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UTAH APPELLATE COURTS

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IN THE UTAH COURT OF APPEALS

NORTHERN MONTICELLO ALLIANCE, LLC, a Utah limited liability company, Plaintiff/Appellant, v. SAN JUAN COUNTY COMMISSION, a political subdivision of the State of Utah and SAN JUAN COUNTY, a political subdivision of the State of Utah. Defendants/Appellees. SUSTAINABLE POWER GROUP, LLC and LATIGO WIND PARK, LLC, Intervening Respondents.	**SUPPLEMENT TO BRIEF OF NORTHERN MONTICELLO ALLIANCE, LLC** Appellate Case No. 20180225-CA District Court Case No. 170700006

Appeal from the Seventh Judicial District Court, San Juan County, Utah
The Honorable Lyle Anderson, District Court Judge

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INTRODUCTION

In the Final Order[1] being appealed by NMA, the district court refused to engage in a substantial evidence analysis consistent with the Utah Supreme Court's decision in *McElhaney v. City of Moab*, 2017 UT 65, 423 P.3d 1284. Instead, the Final Order states:

> While the law of the case doctrine may not strictly apply to this situation, the Court nonetheless may, as it has considered and decided these matters on effectively the same record in *NMA I* once before, determine that it need not reconsider them and instead rely on its prior determination that, but for the due process violation, the county commission's decision was not illegal and was supported by substantial evidence.

(*See* Record Submitted on April 16, 2018 (the "**Original Record**"), R2877A[2]).

Having determined that "it appears that the record from NMA I was considered by the district court in reaching the decision now on appeal," this Court permitted supplementation of the Original Record to include "all papers filed and appearing on the docket in *Northern Monticello Alliance LLC v. San Juan County*, case no 16070001, Utah Seventh District Court, referred to as *NMA I*." *See* Order dated August 14, 2018 (the "**Order**"). The Court further ruled that "NMA is entitled to file a supplement to its brief, if it chooses to do so, addressing materials in the record following supplementation."

The record from *NMA I* (the "**Supplemental Record**") was submitted on August 22, 2018.[3] Pursuant to the Order, NMA now submits this supplement to the Brief of Northern Monticello Alliance, LLC to address materials in the Supplemental Record.

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[1] Unless otherwise defined herein, capitalized terms have the meanings ascribed to them in the Brief of Northern Monticello Alliance, LLC dated June 28, 2018.

[2] Citations to the Original Record are noted with an "**A**" following the page number.

[3] Citations to the Supplemental Record are noted with a "**B**" following the page number.

SUPPLEMENTAL ARGUMENT

The Planning Commission, not the County Commission, is the body vested with authority to receive evidence and make findings of fact that are relevant to the legal standards governing its decision. *See* UTAH CODE ANN. § 17-27a-707(3). *Cf. McElhaney*, 107 UT 65, ¶ 40 (it is the land use authority's responsibility to define the basis for its decision, not the appeal authority's).

As demonstrated by the Supplemental Record, the Planning Commission never produced explicit written findings of fact or conclusions of law to provide a substantial evidentiary basis for its determination that sPower was in compliance with the Amended CUP. The only contemporaneous written record regarding the Planning Commission's decision not to revoke the Amended CUP comprises the minutes of its September 9 and September 14, 2015 revocation hearings, which state only that:

> Studies were done relating to sound, flicker, and light. Thresholds were determined and affected lands were indicated. Mitigation for lands affected were determined and compensation amounts decided.

September 9, 2015 Minutes (R000049B).

> The other issue was whether or not any mitigation for sound, light, and flicker had taken place. This is a more subjective issue and not black and white. It was determined that mitigation had taken place as much as possible at this time.

September 14, 2015 Minutes (R000051B).

The Planning Commission did not specifically identify any actual "studies" it received from sPower prior to its decision on September 14, 2015, nor did it explain how

the "studies" demonstrated that sPower had mitigated adverse impacts on the NMA Property or whether any mitigation compensation had been made to NMA Members.[4]

In its subsequent appeal to the County Commission dated November 5, 2015, NMA argued that it never had the opportunity to present compelling evidence of sPower's failure to comply with the conditions of the Amended CUP before the Planning Commission and provided its evidence to the County Commission. (R002175B – R002370B).

sPower, through its counsel, Snell & Wilmer, submitted a letter dated November 5, 2015, with attachments, to the County Commission on appeal. (R001722B – R002174B). Included in sPower's submission was a September 23, 2015 letter from sPower's counsel, Sean McBride, to the Planning Commission, with enclosures purportedly outlining sPower's mitigation efforts. (R002151B).

The Planning Commission also submitted a Written Brief dated November 5, 2015. (R002642B – R002655B). With respect to the mitigation evidence before it at the September 9 and September 15, 2014 hearings, the Planning Commission stated only that:

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[4] sPower conceded that there is a financial mitigation condition of the Amended CUP, but claims to have fulfilled that condition:

> To the extent that light, flicker and sound could not be fully mitigated, evidence on the record demonstrates that sPower satisfied "financial mitigation" commitments and provided monetary compensation to neighboring properties as required under the CUP.

Sustainable Power Group, LLC and Latigo Wind Park, LLC's Memorandum Opposing Northern Monticello Alliance's Motion for Summary Judgment (R002944B).

> [A]t the September 9, 2015 Planning Commission meeting, the PC received information and evidence concerning the Permittees [sic] efforts to mitigate the harm of its project on others. In the Permittee's presentation, the PC received studies concerning sound, flicker, and light. It received information on thresholds and how they were determined and what neighboring lands were affected.

(R002645B).

Again, the Planning Commission failed to identify the "information" and "studies" or to provide the "presentation" upon which it purportedly relied to determine that sPower had fulfilled the mitigation requirements of the Amended CUP. There is no indication in the record that the Planning Commission ever transmitted to the County Commission any of the *actual evidence* it considered or any contemporaneous record of its proceedings, aside from its September 9, 2015 and September 14, 2015 Minutes.

After a hearing on NMA's appeal on November 10, 2015, the County Commission issued its Final Written Decision dated December 2, 2015, wherein it found that:

> We have been presented with *no evidence* in this appeal that s*Power has worked to mitigate sound, light, and flicker *other than s*Power's representation that it has done studies and mitigated effects that exceeded the thresholds it set*. … That is insufficient for us to determine whether s*Power is meeting the Latigo CUP's mitigation condition, and we therefore believe it was also insufficient for the [Planning] Commission to conclude that s*Power was satisfying the condition.

(R000094B – R000095B) (emphasis added).

Accordingly, the County Commission reversed the P&Z Decision and remanded the matter back to the Planning Commission to allow NMA to be heard (R000095B – R000096B), which is what NMA has been seeking all along.

Threatening a $100 million damages claim, on December 3, 2015, sPower demanded that the County Commission reverse the Final Written Decision, asserting that it had provided mitigation evidence other than its own self-serving representations to the Planning Commission. On December 8, 2015, the County Commission issued its Amended Decision, upholding the Planning Commission's decision in its entirety and denying NMA a hearing before the Planning Commission, stating that: "sPower is correct that, for reasons we need not go into, we had not considered the mitigation evidence it had presented to the Planning Commission at the time we rendered our December 2 'Written Decision.'" (Amended Decision, R000018B). This "mitigation evidence" comprised "two three-ring binders of information" sPower claimed to have given to the Planning Commission at or prior to the September 9 or September 14, 2015 revocation hearings. (*Id.*).

While acknowledging that the Planning Commission had failed to make any findings of fact to support its decision not to revoke the Amended CUP, the County Commission attempted to discern the evidentiary basis for the Planning Commission's decision from the materials supplied to the County Commission ***by sPower*** in its *post hoc* September 23, 2015 letter. (R000018B – R000019B). The County Commission then upheld the P&Z Decision based on its own conclusions – a result eschewed by *McElhaney* – rather than remanding the matter to the Planning Commission to generate explicit findings *See* 2017 UT 65, ¶¶ 39-40. The County Commission further concluded, without evidentiary support, that the *existence* of the Purchase Option was sufficient evidence of financial mitigation to NMA to uphold the Planning Commission's determination that sPower had met the financial mitigation condition of the Amended CUP. (R000020B).

As noted by Commissioner Phil Lyman in his dissenting opinion, the "mitigation evidence" received by the County Commission was sPower's November 5, 2015 letter, with the attached September 23, 2015 letter. (*See* Lyman Dissent, R000847B). Commissioner Lyman recognized there is "no evidence" that the materials contained in the September 23, 2015 letter were in fact "considered by the Planning Commission at their September 9 or 14, 2015 meetings," although the Planning Commission "may have had similar information." (*See* Lyman Dissent, R000847B). Commissioner Lyman then noted that "[t]he issues of sound, flicker, light, are technical questions that deserve at least some evidence of effort on the part of the planning and zoning commission to assess. ***No such evidence was presented to the hearing authority.****"* (R000848B) (emphasis added).

Commissioner Lyman further stated that there was no evidence that sPower had fulfilled the financial mitigation requirements of the Amended CUP, but rather that the evidence showed that sPower "did not mitigate in relation to the NMA Land Owners." He further characterized sPower's assertion that it had in fact paid NMA Members "full value for their properties under the mitigation agreement" as "absurd." (R000848B – R000849B). Commissioner Lyman concluded:

> [The Amended] CUP states that proof of financial mitigation payments be verified before a building permit is issued. No one is asserting that the specifics of the financial transaction between Latigo and NMA are the county's business, but what we have here is clear evidence that Latigo Wind Park's assertion, that it provided mitigation through compensation to NMA land owners, is *completely false*.

(R000850B) (emphasis added).

NMA timely appealed the Amended Decision to the district court arguing, among other things, that the Amended Decision was arbitrary and capricious in that it was not supported by substantial evidence. (*See* Amended Complaint and Petition for Judicial Review dated February 10, 2016, R000127B – R000128B). After briefing and a hearing on competing motions for summary judgment and a motion for judgment on the pleadings, the district court issued its *Memorandum of Decision on the August 30, 2016 Hearing* dated September 9, 2016 ("**Memorandum Decision**"). (R003158B).

In the Memorandum Decision, the district court found that, where the County based the Amended Decision on an ex parte communication, the reconsideration "*did not originate from the evidence*," and NMA received neither notice of sPower's September 23, 2015 letter nor an opportunity to be heard in opposition, the Amended Decision violated NMA's due process rights and was therefore illegal. (R003164B – R003165B).

The district court's entire "substantial evidence" analysis in the Memorandum Decision was as follows:

> A decision is arbitrary and capricious when it is not supported by substantial evidence. The County's decision to reverse its earlier order was based on its failure to consider "two three ring binders of information" on SPower's mitigation efforts. In these binders, the County found sound, light, and flicker studies that it relied on to conclude that SPower's mitigation efforts met the requirements of the permit. Accordingly, the court cannot find that the County's decision was unsupported by substantial evidence.

(R003163B).

It is this "prior determination" upon which the district court relied when it refused to apply the stringent analytical requirements of *McElhaney* in the instant matter. (*See* Final Order, R2877A). There is no indication in the district court's analysis what

information was in the "two three ring binders" or whether the information in the binders was considered by the Planning Commission. In fact, it is impossible to tell whether the district court even looked at the "three ring binders" in determining whether the Planning Commission's revocation decision or the County Commission's Amended Decision was supported by substantial evidence. Consequently, it was impossible for the district court to conclude that there was substantial evidence supporting the Planning Commission's revocation decision, as the County Commission concluded in its Amended Decision.[5]

Nevertheless, the district court relied on this "prior determination," stating at the hearing on the summary judgment at issue on this appeal:

> **THE COURT:** Okay. All right, well, I'm not sure whether law of the case, the appellate--well it actually can be trial court doctrine, but also an appellate court doctrine--I'm not sure how it applies in this circumstance. It may not strictly apply, but I have the right to say, I've considered this once, I don't want to consider it again.
>
> And so at the very least, that's what I'm doing here. I'm not going to go back into the question of whether there's substantial evidence … .

Transcript of August 29, 2017 Hearing (R2825A – R2825A).

[5] The district court directed NMA's counsel to prepare a judgment on the Memorandum Decision. NMA prepared a proposed judgment vacating the Amended Decision, reinstating the Written Decision and remanding the matter back to the Planning Commission. (R003188B – R003190B). Responding to the County's objection to the proposed judgment remanding the matter to the Planning Commission, NMA explained why remand to the Planning Commission was imperative. (R003181B – R003186B). The district court rejected NMA's proposed order and entered a Judgment remanding the matter back to the County Commission, which had no authority to make findings of fact and conclusions of law. (R003215B). The Judgment was subsequently amended to remove any indication that NMA's counsel prepared the Judgment or approved the Judgment as to form. (R003243B – R003244B).

While the district court relied on the prior record in making its decision, it made no effort to apply the principles of *McElhaney* to that prior record. Such an analysis would mandate remand of this matter to the *Planning Commission* to generate explicit findings of fact and conclusions of law to permit meaningful appellate review. *See McElhaney*, 2017 UT 65, ¶¶ 40-41.

DATED this 27th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2018, I caused a true and correct copy of the foregoing **SUPPLEMENT TO BRIEF OF NORTHERN MONTICELLO ALLIANCE, LLC** to be transmitted, via e-mail and first-class mail, to the following:

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