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IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

SKY MOUNTAIN GOLF ESTATES HOMEOWNERS ASSOCATION, INC. Petitioner, v. THE CITY OF HURRICANE Respondent.	**MOTION TO DISMISS AND SUPPORTING MEMORANDUM** Case No. 190500180 Judge: John J. Walton

Pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, Respondent, the City of Hurricane ("**Respondent**"), through counsel, hereby moves this Court for an order dismissing the *Petition for Review of Decision* filed in this matter on April 3, 2019 ("**Petition**"). The Petition fails to state a claim under Utah Code § 10-9a-801(3)(a) for which relief can be granted.

STATEMENT OF RELIEF REQUESTED

Respondent seeks an order dismissing the Petition because Petitioner, Sky Mountain Golf Estates Homeowners Association, Inc. ("**Petitioner**"), has failed to assert any legally cognizable claim against Respondent. The Petition seeks review of the decision by the Hurricane City Council

("**Council**") to approve an amendment to Respondent's General Plan. (Petition ¶ 5.) The decision to amend a general plan is a **legislative enactment**. However, the two causes of action which Petitioner has asserted pertain only to **administrative decisions**. Specifically, Petitioner has asserted a claim that the decision to amend the General Plan was "illegal" (Petition ¶¶ 78-120), and a claim that the decision to amend the General Plan was "arbitrary and capricious" (Petition ¶¶ 121-150). Those claims are applicable to the Council's **administrative decisions**, but not to **legislative enactments**. Utah Code § 10-9a-801(3)(b). Under Utah law, the only standards applicable to judicial review of a **legislative enactment** are: first, whether "the land use regulation is expressly preempted by, or was contrary to, state or federal law"; and second, whether "it is reasonably debatable that the land use regulation is consistent with this chapter." Utah Code § 10-9a-801(3)(a). Because Petitioner has failed assert that the Council violated the applicable standard, the Petition must be dismissed.

STATEMENT OF RELEVANT FACTS

The Petition references the following facts. Although for purposes of a motion under Rule 12(b)(6), allegations in the Petition are assumed true, by referring to the allegations of the Petition, Respondent does not admit or acknowledge any of those allegations. Respondent does not waive any rights related thereto including, without limitation, the right to deny, in whole or in part, such allegations, and the right to assert such defenses and affirmative defenses as may be applicable.

1. Respondent has adopted a General Plan to govern land use issues. (Petition ¶ 11.)
2. A provision of the City Code of Hurricane City ("**Code**"), Section 10-2-2(H)(2) permits amendments to the General Plan. (Petition ¶ 21.)

3. On or about December 6, 2018, a developer submitted an application ("**Application**") to amend the General Plan's Land Use Map. (Petition ¶ 17.)
4. The Application sought to change the designated use for certain real property identified in the Application ("**Property**") from Single Family Residential to Mixed Use (a designation that permits residential, commercial, and light industrial uses). (Petition ¶ 18 and ¶ 23.)
5. The Application was reviewed by staff and "deemed to be complete" on "12/18/18" [sic].[1] (*See* **Exhibit A**.)
6. On January 10, 2019, the Application was presented to the Hurricane City Planning Commission ("**Commission**"). (Petition ¶ 44.)
7. The Commission recommended that the Council deny the Application. (Petition ¶ 50.)
8. In a report provided prior to the Commission meeting, Hurricane City Staff had recommended approval of the Application. Among other things, Staff stated that "[t]he proposed development, a full Western village experience, is an exciting opportunity to bring a venue to Hurricane City where visitors and locals can enjoy a completely different kind of entertainment than is currently available anywhere in the area."[2] (*See* **Exhibit B**.)
9. Staff also noted that "such a facility would draw more visitors and keep them in the area longer and provide an associated increase in property taxes and sales taxes." (*See* **Exhibit B**.)

[1] "If a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." *Oakwood Village, LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 13 (citation and internal formatting omitted). Such documents are "fair game for [the] court to consider in addition to the complaint's averments." *Id*., ¶ 10. Here, the Petition repeatedly refers to the Application but does not include a copy. Thus, Respondent has attached a copy as **Exhibit A** hereto.

[2] *See* Footnote 1. Because the Petition repeatedly refers to the "Staff Comments" (*see, e.g.,* Petition ¶ 43), a copy of the Staff Comments are attached hereto as **Exhibit B**.

10. Further, staff stated that "a project including streetscape and community amenities would be better suited to this uniquely beautiful area than just straight residential housing development." (*See* **Exhibit B.**)
11. The Council held a hearing on February 7, 2019, to discuss the Application at which both the developer and the developer's engineer presented information. (Petition ¶ 51.)
12. "Many" members of the public also provided testimony and information at the February 7, 2019, hearing. (Petition ¶ 53.)
13. The Council addressed the Application again at a March 7, 2019, hearing. (Petition ¶ 63.)
14. At the March 7, 2019, hearing, the Council approved the Application in part,[3] voting to change 125 acres as "mixed use" while retaining the original designation for 215 acres. (Petition ¶ 74.)
15. The motion to approve the Application in Part included the Council's findings that: (a) the Application promotes the public interest; (b) the Application convers the values of other properties; (c) the Application encourages appropriate use and development; and (d) the Application promotes the general welfare of the community.[4] (*See* **Exhibit C**.)

ARGUMENT AND SUPPORTING AUTHORITY

While "municipal land use decisions as a whole are generally entitled to a great deal of deference," *Bradley v. Payson City Corp.*, 2003 UT 16, ¶ 10, 70 P.3d 47, the decision to amend the General Plan's Zoning Map is a **legislative enactment**, which is referred to in the land use

[3] The Council is empowered to adopt the Application as proposed or "make any revision the legislative body considers appropriate." Utah Code § 10-9a-404(4)(a); see also Section 10-6-3 of Hurricane's Code.
[4] *See* Footnote 1. Because the Petition repeatedly refers to proceedings and discussions that took place at the March 7, 2019, hearing (*see, e.g.,* Petition ¶ 70, 71, and 73), a copy of the minutes of the March 7, 2019, meeting are attached hereto as **Exhibit C**.

context as a "land use regulation," and is entitled to even greater deference than **administrative decisions**, *Petersen v. Riverton City*, 2010 UT 58, ¶ 10, 243 P.3d 1261. According to the Municipal Land Use, Development, and Management Act ("**Act**"), Utah Code §§ 10-9a-101, *et seq*., a land use regulation, such as the Council's decision to approve the Application, can only be reviewed to determine whether "the regulation is expressly preempted by, or was contrary to, state or federal law" or whether "it is reasonably debatable that the land use regulation is consistent with this chapter." Utah Code § 10-9a-801(3)(a).

I. The Amendment to the General Plan's Land Map is a Legislative Enactment.

"There is no dispute . . . that the enactment and amendment of zoning ordinances is fundamentally a legislative act." *Bradley*, 2003 UT 16, ¶ 11 (citation omitted); *Accord Harmon City, Inc. v. Draper City*, 2000 UT App 31, ¶ 18, 997 P.2d 321 ("Establishing zoning classifications reflects a **legislative policy decision** with which courts will not interfere except in the most extreme cases.") (emphasis added).

Section 10-7-5(A)(1)(a) of Hurricane's Code specifically identifies an amendment to the General Plan as a "legislative proceeding." Likewise, the Act provides the same conclusion but uses a different term: "land use regulation." Utah Code § 10-9a-103(29). The Act defines a "land use regulation" as "a **legislative decision** enacted by ordinance, law, code, map, resolution, specification, fee, or rule that governs the use or development of land" and "includes the adoption or amendment of a **zoning map** or the text of the **zoning code**." *Id.* (emphasis added).

The designation of an amendment to the General Plan as a **legislative enactment** is consistent with the nature of the General Plan as a "comprehensive, long-range" plan for "present and future needs" and "growth and development of all or any part of the land within the

municipality." Utah Code §10-9a-401(1). "The political nature of the decision making process underlying municipal zoning demands that the power to make such decisions be vested in persons who are publicly accountable for their choices." *Bradley*, 2003 UT 16, ¶ 11. "The guiding principle behind our interpretation of legislative zoning decisions is that **we will not substitute our judgment for that of the municipality**." *Id.* ¶ 24 (emphasis added).

Based on the foregoing, the Council's decision in this case to approve the Application was a **legislative enactment** entitled to significant deference and, as explained below, that decision is not reviewable under the standards set forth in the two causes of action identified in the Petition.

II. Legislative Enactments, Such as the Council's Decision to Approve the Application, are Reviewable Only Under the "Reasonably Debatable" Standard.

Utah law is clear on the scope of a Court's review of a **legislative enactment**, referred to in the Act as a "land use regulation."

> A court shall: (i) presume that a **land use regulation** properly enacted under the authority of this chapter is valid; and (ii) **determine only** whether: (A) the land use regulation is **expressly preempted** by, or was enacted contrary to, state or federal law; and (B) it is **reasonably debatable** that the land use regulation is consistent with this chapter.

Utah Code § 10-9a-801(3)(a) (emphasis added.)

Utah caselaw affirms the limited scope of the review identified in the Act:

> [O]ur recognition of the distinction between legislative and administrative or quasi-judicial municipal powers has consistently determined the proper standard of review applicable to municipal land use disputes. For legislative decisions, we have applied a highly deferential variation of the arbitrary and capricious standard and limited our review to the strict question of whether the zoning ordinance could promote the general welfare; or **even if it is reasonably debatable that it is in the interest of the general welfare**.

Bradley, 2003 UT 16, ¶ 14 (citation and internal punctuation omitted, emphasis added); *accord Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 252 (Utah Ct. App. 1998) ("However, if a [zoning]

ordinance 'could promote the general welfare; or even if it is reasonably debatable that it is in the interest of the general welfare' we will uphold it.")

The applicable standard for judicial review is even clearer now then it was when *Harmon* was decided. *Smith, Bradley,* and *Harmon* were decided before the 2005 adoption of the Act.[5] Specifically, in 2005 the Utah Legislature adopted S.B. 60, titled "Local Land Use Development and Management Amendments," which renumbered the municipal land use provisions from Utah Code § 10-9-101, *et seq*., to Utah Code § 10-9a-101, *et seq.* (Excerpts from the enrolled copy of S.B. 60 are attached hereto as **Exhibit D**.) Prior to the adoption of S.B. 60, Utah law only provided for a general "arbitrary, capricious, or illegal" standard. (*See* **Exhibit D**.) Thus, courts had to rely on the cases such as *Smith, Bradley*, and *Harmon* for the proposition that **legislative enactments** were subject to the more deferential "reasonably debatable" standard. However, S.B. 60 codified the distinction by providing for the first time in statute that "[a] decision, ordinance, or regulation involving the exercise of legislative discretion is valid if the decision, ordinance, or regulation is reasonably debatable and not illegal." (*See* **Exhibit D**.)

The Act was subsequently amended, as noted in *Petersen v. Riverton City*, 2010 UT 58, 243 P.3d 1261. In that case the Supreme Court noted:

> The Utah Legislature has articulated the standards that a court must apply when reviewing municipal land use decisions in Utah Code section 10–9a–801 (2007) . . . (3)(b) A decision, ordinance, or regulation **involving the exercise of legislative discretion** is valid if it is **reasonably debatable** that the decision, ordinance, or regulation promotes the purposes of this chapter and is not otherwise illegal.

[5] As explained below, the S.B. 60 and the subsequent amendments to the Act made it clear that, notwithstanding the language in *Bradley*, the "reasonably debatable" standard is not just a "variant" of the "arbitrary and capricious" standard, but the two are different standards applicable to different types of municipal actions. *Compare* Utah Code § 10-9a-801(3)(a) with Utah Code § 10-9a-801(3)(b).

Petersen v. Riverton City, 2010 UT 58, ¶ 9, 243 P.3d 1261. Citing to *Bradley*, the Court further stated: "This court has consistently held that the enactment and **amendment of zoning ordinances is fundamentally a legislative act**," and held that "[g]iven this court's hesitation to substitute its judgment for that of a municipality, we apply the **highly deferential reasonably debatable standard** when reviewing a municipality's zoning decision." *Id*. at ¶ 10 (emphasis added).

Although the Act has been amended further since *Petersen* was decided, those amendments have only served to strengthen the distinction between the applicable standards for a Court's review of **legislative enactments** and **administrative decisions** by providing for separate standards for what the Act terms "a land use regulation" (a **legislative enactment**) and a "land use decision" (an **administrative decision**). *Compare* Utah Code § 10-9a-103(27) and § 10-9a-103(29). The Act now makes it clear that the general "illegal" standard is **not** applicable to a **legislative enactment** but to **administrative decisions**, and that the appropriate standard for a **legislative enactment** is the "reasonably debatable" standard. *Compare* Utah Code § 10-9a-801(3)(a) and § 10-9a-801(3)(b).

III. The Petition Seeks Review Under an Inapplicable Standard and, Therefore, Fails to State a Claim for Which Relief can be Granted.

The Petition seeks to have the Court review the Council's decision to grant the Application under an "illegal" or "arbitrary and capricious"[6] standard. (Petition ¶¶ 78-120 and Petition ¶¶ 121-

[6] In discussing the "arbitrary and capricious" standard, the Petition contains a brief reference to *Bradley* and the "reasonably debatable" standard. (Petition ¶ 123.) However, the remainder of the Petition asserts that the decision to approve the Application was not supported by substantial evidence in the record, which is how the Act defines an "arbitrary and capricious" decision. Utah Code § 10-9a-801(3)(c)(i). For example, Petition alleges that the Council "did not have sufficient information" (¶126), that it "lacked so much information" (¶ 127), and that the "Application is devoid of evidence" (¶ 128). The Petition goes on to characterize the record as having "insufficient evidence," "insufficient information," or "no evidence." (Petition ¶¶ 143, 144, 145, 146, 147,149, and 150.) "[S]ubstantial evidence in the record" is not the applicable standard.

150.) Those are the proper standards in the land use context for an **administrative decision**, which the Act refers to as a "land use decision." Utah Code § 10-9a-801(3)(b). The Act clarifies that a "land use decision" is a decision made with respect to a "land use application." Utah Code § 10-9a-103(27). Importantly, the Act's definition of a "land use application" explicitly excludes "an application to enact, amend, or repeal a land use regulation" such as the Application at issue in this case. Utah Code § 10-9a-103(25).

Thus, while the standards identified in the Petition would be appropriate if the matter before the Court involved an **administrative decision**, and the language of the Petition tracks Utah Code § 10-9a-801(3)(b), the decision at issue in this case to approve the Application was a **legislative enactment**. The appropriate standard of review is found in the preceding subsection, Utah Code § 10-9a-801(3)(a). The standards identified in Petitioner's two causes of action simply do not form a cognizable basis for this Court to review a **legislative enactment** such as the decision to approve the Application.

The Utah Court of Appeals has stated unmistakably that the "arbitrary and capricious" standard cannot be used to disturb a **legislative enactment** such as a zoning determination or, particularly relevant to this case, an amendment to the General Plan:

> Establishing zoning classifications reflects a legislative policy decision with which courts will not interfere except in the most extreme cases. Indeed, **we have found no Utah case, nor a case from any other jurisdiction, in which a zoning classification was reversed on grounds that it was arbitrary and capricious**.

Harmon City, Inc., 2000 UT App 31, ¶ 18 (emphasis added).

Because the Petition seeks this Court's review under standards which are inapplicable to a **legislative enactment**, the Petition fails to state a claim for which relief can be granted and should be dismissed under Rule 12(b)(6).

IV. There is a Sufficient Basis to Find that the Council's Decision to Approve the Application Satisfies the "Reasonably Debatable" Standard.

The Petition makes no claim that the decision to approve the Application was preempted by state or federal law. Indeed, the Act specifically requires Respondent to enact a General Plan. Utah Code § 10-9a-401. Further, the Act specifically authorizes amendments to the General Plan. Utah Code § 10-9a-404. Thus, the only substantive issue for the Court to review is whether the decision to approve the Application satisfies the "reasonably debatable" standard articulated in *Bradley* and Utah Code § 10-9a-801(3)(a).

One of the cases *Bradley* cited to explain the "reasonably debatable" standard held that a zoning decision would be upheld unless "there was no reasonable basis therefor." *Bradley*, 2003 UT 16, ¶ 14 (citing *Dowse v. Salt Lake City Corp.*, 255 P.2d 723, 724 (Utah 1953)). Further, while "a municipality may have a myriad of competing choices before it, the selection of one method of solving the problem in preference to another is entirely within the discretion of the city; and does not, in and of itself, evidence an abuse of discretion. **The propriety of the zoning decision need only be reasonably debatable**." *Id.* ¶ 24 (citation and internal quotation marks omitted, emphasis added). "A city council's ultimate decision, of course, reflects **legislative preferences that are entitled to a presumption of validity**." *Id.* ¶ (emphasis added).

In this case, the proposed amendment to the General Plan identified in the Application would enable a developer to construct commercial uses on the Property including, potentially, "a 1,200 seat auditorium, hotel, wedding chapel, twenty (20) restaurants and shops, and a 185-unit RV park." (Petition ¶ 35.) Petitioner portrays the potential for commercial uses negatively. However, Staff described the commercial uses as "an exciting opportunity" where residents and visitors could "enjoy a completely different kind of entertainment than is currently available

anywhere in the area."[7] (*See* **Exhibit B**.) Staff also pointed out that the change to the General Plan could "draw more visitors and keep them in the area longer" with an "associated increase in property taxes and sales taxes." (*See* **Exhibit B**.) Based on that information alone, the Council could have found it "reasonably debatable" that the Application is "in the interest of the general welfare." *Bradley*, 2003 UT 16, ¶ 14.

However, the Council went further and specifically made findings that demonstrate that the Council's decision more than satisfies "the highly deferential **reasonably debatable** standard." *See Petersen*, 2010 UT 58, ¶ 10 (emphasis added). The Council referenced standards found in the Hurricane Code's articulation of the "reasonably debatable" standard for legislative proceedings: whether the action "will reasonably promote the public interest, conserve the values of other properties, avoid incompatible development, encourage appropriate use and development, and promote the general welfare." Hurricane Code Section 10-7-5(A)(2)(a). In reference to each issue, the Council determined that the Application would promote the interests identified.[8] (*See* **Exhibit C**.)

This Court should not "substitute its judgment for that of a municipality." *Petersen*, 2010 UT 58, ¶ 10. Thus, the issue is not whether the Council was correct in finding that the Application will promote the general welfare. Rather, the only issue is whether the Council's decision satisfies the "**highly deferential reasonably debatable standard**" identified in *Petersen*. Based on the foregoing, there can be no question that the standard has been satisfied.

[7] *See* Footnote 2.
[8] *See* Footnote 4.

CONCLUSION

Because the causes of action set forth in the Petition seek review of the Council's decision to approve the Application under an inapplicable legal standard, the Petition fails "to state a claim upon which relief can be granted" and must be dismissed under Rule 12(b)(6).

DATED this 2 day of May, 2019.

YORK HOWELL & GUYMON

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CERTIFICATE OF SERVICE

I hereby certify that, on this 2 day of May, 2019 I caused a true and correct copy of the foregoing **MOTION TO DISMISS AND SUPPORTING MEMORANDUM** to be electronically filed with the Court which provided electronic notification to all parties by operation of the Court's electronic filing system:

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