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.	**REPLY BRIEF OF NORTHERN MONTICELLO ALLIANCE** 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

J. Craig Smith (4143)
jcsmith@SHutah.law
Jennie B. Garner (5486)
jgarner@SHutah.law
Jay L. Springer (14798)
jspringer@SHutah.law
SMITH HARTVIGSEN, PLLC
257 East 200 South, Suite 500
Salt Lake City, Utah 84111
Telephone: (801) 413-1600
Facsimile: (801) 413-1620
Attorneys for Plaintiff/Appellant

Barton H. Kunz II
GOEBEL ANDERSON PC
405 South Main Suite 200
Salt Lake City, Utah 84111
Attorneys for Appellees

Paul W. Shakespear
Elizabeth M. Brereton
SNELL & WILMER LLP
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101
Attorneys for Intervenors

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ARGUMENT

I. The County may not rely on "some inherent authority" to "reconsider" its Final Written Decision; the County's doing so was illegal.

As conceded by both the County and sPower, neither the County Land Use Development and Management Act, Utah Code Ann. § 17-27a-101 et seq., ("**CLUDMA**") nor the San Juan County Zoning Ordinance ("**Zoning Ordinance**"), provide for reconsideration of the Final Written Decision of the County Commission sitting as the "appeal authority" under Utah Code Ann. § 17-27a-103 and -701. Thus their "some inherent authority" argument fails for multiple reasons.

First, CLUDMA, as the sole source of authority delegated by the Utah legislature for counties to regulate land use, does not provide any hint of either authority for, or procedure to, reconsider a final written decision.[1] To the contrary, Utah Code Ann. § 17-27a-801(2)(a) provides "any person adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the decision is final." Simply put, if the Utah Legislature had intended to delegate either authority for, or a procedure to reconsider appeal authority final decisions, it would have done so in CLUDMA. It did not. *Id.*

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[1] The power for the County to regulate the use of land is delegated by the Utah Legislature through Title 17, Chapter 27a of the Utah Code. Counties hold no inherent authority to regulate the use of land. *See Toone v. Weber Cty.*, 2002 UT 103, ¶ 7, 57 P.3d 1079.

Further, CLUDMA requires that each appeal authority "conduct ***each appeal*** and variance request ***as described by local ordinance***." Utah Code Ann. § 17-27a-706. (emphasis added). Accordingly, the County was required, at a minimum, to provide for reconsideration in its own ordinances before it could grant reconsideration.[2] No Zoning Ordinance provides for or sets forth a mechanism for reconsideration. Thus any "inherent authority" of the County to grant reconsideration is nothing more than an academic question as the County failed to even attempt to provide the ability or procedure for its land use appeal authority to reconsider a Final Written Decision. Instead, the Zoning Ordinance mimics CLUDMA, providing only that "[t]he decision of the Board of County Commissioners may be appealed to the District Court provided such appeal is filed within thirty (30) days of the Commission decision." Zoning Ordinance 6-7. Here, there is neither authority nor procedure to reconsider the Final Written Decision of the County Commission as the land use appeal authority.

A. Even if the County Commission indeed holds "some inherent authority" to reconsider a Final Written Decision, the failure to adopt ordinances or rules providing for and governing reconsideration is fatal.

CLUDMA provides for and allows limited addition to and tailoring by the County of the County's delegated authority to regulate land use. *See* Utah Code Ann. § 17-27a-102(b). "To accomplish the purposes of this chapter, counties may enact all ordinances,

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[2] Other Utah counties have adopted such rules. For example, Salt Lake County Ordinance 2.04.150 "Public Hearings" provides for rehearing of issues not "contrary to Utah law" where "an aggrieved person files a written request for rehearing that includes new evidence which the council determines to justify reconsideration of its decisions. A request for rehearing shall be filed within ten days from the date of the original decision."

resolutions, and rules ... that they consider necessary or appropriate for the use and development of land within the unincorporated area of the county..." As stated above, the Zoning Ordinance does not provide powers or procedures for reconsideration. Instead, Zoning Ordinance 6-7 provides only for appeal from the County Commission to the district court.

Despite the lack of authority or procedure, the County seeks to convince this Court to fill this huge legal vacuum with bald and unexpressed "inherent authority." In other words, despite no adopted ordinance providing for, or even establishing a procedure to reconsider, the County asks this Court to hold that a county land use appeal authority may still reconsider and reverse a final Written Decision without notice, at any time, for any reason, or no reason at all. (Or, as in the present case when it is threatened with a $100 million lawsuit.) None of the cases cited by the County has even come close to sanctioning or even suggesting such a wide open, unexpressed, unrestrained, and lawless, reconsideration avenue.[3]

For example, in *Clark v. Hansen,* 641 P.2d 914, 915 (Utah 1981) the statement "[i]nherent in the power to make an administrative decision is the authority to reconsider a decision" refers to a state agency which had duly adopted and was following rules that

[3] The mischief and chaos such a precedent would cause is easy to imagine. For example, does a request for reconsideration toll the 30 day period to appeal to district court pursuant to Section 17-27a-801(2)(a)? If so, when does that period begin again in the event of inaction by the county? If not, can the county and the district court simultaneously consider the aggrieved party's request? How many reconsiderations are permitted? These are just a few likely scenarios if this Court were to adopt the County and sPower's wide-open, no rules needed, reconsideration power.

provided for and governed reconsideration of its final decision.[4] *See also Career Serv. Review Bd. v. Utah Dept. of Corr.*, 942 P.2d 933 (Utah 1997) (agency had adopted rules governing reconsideration). Ignoring these fatal, self-inflicted, distinguishing flaws, of failure to adopt any ordinance or rule allowing, or providing a process, for reconsideration, the County argues that these cases gave the County Commission "inherent authority" absent any statute, ordinance, rule or adopted procedure to reconsider and reverse, *ex parte* and *ad hoc*, its Final Written Decision remanding NMA's revocation appeal to the Planning Commission to rehear revocation of the sPower Amended CUP. The County Commission, as the legislative body of San Juan County, could have easily provided, but chose not to provide, for or adopt any procedure to reconsider its own Final Written Decision. Instead it adopted Zoning Ordinance 6-7, which directs that the only relief after a Final Written Decision is issued is further appeal to the district court.

Thus, even if one were to accept the argument that the County had "some inherent authority" to provide for and adopt a reconsideration procedure, no Utah Court has ever held that a city or county, or a state administrative agency may reconsider a final Written Decision when no reconsideration mechanism has been adopted.[5] Accordingly, the ruling

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[4] While *Clark* predates UAPA, the State Engineer was authorized to adopt rules under the Utah Rulemaking Act which was adopted in 1974. This Act addressed concerns over the power of state administrative agencies to adopt rules.

[5] Utah's courts are similarly bound by the duly adopted Utah Rules of Civil and Appellate Procedure, which tightly govern all aspects of reconsideration of a final order, judgment, or issued opinion.

of the district court must be reversed with instructions to reinstate the original Final Written Decision of the County Commission, remanding this matter to Planning Commission so that a revocation hearing on the Amended CUP is held where NMA may, for the very first time, submit evidence and testimony regarding why the Amended CUP must be revoked for sPower's failure to abide by the conditions of the Amended CUP.[6]

II. The conclusory decision of the Planning Commission declining to revoke the Amended CUP was fatally deficient, precluding meaningful appellate review.

The insufficiency of the Planning Commission's conclusory and factually unsupported decision not to revoke the Amended CUP was a key element of NMA's appeal before the district court (R2394-2400A, R2662-2666A) and remains a key element in this appeal. Both this Court and the Utah Supreme Court have provided clear standards as to what an administrative decision must include to be sufficient for appellate review and have held that when a decision of a land use authority fails to meet the required standards, it is impossible to rehabilitate the deficient decision on appeal and the only remedy is remand to the administrative body to make and enunciate the required findings and conclusions.

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[6] In the nearly four years that have passed since the County Commission originally ordered the Planning Commission to hold a new revocation hearing, sPower has made no attempt to cure any of its ongoing violations. Instead, sPower continues to rely on its $100 million lawsuit threat to coerce, intimidate and co-opt San Juan County. The most recent example is the joint response brief of sPower and San Juan County – the regulator and the regulated under the Amended CUP.

A. This Court's holding in *Palmer v. St. George City Council* requires remand to the Planning Commission for a new hearing.

The refusal to allow NMA to submit evidence to the Planning Commission renders it impossible to affirm the Planning Commission's decision not to revoke the Amended CUP. As this Court has recently held:

> 'The failure of an agency to make adequate findings of fact on material issues renders its findings arbitrary and capricious **unless the evidence is clear, uncontroverted and capable of only one conclusion**.' Without any findings of fact, or even a discussion on the record to support a decision, this court cannot perform its duty of reviewing the agency's decision 'in accordance with established legal principles and of protecting the parties and the public from arbitrary and capricious administrative action.'

Palmer v. St. George City Council, 2018 UT App 94, ¶ 38, 427 P.3d 423 (citations omitted) (emphasis added).

The evidence was "clear, uncontroverted and capable of only one conclusion," in this case only because the Planning Commission barred NMA from submitting its evidence.[7] *Id.* If NMA had been allowed to participate at the Planning Commission hearing by submitting its evidence, the evidence on revocation would not have been "clear, uncontroverted, and capable of only one conclusion." For this reason alone remand to the Planning Commission so that NMA may submit its evidence is the only remedy.

Barring NMA from participating in the revocation hearing indelibly taints the decision of the Planning Commission not to revoke the Amended CUP such that it cannot

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[7] Much of the documentary evidence that NMA was barred from submitting was later submitted to the County Commission on appeal. *See* R2175-2372B. However, the County Commission cannot rehabilitate the errors and deficiencies of the Planning Commission's ruling.

be sustained. The tainted decision is necessarily arbitrary and capricious, as the substantiality of the evidence that the Planning Commission relied upon cannot be determined in a vacuum devoid of all opposing evidence. In other words, whether or not there was substantial evidence can only be determined in light of the totality of all evidence presented. If, and only if, NMA is allowed to present all of its testimony and evidence to the Planning Commission, the evidence relied upon by the Planning Commission may be determined to be substantial as required by Utah Code Ann. § 17-27a-707 and § 17-27a-801(3)(c)(i).

B. *McElhaney v. City of Moab* requires remand to the Planning Commission, as the land use authority and finder of fact, to craft findings of fact capable of review by the appeal authority and the courts.

As the Supreme Court held in *McElhaney*, it is not the role of appellate bodies, whether they are the city/county appeal authority, district court or appellate court, to attempt to rehabilitate deficient rulings of a land use authority by divining and recreating the reasons and rationale which the land use authority failed to express in writing. *McElhaney v. City of Moab*, 2017 UT 65, 423 P.3d 1284. Rather, in order to have a valid land use decision reviewable on appeal, the land use authority must set forth in writing its findings and conclusions. *Id.* at ¶ 40. Failure to do so is fatal and reversible error that cannot be cured by either the appeal authority or the district court on review.[8] In other words, the

[8] Among other reasons, the appellate body, *i.e.*, land use appeal authority, district court, or appellate court, must apply a deferential standard of review. *See* Utah Code Ann. § 17-27a-801(3)(b).

error of failing to provide adequate written findings and conclusions must be corrected by the land use authority. In *McElhaney*, the land use authority was the Moab City Council. In this case, the land use authority is the Planning Commission.[9]

The district court makes the same mistake it did in *McElhaney*. It excuses the Planning Commission by looking past its deficient ruling to the one-sided record and fails to review the actual decision of the Planning Commission. It was not the role of either the County Commission or the district court to attempt to rehabilitate the faulty Planning Commission decision by looking past it to the record. In other words, if the Moab City Council, sitting as the land use authority, had granted the conditional use permit rather than denying it, its summary ruling would have still been legally deficient and the district court could not resort to the record to rehabilitate that ruling either.

The Planning Commission prepared no contemporaneous findings of fact when it made its decision not to revoke the Amended CUP. Rather, it later provided a Written Brief to the County Commission upon the filing of NMA's appeal of its decision. R2642B-2655B. In its Written Brief, the Planning Commission attempted to rehabilitate its decision by claiming that "[i]n [sPower'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." R2645B. However, the minutes of that meeting

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[9] Upon remand to the Planning Commission to hold a proper hearing and then decide whether or not to revoke the Amended CUP, the Planning Commission may need to clarify and memorialize the conditions in the Amended CUP, as the Amended CUP itself does not meet the requirements of *McElhaney*. The Planning Commission failed to prepare a written Amended CUP which clearly sets forth the conditions imposed on the Wind Facility.

reflect 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." The minutes of the September 14, 2015 meeting state only that "it was determined that mitigation had taken place as much as possible at this time." R2655B. The Written Brief did not rehabilitate the deficient ruling.

C. While this Court Reviews the district court's decision, the remedy is remand to the land use authority.

In *McElhaney*, the Supreme Court clarified that, in the appeal of a decision by a land use authority, an appellate court reviews the intermediate court's decision. However, the Supreme Court further clarified that, in such a review, "[w]e afford no deference to the intermediate court's decision and apply the statutorily defined standard to determine whether the court correctly determined whether the administrative decision was arbitrary, capricious or illegal." *Id.* at ¶ 26. The footnote is instructive on the practical effect of this standard: "Although we take this opportunity to clarify the standard, the outcome of this case would be the same if we reviewed the Council's decision directly. In either scenario, we would conclude that the Council did not produce findings sufficient to permit meaningful review." *Id.* at n.4. The *McElhaney* court went on to hold that the district court erred by failing to remand the matter to the administrative agency to make additional findings of fact and vacated the district court's decision with instructions. *Id.* at ¶ 42. The result: the case was remanded to the land use authority to prepare and set forth written

findings and conclusions, which is exactly the result NMA is entitled to and seeks in this matter.[10]

D. McElhaney simply clarified existing law.

NMA does not assert that *McElhaney* was "new" law – only that it *clarified* the requirements a decision issued by a land use authority must satisfy to be supported by substantial evidence. NMA's Brief, 15. *See* 2017 UT 65, ¶ 33-35. *McElhaney* is significant because it specifically prescribes remand to the *land use authority*, not the *appeal authority*, to rectify the deficiencies in a land use decision. 2017 UT 65, ¶ 42. NMA has argued from the beginning of this case that remand to the Planning Commission is the only real remedy so that the Planning Commission can receive evidence and make a proper factual determination regarding sPower's failure to comply with the conditions of the Amended CUP. (R2175B; R0012B-0014B; R3178-3187B; R3199B-3201B; R0022A; R0033A-0035A; R2233A-2247A.).

As admitted by the County, the Supreme Court noted in *McElhaney* that this Court has, in prior rulings, required that land use authorities "issue findings of fact when denying conditional use permits." County's Brief, 31. Interestingly, in both of the cases cited by *McElhaney*, this Court actually reviewed the decisions of the *land use authorities*, in

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[10] The County Commission's original remand instructions in its Written Decision directed the result NMA now seeks – a proper review of the facts, including meaningful NMA input, before the Planning Commission. *See* Petitioner Northern Monticello Alliance, LLC's Response to the Respondent County's Objection to Proposed Judgment, submitted by NMA in *NMA 1*. R003178B – R003191B; Brief on Remand from Seventh District Court, R2233A – R2247A.

addition to the district court decisions. *See* 2017 UT 65, ¶ 37; *see also Davis Cty. v. Clearfield City,* 756 P.2d 704 (Utah Ct. App. 1988) (finding that the land use authority's failure to provide written findings "tended to suggest there was no rational basis"); *Ralph L. Wadsworth Constr., Inc. v. W. Jordan City*, 2000 UT App 49, ¶ 14, 999 P.2d 1240 (finding the City Council's decision arbitrary and capricious where it provided no factual findings). In other words, this Court looked back to the record and decision at the *land use authority* level while evaluating the decision of the district court.

The County attempts to excuse the Planning Commission's and County Commission's failure to provide findings of fact capable of judicial review, stating, without any legal support, that because it had discretion as to whether to revoke a permit, "the planning commission merely had to state that it had reviewed the evidence presented and found no violation of the permit's conditions." County's Brief, 33. In fact, *McElhaney* did not make any distinction between mandatory or discretionary administrative decisions, as asserted by the County. Rather, *McElhaney* flatly stated that "an administrative agency must 'make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review.'" 2017 UT 65, ¶ 35.

> Simply stated, if a city council is going to sit as an adjudicative body, it needs to produce finds of fact capable of review on appeal. By mandating that a reviewing court must uphold a city council's decision as long as it is supported by the substantial evidence, the legislature has utilized a term of art that presupposes written findings.

2017 UT 65, ¶ 41.

III. A substantial evidence review of a land use decision required the district court to review all evidence in the record, both favorable and contrary.

CLUDMA requires that '[i]f the scope of review of factual matters is on the record, the appeal authority shall determine whether the record on appeal includes ***substantial evidence for each essential finding of fact.***" Utah Code Ann. § 17-27a-707(3) (emphasis added). This Court has consistently held that in determining whether a land use authority's decision is supported by substantial evidence, this Court "will consider ***all the evidence in the record, both favorable and contrary***" to the land use authority's decision. *Patterson v. Utah Cty. Bd. Of Adjustment*, 893 P.2d 602, 604 (Utah Ct. App. 1995) (citing *Grace Drilling Co. v. Bd. of Review*, 776 P.2d 63, 68 (Utah Ct. App. 1989) (emphasis added). *See also, Baker v. Park City Mun. Corp,* 2017 UT App 190, ¶ 18, 405 P.3d 962 (quoting *Patterson*); *Carlsen v. Bd. of Adjustment of City of Smithfield*, 2012 UT App 260, ¶ 5, 287 P.3d 440 (quoting *Patterson*); *Vial v. Provo City,* 2009 UT App 122, ¶ 9, 210 P.3d 947 (quoting *Patterson*). In other words, the "whole record" is applicable to a challenge of a land use authority's decision.[11]

The County argues that, because NMA cited *Grace Drilling*, NMA has relied on "UAPA's statutory whole-record test," and then asserts that such reliance is misplaced because the standard does not apply. This argument fails where *Patterson* and its progeny demonstrate that a "whole record" review ***is*** applicable in land use decisions that are not

[11] Here, the Record itself is fatally flawed as NMA was barred from presenting any evidence to the Planning Commission as NMA was prevented from submitting any evidence to the Planning Commission. See R0915A-0917A.

governed by the UAPA. As *Patterson* makes clear the "substantial evidence" standard requires a review of the "whole record," not just evidence favorable to the determination of the land use authority.[12] The district court failed to even review the record.

Even if the decision of the Planning Commission were sufficient to permit meaningful appellate review, the review by the district court was woefully inadequate. In its decision in *NMA 1*, the district court simply, and conclusorily, referenced "two three-ring binders of information," wherein "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." *See* Memorandum of Decision on the August 30, 2016 Hearing, R003163B. In *NMA 2*, the district court simply harkened back to and relied on its deficient review of the record in *NMA 1*. The district court did not review the record, instead relying on mass alone, and summarily and conclusorily assumed that the referenced binders provided substantial evidence. This anemic review fails to meet the requirements of § 17-27a-707(3) and *Patterson*.

The district court's actual holding in *NMA 1* was that, since the County Commission (not the Planning Commission) claimed to have reviewed "two three ring binders of information," "the court cannot find that the County's decision was unsupported by substantial evidence." Memorandum of Decision on the August 30, 2016 Hearing,

[12] This is yet another reason why it was critical for NMA to have an opportunity to present evidence ***to the Planning Commission*** that "fairly detracted" from the evidence ostensibly relied upon, but not identified or analyzed by, the Planning Commission.

R003163B. However, under *McElhaney* it is the decision of the Planning Commission as the land use authority at issue.

IV. NMA met any marshaling requirement.

Marshaling first requires ***findings of fact*** capable of review on appeal. As set forth in NMA's Brief, no such findings exist. Nor has the County even identified any evidence to support a finding that sPower mitigated with respect to the *NMA Property*. NMA's Brief, pp. 20-22.[13]

The Planning Commission's decision refers only to "studies concerning sound, flicker, and light," and "information" concerning sPower's "efforts" to mitigate affected property. *See* R2653B, R2655B, R2645B. Based on these references, NMA marshaled the "studies" in the record, none of which are specifically identified by the Planning Commission as the basis for its decision, to show that these "studies" cannot support a

[13] The County argues that the County Commission made sufficient findings, and that the district court is excused from making findings because "the County and sPower set out their arguments in their memoranda that the district court implicitly adopted." County's Brief, 40. First, the County Commission explicitly recognized in its Amended Decision that the Planning Commission made no written findings, so whatever "findings" the County Commission made were in contravention of *McElhaney*. (R0831B-0832B). Second, even if the district court "implicitly adopted" the County's arguments, it was the *Planning Commission's* "responsibility to define the basis for its decision, not the district court's" or the appeal authority. *See McElhaney*, 2017 UT 65, ¶ 41. Under *McElhaney*, neither the County Commission nor the district court could cure the deficient findings of the Planning Commission.

finding that sPower has mitigated the detrimental impact of the Wind Facility on *the NMA Property*. *See* NMA's Brief, pp. 23, 28-34.[14]

In *State v. Nielsen,* the Utah Supreme Court "reaffirm[ed] the traditional principle of marshaling as a natural extension of an appellant's burden of persuasion," and instructed that an appellate court's analysis must "be focused on the ultimate question of whether the appellant has established a basis for overcoming the healthy dose of deference owed to **factual findings**...." *State v. Nielsen*, 2014 UT 10, ¶ 41, 326 P.3d 645 (emphasis added).

Where the Planning Commission made no findings of fact, NMA has made a sufficient effort to "identify and deal with supportive evidence" (*See Nielsen,* 2014 UT 10, ¶ 40) to carry its burden of persuasion on appeal and to demonstrate that the Planning Commission's decision, which is completely devoid of factual findings, is not supported by substantial evidence and therefore could not – and cannot – be sustained on appeal.

V. NMA preserved its arguments below.

NMA does not argue that the Record is "unreliable," or "inaccurate," or that there are materials that "shouldn't be in the record" (County's Brief, pp. 41-42). Rather, NMA argues that (1) the Record fails to disclose what evidence, if any, the Planning Commission relied on; and (2) the County Commission was barred from considering evidence that was not before the Planning Commission to rehabilitate the Planning Commission's ruling.

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[14] The County Commission's Amended Decision acknowledged that the flicker study actually showed that the flicker on the NMA Property exceeded industry standards. R0832B.

The County argues that NMA failed to preserve objections to evidence in the Record, including but not limited to the post Planning Commission ruling September 23, 2015 letter from sPower to San Juan County Attorney Kendall Laws ("**September 23, 2015 Letter**") (R1748) that purports to provide evidence presented to the Planning Commission prior to its September 14, 2015, decision. County's Brief, 41.[15] However, NMA never had an opportunity to present an objection to that evidence to the finder of fact, *i.e.,* the *Planning Commission.* This belated letter was sent after the Planning Commission issued its ruling on September 14, 2015.

In its December 23, 2016 Brief on Remand, NMA objected to the County Commission's reliance on evidence that was not before the Planning Commission, including the September 23, 2015 Letter. Remand Brief at R2235-36A, R2246A. NMA further raised the issue in its March 23, 2017 Complaint (R0014-15A) and in its October 18, 2017 Motion for Summary Judgment, (R2391A).

Contrary to the County's assertions, NMA's objection to the County Commission's consideration of evidence that was not before the Planning Commission *on remand* was timely. NMA presented this specific issue to the County Commission's attention, giving it an "opportunity to rule on the issue." *See 438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 5,

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[15] The County claims that once NMA raised the issue that the September 23, 2015 Letter was not before the Planning Commission, it "switched the citations… to other parts of the record." County's Brief, p. 43. The difficulty with this argument is that, since the Planning Commission made no findings of fact and failed to identify the materials upon which it relied, there is still no contemporaneous evidence in the Record that those materials were ever before the Planning Commission.

99 P.3d 801. (R2234-2236A). The County Commission had an opportunity to rule on the issue, but instead considered the September 23, 2015 Letter and its attachments on remand. The district court blindly followed suit.

VI. NMA has a protectable property and due process interest in enforcement of the Amended CUP pursuant to San Juan County Zoning Ordinances.

A protectable property interest exists where "existing rules and understandings that stem from an independent source such as state law ... secure certain benefits and [ ] support claims of entitlement to those benefits." *Petersen v. Riverton City*, 2010 UT 58, ¶ 22, 243 P.3d 1261.

While the Planning Commission has discretion to grant or revoke a conditional use permit, that discretion is limited by requirements of the Zoning Ordinance 6-4, which provides that, "[i]n authorizing any conditional use the Planning Commission ***shall impose*** such requirements and conditions as are necessary for the ***protection of adjacent properties*** and the public welfare." (Emphasis added.)

The distinction between "adjacent properties" and the "public welfare" is critical for purposes of determining whether NMA has a protectable property interest. The NMA Property is adjacent to the Wind Facility, and thus its rights are distinguished ***by ordinance*** from general rights of the public. This distinction gives specific property owners such as NMA, as opposed to the general public, a "legitimate claim of entitlement" to protection of its property in the granting and enforcement of a conditional use permit. *See Petersen*, 2010 UT 58, ¶ 21. This is not an "abstract need for, or unilateral expectation of to some benefit." *See id,* ¶ 22.

Zoning Ordinance 6-4 further limits the Planning Commission's discretion by providing that it "***shall not authorize*** a conditional use permit ***unless*** the evidence presented is such to establish: (1) That such use will not, under the circumstances of the ***particular case*** be ... injurious to ***property*** or improvements in the vicinity ...." (emphasis added). Implicit in this language is a requirement that Planning Commission shall not ***allow*** a conditional use to ***continue*** if it has unmitigated detrimental impacts on the specific property contemplated by the permit. Thus, the issue is whether NMA has a due process right to participate in a hearing regarding revocation of the Amended CUP that specifically contemplates mitigation of specific detrimental impacts on the NMA Property.

Zoning Ordinance 1-5(19) defines a conditional use as a "land use that, because of its unique characteristics or potential impact on the county, surrounding neighbors, or ***adjacent land uses***, may not be compatible in some areas or may be compatible ***only if certain conditions*** are required that ***mitigate or eliminate the detrimental impacts***." Both sPower and the County have acknowledged that the Wind Facility is injurious ***specifically*** to the NMA Property – that is the entire reason for the mitigation requirements of the Amended CUP. Thus, the benefit of the Amended CUP has ***already been granted to NMA***. Accordingly, NMA has a due process right to enforce that benefit.

The County cites no Utah case law holding that an adjoining landowner who is entitled to specific mitigation under a conditional use permit does not have a due process right to enforce a mitigation requirement. Rather, the County cites *Gagliardi v. Vill. of Pawling*, 18 F.3d 188 (2d Cir. 1994), which is distinguishable because it dealt with a general zoning ordinance adopted for the welfare of the public, rather than a specific

conditional use permit requiring mitigation of specific detrimental effects on specific property. NMA does not seek enforcement of a general zoning law – it seeks enforcement of the Amended CUP that was ***expressly conditioned*** on mitigation of the detrimental effects of the Wind Facility on the ***NMA Property***.

VII. The district court ruled that NMA has due process rights and the County and sPower failed to preserve their objection or properly appeal this ruling.

In *NMA I,* the district court held that the County Commission's Amended Decision violated NMA's due process rights. R3165B. Neither the County nor sPower appealed that ruling. In the appeal filed by NMA after the ruling by the district court in *NMA 1*, this Court did not disturb the district court's ruling regarding due process, but rather, found that the district court's ruling vacating the Amended Decision and remanding the case for "further proceedings to permit NMA notice and an opportunity to be heard" gave NMA what it had asked for. R3343B. What NMA had actually asked for was a hearing before the Planning Commission, which was denied by the district court on remand, sending the case back only to the County Commission, and only for a hearing on whether the County Commission should reconsider its original decision. Not surprisingly, the County Commission affirmed itself and NMA again appealed to the district court ("***NMA 2***").

In *NMA 2*, the district court reaffirmed its holding that NMA indeed has due process rights, but found that the County Commission had remedied its denial of due process by giving NMA an opportunity to be heard on the reconsideration remedy. R2877-78A. However, the denial of due process and a right to protect NMA members' property interest was not solely due to the reconsideration. The critical deprivation of these rights occurred

before the Planning Commission when NMA was denied the right to participate or submit evidence. The only way this denial of NMA's rights may be cured is by remand to the Planning Commission for a new hearing on revocation. The Planning Commission was, and is, the only body that can properly determine if the Amended CUP should be revoked. *See* Zoning Ordinance 6-10 ("A conditional use permit shall be revocable by the Planning Commission at any time due to failure of the permittee to observe any condition specified..."). Reviewing bodies are not empowered to substitute their judgment for that of the Planning Commission and must review the Planning Commission's decision deferentially. However, the County and sPower have never appealed the district court's recognition of NMA's due process rights.

CONCLUSION

There are four independent grounds for reversal and remand to the Planning Commission. First, the Planning Commission's barring NMA from submitting any evidence for revocation necessarily invalidates its ruling not to revoke the Amended CUP. Second, the ruling of the Planning Commission fails to meet the requirements found in *McElhaney* and neither the County Commission nor the district court may rehabilitate the Planning Commission's deficient ruling on appeal. Third, the County Commission had no authority or procedure to reconsider its original Final Written Decision and that Decision must be reinstated. Fourth and finally, the due process and statutory participation rights of the NMA members were violated by denying them full participation in the Planning Commission hearing. Accordingly, NMA respectfully requests this Court to reverse the

ruling of the district court with instructions for remand to the Planning Commission where a proper and legal hearing on revocation may finally be held.

DATED this 4th day of February, 2019.

SMITH HARTVIGSEN, PLLC

/s/ J. Craig Smith
Craig Smith
Jennie B. Garner
Attorneys for Plaintiff/Appellant
Northern Monticello Alliance, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2019, I served the foregoing **Reply Brief of Appellant Northern Monticello Alliance, LLC** via email, to the following:

Barton H. Kunz II
GOEBEL ANDERSON PC
405 South Main Suite 200
Salt Lake City, Utah 84111
Attorneys for Appellees
bkunz@gapclaw.com

Paul W Shakespear
Elizabeth M. Brereton
SNELL & WILMER LLP
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101
Attorneys for Intervenors
pshakespear@swlaw.com
lbrereton@swlaw.com

SMITH HARTVIGSEN, PLLC

/s/ Jay L. Springer
J. Craig Smith
Jennie B. Garner
Jay L. Springer
Attorneys for Plaintiff/Appellant Northern Monticello Alliance, LLC

4829-8209-8820

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J. Craig Smith
Attorney's or Party's Name

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