots from its Phase 5 of the development to offset the increase in lodging rooms associated with the newly proposed first phase hotel concept, which calls for a 150 room hotel (referred to here as the “Deletion Option”).

Concurrently, I understand that on June 30, 2016 Moab LB submitted an application for amendment of the approved preliminary master planned development for the project. That application includes the larger hotel concept along with utility changes, but without the deletion of units described as the Deletion Option.

The initial question was whether this concept would qualify as a “minor change” under the City’s Master Planned Development Ordinance, MMC §17.65.130. Although a revised plan containing the Deletion Option has not been submitted for review, I conclude that the scope of the changes contemplated under either scenario would likely be major changes under the Moab ordinance.

MMC § 17.65.130 provides that amendments “that change the character, basic design, building density and intensity, open space or any other requirements and conditions” require planning commission review and approval. The “minor change” provision, subsection A, allows staff approval of minor changes “in the location and placement of buildings” where these are the product of unforeseen circumstances—such as engineering difficulties. Changes as to “structural types” and the “arrangement of multiple lots and blocks,” or the

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Thomas Kennedy
September 12, 2016
Page 2

“overall design or intent of the project” are major changes requiring land use authority approval. Id. at B.

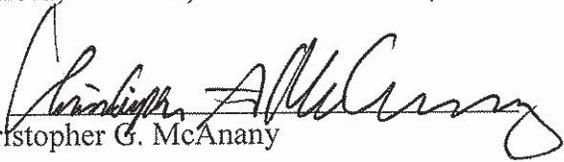
Given the scope of the changes under either the Deletion Option or the June 30 submittal, it is my conclusion that this project should be processed as a “major change” under Section 130. Under either proposal the applicant would be substantially changing the configuration, building types, phasing, and total square footage of the structures. These are not minor changes due, for example, to site constraints.

As you know, under Utah law municipalities are bound to adhere to their own land use ordinances. Although a minor change might appear to be expedient, in my opinion that would run contrary to the Moab ordinance. Similarly, attempting to process this application as a minor change would likely invite a legal challenge by other interested persons. Thus, there is both a legal reason and a practical reason to treat this as a major change. Given the past litigation history as to this project, the parties should use care to follow the review processes to the letter.

In making this determination I do not express any opinion as to the merits of the project. We concur that, regardless of the submittal Moab LB elects to pursue, the parties will need to make changes to the Development Agreement, Annexation Agreement, and related plans and specifications.

If for any reason you disagree with this position please feel free to provide me with any additional information upon which you rely. Note also that City staff is available to confer with your client as to submittals and review processes.

Dufford, Waldeck, Milburn & Krohn, LLP

By: 
Christopher G. McAnany

xc: Rebecca Davidson

EXHIBIT B

to Complaint and Petition for Review (Tier 2)

Zoning Status Agreement

**ZONING STATUS AGREEMENT
(Lionsback Resort)**

THIS ZONING STATUS AGREEMENT (“Agreement”) is entered into and made effective as of December 13, 2016 (“**Effective Date**”) by and between the City of Moab, a Utah municipal corporation, acting through its City Council (“**City**”); LB Moab Land Company, LLC, a Colorado limited liability company (“**Developer**”); and the State of Utah, acting by and through the School and Institutional Trust Lands Administration (“**SITLA**”). The City, the Developer and SITLA are collectively referred to herein as the “**Parties**”.

RECITALS

A. The State of Utah, through SITLA, is the owner of a certain parcel of real property situated in Grand County, Utah consisting of 139.95 acres, more or less, more particularly described in the Development Agreement (defined below) (“**Property**”).

B. The State of Utah, through SITLA, is also the owner of certain adjoining property more particularly described in the Development Agreement (“**Adjoining Property**”).

C. Capitalized terms included herein and not otherwise defined shall have the meaning ascribed to the term in the Development Agreement.

D. State trust lands managed by SITLA are not subject to municipal planning and zoning regulation pursuant to Utah Code Ann. 10-9a-304, absent consent by SITLA, which may be granted, withheld or withdrawn by SITLA in its discretion.

E. Developer and SITLA have entered into a certain SITLA Lease and Development Agreement, as amended, by which Developer is authorized and empowered to seek and obtain development approvals from the City, including the entitlements described herein.

F. Use and development of the Property may occur in accordance with and as provided for in the Moab City Code (“**City Code**”) as well as all other applicable laws and regulations of the City of Moab (“**Moab City Laws**”), subject to the provisions of the Utah Municipal Land Use, Development and Management Act, Utah Code Ann. § 10-9a-101 et seq, including section 10-9a-304 thereof.

G. Developer has pursued certain planning and zoning approvals with the City of Moab (“**City**”) concerning the Property, which SITLA has authorized and granted its consent from time to time

H. The planning and zoning approvals include the annexation of the Property (“**Annexation**”) into the City, which occurred in accordance with the Moab City Laws and applicable provisions of Utah law, as more specifically described in Exhibit “A”. The planning and zoning approvals for the Property also included the zoning of the Property (“**Rezoning**”) in the City’s Sensitive Area Resort Zone (“**SAR**”) as provided for in the City Code and the Moab City Laws.

I. The planning and zoning approvals for the Property also included reviews and approvals for a Mixed Use Master Planned Development (“**MPD**”) for the Lionsback Project, a mixed use project (“**Project**”), as also more specifically described in Exhibit “A”.

J. The approvals granted by the City, including, the Annexation, the Rezoning, and the MPD Approvals, which are collectively referred to as the “**City Approvals**,” authorized the development of the Project as such approvals were reflected by and described in the City Approvals. As further reflected in the Development Agreement and the Pre-Annexation Agreement, the City approved a period of extended

vested rights (“**Vested Rights**”) for the development approvals granted for the Project and Property which ran for 15 years from the date of the Preliminary MPD, through July 27, 2024.

K. The Development Agreement further provided that Developer may submit separate development applications associated with the Final MPD for each Phase of the Project (“**Final Plat**”) and with such filing, the Developer is required to submit a Final Plat and a Subdivision Improvement Agreement (“**SIA**”) for the Lots, Parcels and associated onsite and offsite Subdivision Improvements (described in the Development Agreement) to be constructed for the particular Phase, which will be consistent with the Lionsback Phasing Plan. The required onsite and offsite infrastructure improvements (“**Subdivision Improvements**”) for the development in the Project are described in the Development Agreement.

L. Developer and SITLA seek to amend certain elements of the City Approvals granted for the Project, as provided for herein (“**City Approvals Amendments**”) to include a 150 unit hotel complex for Phase One of the MPD. Developer and SITLA contend that the City previously approved the proposed amendments or elements thereof, a contention which the City currently disputes. Developer and SITLA subsequently submitted their application dated June 30, 2016 (“**City Approvals Amendments Application**”) seeking formal approval of the City Approvals Amendments. The City subsequently informed the Developer and SITLA that City Approvals Amendments Application would be treated as a major change to the Project, based upon provisions of the Master Planned Development Ordinance. Developer and SITLA dispute that the Amendments Application is a major change. The City Approvals Amendments Application remains pending with the City.

M. Based upon the dispute described in Recital L, above, SITLA ~~has~~ notified the City, through counsel, of its election to withdraw its consent to local planning and zoning jurisdiction pursuant to Utah Code Ann. 10-9a-304 with respect to the City’s review and action on the City Approvals Amendments Application and ongoing future City review of planning and zoning matters affecting and concerning the Property, which notification is acknowledged by the City. The foregoing notwithstanding, although SITLA maintains that it has the right and authority pursuant to Utah Code Ann. 10-9a-304 to make decisions concerning the use and development of its property without regard to the Moab City Laws and/or the involvement of the City, SITLA recognizes the importance of reasonably coordinating the development of its land with the City and to that end, SITLA has determined to grant its limited consent to local planning and zoning jurisdiction relating to the Property and Project with respect to the City Approvals Amendments, provided that the City review process occurs in the manner provided for herein.

N. There exists a potential dispute between the City and SITLA with respect to the extent of prior approvals of amendments to the City Approvals, and with respect to any zoning exemption which SITLA may enjoy, given its prior decision to submit the Property to the land use jurisdiction of the City of Moab and the execution by the Developer, with SITLA approval, of various agreements in conjunction with the City Approvals. By entering into this Agreement the City makes no admission as to the contentions made by SITLA and the Developer, or the scope of any zoning exemption which may be claimed by SITLA, as described in the prefatory recitals, above.

O. The Parties desire to enter into this Agreement to reflect the manner that the City Approvals Amendments Application as well as future land use applications concerning the Property and the Project would be handled by the Parties.

AGREEMENTS

NOW, THEREFORE, in consideration of the foregoing recitals, which are hereby incorporated as part of the agreements of the Parties, and for such other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Status of City Approvals.** Notwithstanding the election by SITLA to withdraw its consent to local planning and zoning jurisdiction relating to the Property and Project pursuant to Utah Code Ann. 10-9a-304, SITLA and Developer agree to comply with the existing terms and conditions of the City Approvals, subject to the pending City Approvals Amendment Application and the other issues addressed herein. It is acknowledged and agreed by the Parties that the terms and conditions of the City Approvals in effect as of the Effective Date, shall remain in full force and effect. It is further acknowledged and agreed that the City is fully compliant with all commitments, terms, and conditions extant in the City Approvals as of the Effective Date.

2. **City Approvals Amendments.**

2.1. An amendment to the MPD Approvals is governed by the amendment procedures set forth in Section 17.65.130 of the City Code and is handled as either a Major Amendment (which are reviewed and acted upon by the City Council and/or the City Planning Commission) or Minor Amendment (which are reviewed and acted upon by the Moab City planning department staff).

2.2. SITLA consents to the City's exercise of its local planning and zoning jurisdiction relating to the Property and Project with respect to the review and action on the City Approvals Amendment Application, provided that the City Approvals Amendments Application is deemed to be a Minor Amendment, which will be reviewed and acted upon by the Moab City planning department staff ("**City Planning Department**") by and through the City Planning Director, not to be unreasonably delayed or conditioned, and which would not require a public hearing. The City Planning Department may impose reasonable conditions upon the approval of the Amendment Application which are generally consistent with the intent expressed in the MPD Approvals, applicable ordinances, and/or the needs of the Project. SITLA and Developer agree to be bound by the results of that minor plan review process, subject to applicable appeal procedures.

2.3. Following the action by the City Planning Department on the City Approvals Amendments Application, the Parties recognize and agree that the Development Agreement must be amended to reflect the changes to the MPD Approvals resulting from the City's approval of the City Approvals Amendments, which the City agrees to cooperate and assist in drafting and executing, which will not be unreasonably delayed or conditioned. SITLA consents to the Parties execution of an appropriate amendment to the Development Agreement reflecting the approval of the City Approvals Amendment Application. A list of outstanding items related to the final MPD and Plat Approvals is attached hereto as Exhibit "B" and incorporated by reference.

3. **Provision of Water and Sewer Service to the Property and Project.** The City confirms, acknowledges and agrees that the City shall provide municipal water and sewer service to Developer to serve the Project and Property, in form and manner contemplated by the City Approvals, which service will be based upon uniform terms, conditions and specifications as well as on fees and charges uniformly charged to other persons or entities in the City.

4. **Special Districts.** Developer may elect to form a special tax district or improvement district to finance and fund the cost and expense of the installation, operation, repair and maintenance of any and all privately operated water, sewer, road and utilities serving the Property and Project, which are to be paid for by Developer. City agrees to cooperate and assist Developer in connection with the formation of any such district. It is agreed that the City Approvals shall be modified to provide that all wastewater treatment service lines and equipment within the Property shall be privately owned, operated, and maintained, with the City to assume collection, maintenance, and treatment obligations at a point

mutually agreed, as designated on the final utility plan approved in connection with Phase One of the Project.

5. **Traffic Studies and Related Improvements.** Developer, SITLA, and the City agree to confer in good faith with respect to traffic impacts which will be generated in connection with the Amendment Plan which is currently under review, and with respect to traffic improvements (including off-site improvements) which may be necessitated by the Amendment Plan and/or future phases of the Project. An updated traffic impact study prepared by a licensed engineer shall be submitted to the City no later than six (6) months from the date of the issuance of a certificate of occupancy for the hotel comprising Phase One of the Project. SITLA and Developer agree that the City may require Developer to install additional traffic related improvements: a) in conjunction with future phases of development on the Property; or b) if traffic impacts from Phase One result in unacceptable or dangerous vehicular or pedestrian traffic conditions on roads providing access to the Property. Any additional traffic related improvements which may be required by the City and installed by the Developer in conjunction with the Amendment Plan and/or future phases of the Project must be reasonable and proportional to traffic impacts generated by the development of the Property, as identified by the updated traffic study or other data provided to or considered by the City.

6. **Engineer Review By City.** The Parties agree that any engineer reviews to be conducted by the City in connection with the review and approval of plans, plats and other documents submitted by Developer to the City from time to time may be handled by a duly qualified engineer mutually agreed to by the City, Developer and SITLA, which reviews shall occur in a reason manner, not to be unreasonably delayed.

7. **Review of Final Plats and Permits.** SITLA consents to the City's exercise of its local planning and zoning jurisdiction with respect to future final plats, permits and other reviews required to be undertaken by the City pursuant to the City Code, which the City agrees will occur administratively by the City Planning Department, without a requirement for a public hearing. The Parties acknowledge and agree that development of improvements on lots in the Project will comply with all applicable building codes as uniformly applied to similar property in the City.

8. **Future Amendments to City Approvals.** In the event that Developer and SITLA seek to pursue other amendments to the City Approvals and/or to pursue new approvals for the Property and Project, ~~including the Adjoining Property,~~ the Parties shall meet and confer in good faith and discuss the nature and extent of the City review requirements. The City Planning Department may impose reasonable conditions upon the approval of future amendments and new approvals which are generally consistent with the intent expressed in the MPD Approvals, applicable ordinances, and/or the needs of the Project. Such approvals shall not be unreasonably delayed or conditioned, and shall be subject to applicable appeal procedures.

~~8-9.~~ **Indemnification for Legal Costs.** In the event that any third party files any litigation challenging the validity or legality of this Zoning Status Agreement, SITLA agrees to indemnify, defend, and hold the City harmless from all attorneys' fees and litigation costs incurred by the City in connection with such action. In the event that litigation is filed by a third party, SITLA will assume primary defense of such litigation, and the City agrees to cooperate with SITLA in the defense thereof. The City shall retain legal counsel of its choosing in any such dispute.

~~9-10.~~ **Miscellaneous.**

~~9-1~~ **Amendment of Agreement.** Except as otherwise provided herein, this Agreement may be amended from time to time by mutual consent of the original Parties or their successors in interest in writing.

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9.2 **Governing Law.** This Agreement shall be construed and enforced in accordance with the laws of the State of Utah. The exclusive venue for any dispute arising under this Agreement shall be the courts of Grand County, Utah.

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9.3 **Performances.** Time is of the essence of this Declaration and for the performance of each of the duties and obligations provided herein.

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9.4 **Severability.** Wherever possible, each provision of this Declaration shall be interpreted in such a manner as to be effective and valid under applicable law. If any provision of this Declaration shall be found invalid or unenforceable, this shall not affect the validity of the remaining provisions of this Declaration, and the remaining provisions shall remain in full force and effect.

9.5 **No Waiver.** Failure of a Party hereto to exercise any right hereunder shall not be deemed a waiver of any such right and shall not affect the right of such Party to exercise at some future time said right or to enforce any other right it may have hereunder.

9.6 **Parties' Representations.** In entering into this Agreement, the Parties acknowledge and agree and represent and warrant to each other as follows: (a) that they will perform their duties and obligations in a commercially reasonable and good faith manner and that this commitment is being relied upon by each other Party; and (b) that the Party has actual and express authority to execute this Agreement, has taken all actions necessary to obtain such authorization, the Agreement constitutes a binding obligation of the Party and the person signing below is duly authorized and empowered to execute this Agreement.

9.7 **Notices.** The contact addresses of the Parties are as follows:

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LB Moab Land Company, LLC Post Office Box 967 Moab, UT 84532 Cell 970-708-1896 Email: badgermoab@gmail.com	City of Moab 217 East Center Street Moab, Utah 84532 Attention: City Manager Phone: 435-259-5121 Fax: 435-259-4135 Email: _____	State of Utah, acting by and through the School and Institutional Trust Lands Administration 675 East 500 South, Suite 500 Salt Lake City, Utah 84102 Attn. Development Group
<u>With a Copy to</u> Thomas G. Kennedy, Esquire P.O. Box 3081 Telluride, CO 81435 Phone: (970) 728-2424 Fax: (970) 728-9439 Email: tom@tklaw.net	<u>With a Copy to</u> Christopher G. McAnany Dufford, Waldeck, Milburn & Krohn, LLP 744 Horizon Court, Suite 300 Grand Junction, CO 81506 Phone: (970) 241-5500 Fax: (970) 243-7738 Email: mcanany@dwmk.com	<u>With a Copy to</u>

9.8 **Captions.** The captions or headings in this Agreement are for convenience only and in no way define, limit, or describe the scope or intent of any provisions or sections of this Agreement.

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9.9 **Counterparts; Facsimile.** This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original and all of which taken together shall constitute one and the same agreement, which may be transmitted by canned/email or facsimile signature pages.

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IN WITNESS WHEREOF, this Agreement has been executed by the City of Moab, acting by and through the Moab City Council, which has duly authorized execution, and by a duly authorized representative of Developer, as of the Effective Date.

CITY:

City of Moab,
a Utah municipal corporation

By: _____ Date: _____

Printed Name: _____
Title: _____

SITLA

The State of Utah, acting by and through the
School and Institutional Trust Lands Administration

By: _____ Date: _____

Printed Name: _____
Title: _____

COMPANY:

LB Moab Land Company, LLC,
a Colorado limited liability Developer

By: _____ Date: _____

Printed Name: _____
Title: _____

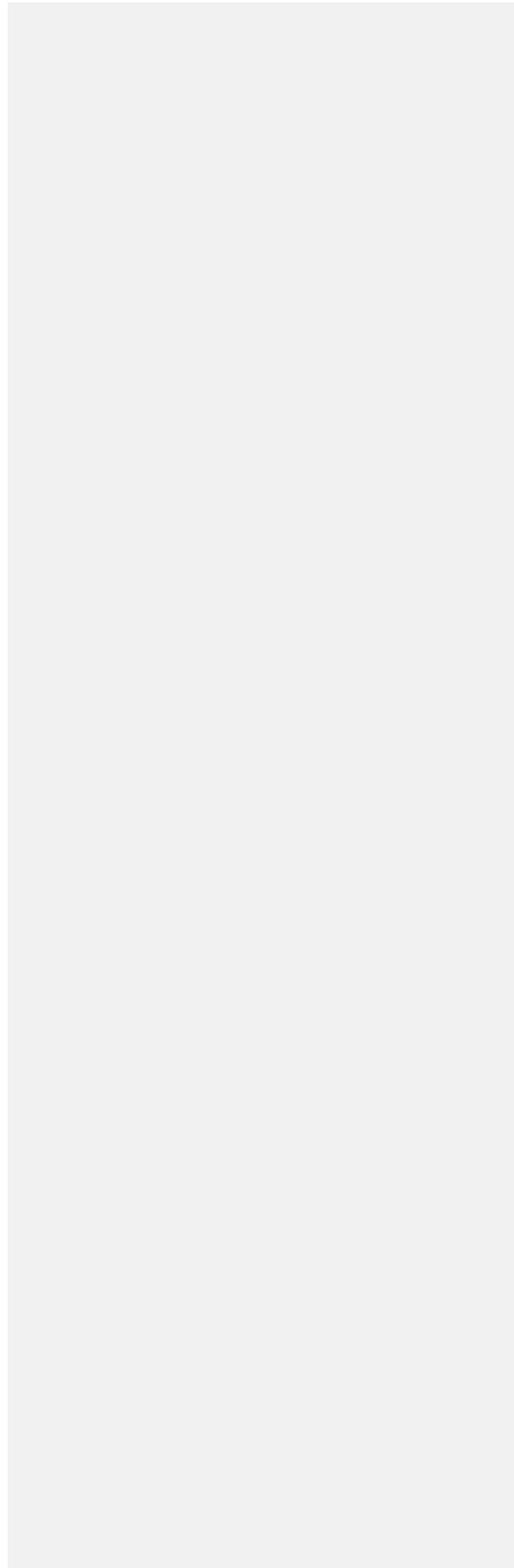


EXHIBIT A
(Annexation and Planning/Zoning Approvals)

The Annexation of the Property occurred pursuant to and in accordance with the following documents:

- (i) City of Moab Ordinance No. 2008-20 (“**Annexation Ordinance**”) dated December 9, 2008 and recorded on February 23, 2009 in Book 744, Page 407-423 with the Clerk and Recorder for Grand County, Utah (“**Official Records**”);
- (ii) The Pre-Annexation Agreement dated October 28, 2008 and recorded on February 23, 2009 in Book 744, Page 407-423 in the Official Records (“**Pre-Annexation Agreement**”); and
- (iii) The Annexation Map recorded February 23, 2009 in Book 744, Page 424 in the Official Records (“**Annexation Map**”);

The Property has received the following planning and zoning approvals (“**MPD Approvals**”):

- (i) **Concept MPD.** At a duly noticed and conducted public hearing/meeting, the City of Moab Planning Commission (“**Planning Commission**”) reviewed and approved the Development Application associated with the Concept Plan/Master Planned Development (“**Concept MPD**”), subject to conditions stated in the document reflecting the Concept MPD approval.
- (ii) **Preliminary MPD.**
 - (a) At a duly noticed and conducted public hearing/meeting, the Planning Commission reviewed and recommended approval of the Development Application associated with the Preliminary Plan/Master Planned Development (“**Preliminary MPD**”) to the City of Moab City Council (“**City Council**”).
 - (b) At a duly noticed and conducted public hearing/meeting, the City Council reviewed and approved the Development Application for the “**Lionsback Development Plan**” associated with the Preliminary MPD, subject to conditions stated in the document reflecting the Preliminary MPD approval (a copy of which is on file with the City).
 - (c) The City, Developer and SITLA executed a certain Development and Phasing Agreement for Lionsback Resort dated July 28, 2009 (“**Development Agreement**”). The Development and Phasing Agreement, among other things, included the “**Lionsback Development Plan**” as reflected in the Development Approvals is on file with the City, approved the proposed land use and phasing plan for the Project and noted the allocation of infrastructure improvements required for the Project.
 - (d) The Development Agreement incorporated an approved Phasing Plan for the Property as well as the Adjoining Property and Project. Developer contemplates that the Project will consist of five phases (each a “**Phase**”). The Lionsback Phasing Plan depicts the Phases for the Project and establishes the Lots, Parcels, uses and Subdivision Improvements (defined below) for the Project.

EXHIBIT B
Outstanding items related to Final MPD & Plat Submittal

1. Conceptual Landscape Plan:
 - a. The Approved Preliminary MPD landscape plan/guideline is not proposed to change in overall context and intent. With the change to the area directly surrounding the hotel, Developer will supply a conceptual landscape plan specific to the anticipated areas impacted by the hotel site construction.
 - b. Areas impacted by the roadway, utility, and casita construction will follow the native vegetation and restoration guidelines previously approved.
2. Signage Plan:
 - a. Directional/wayfinding signage as well as proposed monument signage will be submitted to city planning staff for approval.
 - b. Building signage is dependent on hotel operator and will be submitted for approval as part of Final MPD Application.
3. Lighting Plans:
 - a. Site lighting fixture detail sheets noting the height, details, and specifications for each of the proposed fixture types (parking lots, trails, & roadways) will be submitted for review by staff. Final light locations will be determined at Final MPD and submitted for final review.
 - b. Building Lighting Fixtures will be submitted for review/approval as part of Final MPD and Building Permit Issuance process.
 - c. Developer agrees that fully shielded cut-off fixtures will be required and no 'up-lighting' will be allowed to insure dark sky intent is met.
4. Hotel Elevations:
 - a. Detailed Building Elevations (including height) will be submitted as part of the Final MPD. The height varies due to the terrain and proposed grading on the parcel. Developer intends to build the hotel 'into' the site to minimize the height as much as possible. The height will comply with the SAR Zone of a 30'.
5. Utility Plans:
 - a. Conceptual utility plans were submitted to Moab City Engineers Office in November and December 2015. These will be supplemented with a narrative explaining utility service structure (private, sewer district, etc.)
 - b. Final Utility Plans will be submitted to Moab City for approval as part of Final MPD.
6. Traffic:
 - a. The revised trip generation letter (dated 9/13/2016) noted no major impacts from the changes regarding Phase One of the Hotel & Casitas and is sufficient for development & approval of Phase 1 of the Lionsback Final MPD and Plat.
 - b. Prior to final approval of Phase 2 of the Lionsback MPD and associated plats; the previously approved Traffic Impact Study will be updated to include the changed street classifications (Sand Flats Road, Mill Creek Drive, 400 East, and 300 South) as well as updated counts at Sand Flats, Mill Creek Drive, and 400 East Intersections per city request.
7. Grading & Drainage:
 - a. Detailed grading & drainage plans & calculations will be submitted for approval as part of Final MPD and Plat approval. Plans and Calculations will meet Grand County Storm Drainage requirements.
8. Geotechnical Report:
 - a. An Updated Geotechnical report will be submitted with Final MPD Submittal for each phase of development.