

Moab City Corporation

217 East Center Street

Moab, Ut 84532

435.259.5123

Receipt No: 199450

Receipt Date: 03/30/2017

Timestamp: 03/30/2017 01:56 PM

Payor: LIVING RIVERS

APPEAL AUTHORITY APPLICATION #17-01
1034001 SPECIAL SERVICES BY CITY DEPTS

250.00

\$250.00

Check 436

\$250.00

Tendered Amount:

\$250.00

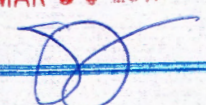
Cash Back:

\$0.00

Total Applied:**\$250.00**

CITY OF MOAB
APPEALS AUTHORITY APPLICATION
4 PAGES - FORM MUST BE COMPLETED IN INK



DATE STAMP FOR CITY USE ONLY RECEIVED MAR 30 2017 BY: 	TO BE FILLED OUT BY APPLICANT
	PROJECT NAME (if any): Lionsback Resort Development PROJECT STREET ADDRESS OR ACCESS STREET: Sand Flats Road FOR CITY USE ONLY APPLICATION NUMBER: 17-01 DATE RECEIVED: 3-30-2017 APPLICATION FEE: \$250.00 TREASURER'S RECEIPT NUMBER: 199450

All applications are subject to review by city staff for completeness. Staff will notify the applicant of deficiencies or completeness within fifteen days.

Date 3/30/2017

Decision being applied for: (select one)

- ☒ Appeal An error in any order, requirement, decision, or determination made by an official in the administration or interpretation of the zoning ordinance
- ☐ Variance A waiver or modification of the requirements of the zoning ordinance as applied to a parcel of property in which the applicant holds beneficial interest

Name of Applicant (Print): Barbara Polich representing: Lucy Wallingford, Kiley Miller, John Rzczycki, Carol Mayer, David Bodner, Meeche Bodner, Sarah Stock, Josephine Kovash, and Living Rivers.

Mailing Address: c/o Barbara Polich, ANTCHAK POLICH LAW LLC, 324 South 400 West, Suite 225, Salt Lake City, Utah 84101

Telephone #: (801) 521-4409

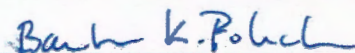
Email: bpolich@antczaklaw.com

Property Address: Lionsback Development

Property Zone: _____

Applicant's Request: See Letter, attached as Exhibit 1.

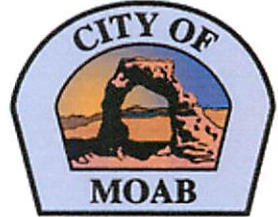
Signature: _____



DEPARTMENT OF PLANNING AND ZONING
217 EAST CENTER STREET • MOAB, UTAH • 84532
Phone: (435) 259-5129 • Fax: (435) 259-4135 • E-mail: info@moabcity.org
Website: www.moabcity.org

APPEALS AUTHORITY APPLICATION

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AFFIRMATION OF SUFFICIENT INTEREST

I hereby affirm that I am the fee title owner of the below described property or that I have written authorization from the owner to pursue the described action.

Name of Applicant (please print) Barbara Polich

Mailing Address c/o Barabara Polich, ANTCZAK POLICH LAW LLC, 324 South 400 West, Suite 225, Salt Lake City, Utah 84101

Signature Barbara K Polich Date 3/30/2017

THE BURDEN OF PROOF IS THE RESPONSIBILITY OF THE APPLICANT IN ALL APPEALS AUTHORITY CASES.

Appeal

17.72.150 Appeals

(B) Standards

1. Only decisions applying to the zoning ordinance may be appealed to the appeal authority.
2. A person may not appeal, and the appeal authority may not consider, any zoning ordinance amendments.
3. The city council shall hear and decide appeals from planning commission decisions regarding conditional use permits.

(C) Appeals may not be used to waive or modify the terms or requirements of the zoning ordinance.

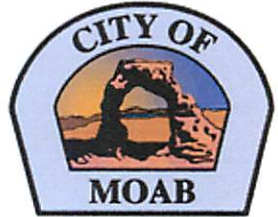
Variance

17.72.190 Standards.

- A. The appeal authority may grant a variance only if each of the following conditions is met:
1. Literal enforcement of the zoning ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the zoning ordinance;
 2. There are special circumstances attached to the property that do not generally apply to other properties in the same district;
 3. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district;
 4. The variance will not substantially affect the general plan and will not be contrary to the public interest; and
 5. The spirit of the zoning ordinance is observed and substantial justice done.
- B. In determining whether or not enforcement of the zoning ordinance would cause unreasonable hardship under subsection A of this section, the appeal authority may not find an unreasonable hardship unless the alleged hardship:
1. Is located on or associated with the property for which the variance is sought; and
 2. Comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood.

APPEALS AUTHORITY APPLICATION

4 PAGES - FORM MUST BE COMPLETED IN INK



- C. In determining whether or not enforcement of the zoning ordinance would cause unreasonable hardship under subsection A of this section, the appeal authority may not find an unreasonable hardship if the hardship is self-imposed or economic.
- D. In determining whether or not there are special circumstances attached to the property under subsection A of this section, the appeal authority may find that special circumstances exist only if the special circumstances:
 - 1. Relate to the hardship complained of; and
 - 2. Deprive the property of privileges granted to other properties in the same district.
- E. The applicant shall bear the burden of proving all of the conditions justifying a variance have been met.
- F. Variances run with the land.
- G. The appeal authority may not grant use variances.
- H. In granting a variance, the appeal authority may impose additional requirements on the applicant that will:
 - 1. Mitigate any harmful affects of the variance; or
 - 2. Serve the purpose of the standard or requirement that is waived or modified.

EXHIBIT 1

to City of Moab Appeals Authority Application

Letter re Appeal of Moab City Resolution 14-2017

BARBARA K. POLICH
bpolich@antczaklaw.com

GEORGE POULTON
gpoulton@antczaklaw.com

March 30, 2017

Via- Hand Delivery
Moab City Appeal Authority
217 E. Center Street
Moab, Utah 84632

Re: Appeal of Moab City Resolution 14-2017

Dear Moab City Appeal Authority,

Lucy Wallingford, Kiley Miller, John Rzczycki, Carol Mayer, David Bodner, Meeche Bodner, Sarah Stock, Josephine Kovash, and Living Rivers (collectively “**Appellants**”) have retained Antczak Polich Law, LLC to represent them in their appeal of Resolution No. 14-2017, adopted by the Moab City Council on February 28, 2017, with the Moab City Appeal Authority pursuant to Utah Code Ann. Section 10-9a-703 and MMC Section 17.72.150.

INTRODUCTION

As you are aware on February 28, 2017 the Moab City Council approved a resolution to enter into a Zoning Status Agreement regarding the Lionsback Development which illegally, and in an arbitrary and capricious fashion, and in disregard of Moab’s Ordinances, and the advice of its own attorney, classifies changes and amendments to the Lionsback Master Planned Development (“**MPD**”) as a “minor change” when the changes are actually “major changes” as defined by Moab City Ordinance. This determination has denied the public and specifically the Applicants, the right to participate in public hearings on the changes, a right they are entitled to under Moab City’s Ordinances for any “major change,” which the proposed changes certainly are given their nature and character. There can be no question that the amendments and revisions are in fact “major changes” as the amendments and changes, among other things, nearly double the square footage of the hotel and more than double the parking spaces in the MPD.

PARTIES

Each of the Applicants has been adversely affected by the City Council’s land use determination. Appellant 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. Appellant 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. Appellant John Rzczycki is a real property owner, taxpayer, and

resident of Moab whose property is located less than one mile away from the Lionsback Development. Appellant 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. Appellant 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. Appellant 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. Appellant 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. Appellant 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. Appellant Living Rivers is a nonprofit corporation whose members have been and will be adversely affected by Moab's actions.

Each Appellant 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.

Specifically, Plaintiffs' interests are impacted by the changes to Lionsback. Plaintiffs, among other things, 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, land use, and construction impacts based on the proposed changes to MPD.

FACTUAL BACKGROUND

As you are likely aware, 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. The Lionsback development is a project by LB Moab Land Company, LLC ("LB Moab") involving the State Institutional Lands Trust Administration ("SITLA"). 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." 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 five conditions.

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. 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. The site is located on a bench above Moab City on the east side of the Moab-Spanish Valley. As originally proposed, Lionsback was to include 50 commercial

lodging units, among other residential units and facilities.

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**”). Following the resolution of **Lionsback I**, LB Moab proposed making certain amendments to **Lionsback**. In September 2013, LB Moab met with City Staff and presented a revised concept of the project. 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. LB Moab and SITLA did not want the revisions to the MPD to be subject to public hearings. The revisions to the MPD included changes to the configuration, building types, phasing, and total square footage of structures. 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 a large 150 room hotel with nearly twice the square footage. These proposed changes are not “minor” under the City’s Master Planned Development Ordinance, MMC §17.65.130, but instead were inappropriately so characterized 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.

ARGUMENT

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. 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.

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.**) 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 constraints [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...

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**.) 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.)

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. 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”. The actions of the City Council in adopting the resolution to approve the Zoning Status Agreement are 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. Note also that no public hearing was held on Resolution No. 14-2017.

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. 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. Indeed, the amendments to the MPD proposed by SITLA and LB Moab are major changes. Consider that 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.¹ Additionally, these changes include related changes to the structures, design, landscaping, parking features, and traffic circulation necessitated by such a change.

Under Utah Code, “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). 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. Further, 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.” 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.

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 avoiding the need for a public hearing on the amendments to the MPD. The decision was arbitrary, capricious, and in error. The decision to adopt Resolution No. 14-2017 was illegal and in error, 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 Appellants and the public from being able to present evidence regarding major changes at a public hearing. 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

¹ The revisions to the MPD include: (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.

March 30, 2017

“major changes”, was arbitrary, capricious illegal, and/or in error for the reasons alleged herein.

CONCLUSION

The Moab City Appeals Authority should reverse the decision of City Council adopting Resolution No. 14-2017 given it 1) effectively designates the revisions and amendments as “minor changes” and not “major changes”; 2) deprives the public of their right to comment and provide evidence at a public hearing on the major changes to the MPD; and 3) arbitrarily, capriciously, illegally and in error ignores Moab’s ordinances in determining that the revisions and amendments are “minor”. The City Council has erred in the application of the land use ordinances of Moab by unlawfully circumventing the procedural requirements of MMC § 17.65.140, 17.65.080 & 17.65.130. For these reasons, Resolution No. 14-2017 should be reversed in so far as it determines or has the effect of designating the revisions and amendments as “minor changes” and not “major changes.”

Should you have any question or desire to discuss this appeal, please do not hesitate to contact our offices.

Sincerely,

ANTCZAK POLICH LAW LLC

A handwritten signature in blue ink, reading "Barbara K. Polich", written over a horizontal line.

Barbara K. Polich

George Poulton

Enclosures

cc: Mayor Sakrison
Moab City Council
Moab City Recorder

EXHIBIT A

to Appeal of Moab City Resolution 14-2017

Letter to LB Moab
(September 12, 2016)



**DUFFORD WALDECK
MILBURN & KROHN LLP**
Attorneys at Law

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(1919-1998)

William G. Waldeck
(1923-2009)

+ Also admitted in Oregon
† Also admitted in Texas
* Also admitted in Utah
~ Also admitted in Wisconsin
◇ Also admitted in Wyoming

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.

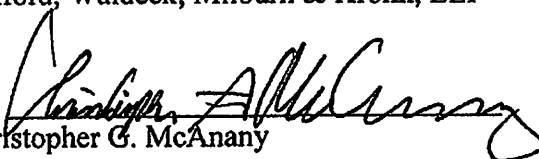
Given the scope of the changes under either the Deletion Option or the June 30 submittal, it is my conclusion that this project should be processed as a “major change” under Section 130. Under either proposal the applicant would be substantially changing the configuration, building types, phasing, and 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 Appeal of Moab City Resolution 14-2017

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.