**DUNN LAW FIRM**
Adam C. Dunn, #10926
Michael C. Dunn, #10927
110 West Tabernacle
P.O. Box 2318
St. George, UT 84770
Phone: 435-628-5405
Facsimile: 435-628-4145
acdunn@dunnfirm.com

*Attorneys for Petitioner*

| **IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR WASHINGTON COUNTY, STATE OF UTAH** | |
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| SKY MOUNTAIN GOLF ESTATES HOMEOWNERS ASSOCIATION, INC.<br><br>Petitioner,<br><br>vs.<br><br>THE CITY OF HURRICANE, UTAH,<br><br>Respondent. | **MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS**<br><br>Case No. 190500180<br><br>Judge: John J. Walton |

COMES NOW, the Petitioner, SKY MOUNTAIN GOLF ESTATES HOMEOWNERS ASSOCIATION (hereinafter "Sky Mountain" or "Petitioner"), by and through its attorney of record, Adam C. Dunn of the Dunn Law Firm, and hereby opposes Respondent's Motion to Dismiss, as follows:

## REQUESTED RELIEF

Petitioner respectfully requests that this Court deny the Respondent's Motion to Dismiss under Rule 12(b)(6) of the Utah Rules of Civil Procedure (hereinafter "Motion to Dismiss"). Respondent's motion alleges that the Petition fails to state a claim upon which relief can be

granted, erroneously claiming that Petitioner invoked the wrong standards for the district court review of Respondent's decision to approve an Application for the amendment of its general plan map. However, Petitioner has applied and invoked the correct standard.[1] Given that the allegations of fact in the Petition are assumed true for purposes of resolving Respondent's Motion (and in this instance, they are actually true), Petitioner has sufficiently stated causes of action upon which relief may be granted. As a result, this Court should deny the Motion to Dismiss.[2]

## INTRODUCTION

The City of Hurricane, Utah (hereinafter "Respondent" or "Hurricane" or the "City") has asked this Court to dismiss Sky Mountain's Petition for District Court Review. Hurricane's basis for dismissal is that Sky Mountain asked the Court to reverse the approval of a general plan map amendment using the wrong standards under Utah Code. The Petitioner acknowledges that at issue in this district court review is a legislative decision. *See* Petition for Review of Decision (hereinafter "Petition") at ¶ 122.

Utah Code provides that a Court should presume the validity of a city's decision unless it is, among other things, "…contrary to state law". *See* U.C.A. § 10-9a-801(3)(a)(ii)(A). Under Petitioner's First Cause of Action[3] the Petitioner clearly outlines how the approval of the general plan amendment is contrary to state law or, in other words, illegal[4]. The Petitioner states in the

[1] Respondent has misapplied the pertinent provisions of the state code and the applicable case law to the actual allegations in the Petition for District Court Review.
[2] Alternatively, the Petitioner asks for leave to amend its Petition to clarify and correct a mistaken paragraph, as described herein Section II of the Argument portion of this Opposition.
[3] Petitioner's First Cause of Action has the heading "Hurricane's Decision was Illegal because the City violated its own Ordinances".
[4] Black's Law Dictionary 7th Ed. defines illegality as "an act that is not authorized by law". In this instance, illegality would therefore be "contrary to state law".

Petition that state law ***requires*** that a land use authority ***must*** follow its own ordinances (Petition, at ¶ 79), and then the Petitioner alleges numerous facts showing exactly how the City did not follow its own ordinances (*Id.* at ¶¶ 80 – 118). Because the City did not follow its own ordinances in enacting the amendment to the general plan, such action is "contrary to state law" or, in other words, is illegal, and the Petitioner has sufficiently stated a cause of action against the City under its First Cause of Action in the Petition.

Utah Code provides further that a Court should presume the validity of a city's decision unless it is, among other things, not "…reasonably debatable that [it] is consistent with [the land use chapter]". *See* U.C.A. § 10-9a-801(3)(a)(ii)(B). This "reasonably debatable" standard, is a "deferential meaning of arbitrary". *Harmon City, Inc. v. Draper City*, 997 P.2d 321, 2000 Utah Ct. App. 31, ¶ 10, citing *Dowse v. Salt Lake City Corp.*, 123 Utah 107, 255 P.2d 723 (1953). In Petitioner's Second Cause of Action[5], the Petitioner's acknowledged the legislative nature of the City's decision (Petition, at ¶ 122), and then articulate clearly that such decisions are based on the "reasonably debatable" standard (*Id.*, at ¶ 123). The Petitioner further points out through numerous factual allegations why the City's decision does not meet the reasonably debatable standard. Such allegations include that the Planning Commission found, among other things (a) that there was no "compelling reason to change the General Plan" (Petition, at ¶ 48), (b) that after asking for further information on access across BLM land, no such information was ever provided (Petition, at ¶¶ 61 & 68), (c) that the City highlighted fourteen (14) deficiencies in the application

[5] Petitioner's Second Cause of Action has the heading "Hurricane's Decision was Arbitrary and Capricious – in the Alternative".

for the change, and then approved the change without those deficiencies eever being addressed (Petition, at ¶¶ 62 & 73), and (d) that the City approved a general plan map amendment completely different than that noticed and sought by the Developer (Petition, at ¶¶ 71 & 75).

The Petition states claims upon which relief may be granted because it lays out facts asserting that the actions of the City are "contrary to state law" or are, in other words, illegal and because it lays out facts that the decision does not meet the reasonably debatable standard under Utah law.

## STATEMENT OF FACTS PRESUMED TRUE

In resolving a motion to dismiss for failure to state a claim upon which relief can be granted, the Court accepts all facts alleged as true. *Osguthorpe v. Wolf Mountain Resorts, LC*, 2010 UT 29, ¶ 10, 232 P.3d 999. All reasonable inferences should also be in favor of the non-moving party. *O'Hearon v. Hansen*, 409 P.3d 85, ¶ 10, Utah App., 2017. Consequently, for purposes of Respondent's motion, the allegations in the Petition that the Application failed to comply or insufficiently complied with several requirements provided by the Utah Code, are deemed true. As such, the City acted contrary to state law, which requires the City to follow its own ordinances.

Factual allegations showing the City's failures to follow its own ordinances include the following:

1. The Developer failed to provide a map of adjoining uses. *See* Petition at ¶ 24.

2. The Developer falsely characterized the adjoining properties in the Statements in the Application. *See Id* at ¶ 25.

3. The Developer failed to provide a clear statement of potential uses. *See Id.* at ¶ 27.

4. The Developer's non-definitive and intended uses included only 50 acres of commercial uses. *See Id.* at ¶ 28-30.

5. Even though the plan put forward by the Developer included only 50 acres of commercial uses, the City ultimately approved 122 acres of mixed-use designation. *See Id.* at ¶ 74.

6. In 2011, the Hurricane Planning Commission concluded that the best use for the Property is single-family homes and the City did not present any legitimate basis as to why that best use has now changed. *See Id.* at ¶¶ 20 & 103.

7. The Developer failed to explain why the existing general plan is no longer appropriate or feasible. *See Id.* at ¶ 39-40.

8. The Developer failed to present the required analysis of potential impacts of the proposed amendment. *See Id.* at ¶ 41-43.

9. Not only did the Developer fail to provide any analysis of the potential impact of the amendment applied for, the statements include erroneous details. *See Id.* at ¶ 26.

10. The City documented fourteen (14) concerns in the February 7, 2019 City Council Meeting, and the only document provided by the Developer to Hurricane prior to the March 7, 2019 Public Hearing, wherein the Application was approved, was the letter from the Fire Chief which stated that "[t]he District does not take an official stance of support or non-support for a General Map amendment plan" with no other documents or responses to the City's fourteen (14) concerns. *Id.* at ¶¶ 62 & 64-66.

11. The Fire Chief also expressed concerns about road access and requests documentation for access through BLM land. *See Id.* at ¶ 67.

12. Even until the Application was approved, the Developer was unable to present documentation on access over the BLM property to alleviate traffic and safety concerns. *See Id.* at ¶ 69.

13. Indeed, the Petitioner has alleged that under state law, the City is required to follow its own ordinances, and yet the City failed to do so. *See Id.* at ¶¶ 79 – 120.

The Petitioner also presented allegations acknowledging that the "reasonably debatable" standard, which is a "deferential meaning of arbitrary", applies in this instance and that the City did not comply with this standard as follows:

14. The Planning Commission recommended the denial of the Application, finding that: 1)"There are no compelling reasons to change the General Plan"; 2 "The traffic flow is not supportable"; 3) "Residential and commercial uses would have greater impact than just residential"; and 4) "The community has given feedback on traffic, safety, and other negative impacts to the community as whole". *Id.* at ¶ 48.

15. Hurricane City Ordinance § 10-7-5(A)(2) provides that legislative decisions shall be based on the "reasonably debatable" standard. *See Id.* at ¶ 123.

16. According to Hurricane City Ordinance, a general plan amendment must reasonably "…promote the public interest, conserve the values of other properties, avoid incompatible development, encourage appropriate use and development, and promote the general welfare." *See Id.* at ¶ 124 (citing Hurricane City Ordinance § 10-7-5(A)(2)(a)).

17. The determination of the City on the general plan map amendment cannot be said to be reasonably debatable where the City lacked so much information because the Developer did not

provide the required information under the requirements of the code. *See Id.* at ¶¶ 126-127.

18. The City made no finding of why the current use designation at that site is no longer appropriate or feasible, what the potential uses at that location would be, and why those potential uses would be better than the predetermined "best use" from 2011. *See Id.* at ¶¶ 20, 103, & 135.

The City failed to make other critical findings under its Ordinances, such as (a) no findings on the potential impact of such a designation on the community or values of those in surrounding properties, (b) no findings explaining why it needed additional information on February 7th and yet ignored that need on March 7th, (c) no evidence on the compatibility of the mixed use designation on those adjoining property, and (d) no evidence on how the change will encourage appropriate use and development (especially without appropriate access from the BLM). *See Id.* at ¶¶ 134, 138, 146 & 147.

## ARGUMENT

### I. Petitioner has sought review under the applicable standard of review, thus Petitioner has stated a claim for which relief can be granted.

Respondent states that the "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." *See* Motion to Dismiss, p. 2, citing U.C.A. § 10-9a-801(3)(a). According to Respondent, Petitioner supposedly failed to state a claim for which relief can be granted because "the two causes of action which Petitioner has asserted pertain only to ***administrative decisions***." *Id*, referring to the "illegal" and "arbitrary and capricious" standards

under U.C.A. § 10-9a-801(3)(b).

Although one paragraph in the Petition (¶ 77) mistakenly references U.C.A. § 10-9a-801(3)(b), but in making its motion, Respondent misinterprets and mischaracterizes Petitioner's actual causes of action as they were actually laid out in the petition. The Respondent misinterprets and mischaracterizes the actual facts asserted in the Petition and the fact that such claims do raise cognizable and actionable claims under Utah Code. There is no dispute that the assailed decision of Hurricane is a legislative enactment. It was even stated in the Petition that "Hurricane City Ordinance § 10-7-5-(A)(1)(a) provides that general plan amendments are legislative decisions." *See* Petition, ¶ 122. Petitioner then cited Hurricane City Ordinance § 19-7-5(A)(2) and caselaw for the application of the "reasonably debatable" standard given that Respondent's action was correctly assailed in the Petition as a legislative enactment. *Id.* at ¶ 123. Petitioner neither alleged or treated the approval of the Application as an administrative decision in the actual facts asserted and alleged.

There is also no dispute as to the standards cited by the Respondent for the review of a legislative enactment, except that they completely disregarded a portion of the standard. Petitioner's first cause of action asserts that the approval of the Application is illegal or "contrary to state law", which also falls under the first standard of review cited by Respondent. Petitioner's second cause of action is that the approval of the Application is arbitrary because it failed the "reasonably debatable" standard. As will be demonstrated, the "reasonably debatable" standard is the test for whether a legislative enactment is *arbitrary and capricious*; the two are not mutually exclusive concepts.

*a. The assailed decision of Hurricane must not only pass the "reasonably debatable" standard but must also adhere to state law, which requires the City to follow its own ordinances, otherwise it is illegal.*

As mentioned, the first standard of review under Utah Code § 10-9a-801(3)(a) is that the land use regulation should be upheld unless it "is expressly preempted by, ***or was enacted contrary to, state or federal law***." Under the first test, Respondent asserted that "[t]he Petition makes no claim that the decision to approve the Application was preempted by state or federal law… [t]hus, the only substantive issue for the Court to review is whether the decision to approve the Application satisfies the 'reasonably debatable' standard…" *See* Motion to Dismiss, p. 10. However, Respondent completely ignores the conjunction "or", which is used to connect two different possibilities – in this case, the two parts of the first standard of review for legislative enactments.

Respondent failed to address the second part of the first test and even stated that "[t]he Act now makes it clear that the general 'illegal' standard is not applicable to a legislative enactment but to administrative decisions". *See* Motion, p. 8. This assertion is negated by the explicit provision that the legislative enactment should not be "enacted contrary to state or federal law." Stated otherwise, the land use regulation *should not be illegal*. Black's Law Dictionary 7th Ed. defines illegality as "an act that is not authorized by law". In this instance, illegality would therefore be "contrary to state law".

Supporting this proposition are previous wordings of the Utah Code provision on review of land use regulations. § 10-9a-801(3)(b) of the 2016 Code states, "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***" (emphasis provided). The 2010, 2011, 2012, 2014 and 2015 versions of the Utah Code contain the same provision. The 2006 Code includes a simpler version of the provision, "A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if the decision, or regulation is reasonably debatable and ***not illegal***" (emphasis added). In highlighting the history, *Peterson v. Riverton City*, 2010 UT 58, 243 P.3d 1261, a case quoted by the Respondent in page 7 of its Motion, states that, "A decision, ordinance, 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" (emphasis and underscoring in the Motion). Respondent highlighted only the portion of the "reasonably debatable" standard in arguing that Petitioner applied the incorrect standard but completely ignored the end of the sentence requiring that the legislative act "is not otherwise illegal".

It is only in the 2017 Utah Code modifications that the clause pertaining to preemption was added and the illegality test was reworded to "the land use regulation is preempted by, ***or was enacted contrary to, state or federal law***" (emphasis added). Indeed, the addition of preemption simply meant that a legislative enactment, if preempted, is also illegal. The intent remains the same – land use regulation enactments should follow state or federal law.

Respondent's approval of the Application is "illegal" if "it violates a law, statute, or ordinance in effect at the time the decision was made." *Hodgson v. Farmington City*, 2014 UT App 188, 334 P.3d 484, at ¶ 7. The same principle was also applied in *Morra v. Grand County*, 230 P.3d 1022, 2010 UT 21, at ¶ 31. It should be emphasized that *Morra* involved a legislative act

and applied *both* the "reasonably debatable" standard and the "illegality" standard.[6] If the legislative enactment is done in violation of state law (which requires that a City follow its own ordinances) then it is "contrary to state law".

Essentially, Respondent is arguing that "contrary to law" does not mean "illegal"; these cases disprove their untenable contention. The Code could not have intended for the cities to have unlimited discretion in their legislative enactments, unfettered by any rule or regulation. If the City is not required to follow its own ordinances in enacted land use regulations, then they are superfluous and of no effect, leading to a complete lack of trust in the process. When interpreting statutes, disfavored are the interpretations that produce results "so absurd that the legislative body which authored the legislation could not have intended it." *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50 ¶ 26, 267 P.3d 863. Here, to state that "enacted contrary to state law" does not also mean illegal would be such an absurd result.

Municipal zoning authorities "are bound by the terms and standards of applicable zoning ordinances and are not at liberty" to act "in derogation of legislative standards." *Thurston v. Cache County*, 626 P.2d 440, 444-45 (1981). In *Springville Citizens v. City of Springville*, the Court ruled that a city cannot merely "substantially comply" with "ordinances it has legislatively deemed to be mandatory." 1999 UT 25, 979 P.2d 332 ¶ 30. *Thurston* and *Springville*, although involving decisions of the land authority, are similarly applicable to land use regulations, given that both acts

[6] However, the main issue of the case pertains to the insufficiency of the records due to the County's refusal to transmit them. It was held that the while the complainants have standing to challenge the County's decision, the district court could not have decided on the two aforementioned standards due to the absence records of the proceedings before the County.

of cities are expressly required to follow state and federal laws.

There is no dispute that Hurricane's ordinance provides for certain requirements for the amendment of the general plan. Where the City has failed to follow those ordinances, Hurricane's decision should be struck down for being illegal, or in other words, enacted contrary to state law.

The legality of Hurricane's decision is a wholly different issue as to whether Respondent's decision was "reasonably debatable." Here, the City has argued that illegality should not be addressed by this Court, thus ignoring its obligation to only enact land use regulation in compliance with its ordinances. That is not the case. Even if the Court would find that the decision was "reasonably debatable", it should still be reversed because the City did not follow its own ordinances and thus enacted the amended general plan map amendment contrary to law.

*b. Petitioner correctly invoked the "reasonably debatable" standard under §10-9a-801(3)(a)(ii)(B), Utah Code 2018*

Respondent argues that Petitioner mistakenly invoked the "arbitrary and capricious" standard, which is supposedly only for administration decisions, instead of the "reasonably debatable standard for legislative enactments. While the Petitioner mistakenly references U.C.A. § 10-9a-801(3)(b) in Paragraph 77 of the Petition, Sky Mountain did use the correct "reasonably debatable" standard in the body of the actual causes of action:

> 123. Hurricane City Ordinance ¶ 10-7-5(A)(2) provides that legislative decisions shall be based on the **'reasonably debatable' standard**. *See Peterson v. Riverton City.*, 2010 UT 58, 243 P.3d 1261 (citing *Bradley v. Payson City Corp.* 2003 UT 16, 70 P.3d 47) (providing that a court shall apply the "**reasonably debatable standard** when reviewing a municipality's zoning decision".
>
> 124. A general plan amendment must **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 City Ordinance § 10-7-5(A)(2)(a).
>
> 125. The approval of the Application cannot be said to be **reasonably debatable.**
>
> *See* Petition, ¶¶ 123 -124, p. 21 (emphasis added).

Respondent misinterprets established jurisprudence in its arguments when it comes to Petitioner's second cause of action. Petitioner prays for the reversal of Respondent's decision because it is ***arbitrary***. And to support such a claim of arbitrariness, the Petitioner is showing that the decision *is not* ***reasonably debatable***, as this is the applicable test when it comes to legislative enactments.

*Harmon City, Inc. v. Draper City*, in tracing the history of the "reasonably debatable" standard, explained that its origin is a "deferential meaning of arbitrary". 997 P.2d 321, 2000 Utah Ct. App. 31, ¶ 10, citing *Dowse v. Salt Lake City Corp.*, 123 Utah 107, 255 P.2d 723 (1953). *Bradley v. Payson City Corp.* reiterates this explanation, stating that "[f]or legislative decisions, we have applied a ***highly deferential variation of the arbitrary and capricious standard***." 2001 UT App. 9, 2003 UT 16, 70 P.3d 47, ¶ 14 (emphasis added). In fact, the main issue in *Bradley* is whether the "reasonably debatable" test should be used in determining if the legislative enactment was arbitrary:

> However, in specific cases the determination of whether a particular land use decision is arbitrary and capricious has traditionally depended on whether the decision involves the exercise of legislative, administrative, or quasi-judicial powers. When a municipality makes a land use decision as a function of its legislative powers, we [70 P.3d 51] have held that **such a decision is not arbitrary and capricious so long as the grounds for the**

> **decision are "reasonably debatable."** *Marshall*, 141 P.2d at 709 (reviewing municipal zoning decision as legislative function and employing reasonably debatable standard); *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 252 (Utah Ct.App.1998) (same). When a land use decision is made as an exercise of administrative or quasi-judicial powers, however, we have held that such decisions are not arbitrary and capricious if they are supported by "substantial evidence." *Xanthos v. Bd. of Adjustment of Salt Lake City*, 685 P.2d 1032, 1034-35 (Utah 1984) (reviewing board of adjustment decision as an administrative act and employing substantial evidence standard).
>
> 270 P.3d 47, ¶ 10 (emphasis added).

*Bradley* even had a section differentiating the "reasonably debatable" and "substantial evidence" tests, explaining that "while municipal land use decisions in Utah are valid unless arbitrary and capricious, the specific meaning of that standard is dependent upon the nature of the land use decision at issue", *i.e.* whether it is legislative or administrative in nature. 2001 UT App. 9, 2003 UT 16, 70 P.3d 47, at ¶ 15. Moreover, the Court in *Bradley* explained its ruling in favor of Payson City in a section captioned "UNDER THE **REASONABLY DEBATABLE STANDARD** PAYSON CITY'S DENIAL OF THE PLAINTIFF'S REZONING REQUEST WAS NOT **ARBITRARY AND CAPRICIOUS**." 70. P.3d 54 (uppercase in the original, emphasis added).

"Thus, a municipality's zoning decision **is not arbitrary or capricious** if it is 'reasonably debatable'." *Tolman v. Logan City*, 2007 UT App 260, 167 P.3d 489, ¶14, citing *Marshall v. Salt Lake City*, 105 Utah 111, 141 P.2d 704, 709 (1943) (emphasis added). In *Partners v. Salt Lake County*, the decision of the district court that the rezoning was "neither **arbitrary nor capricious**…because it is reasonably debatable that they will protect the general welfare of the public" was upheld on appeal. 266 P.3d 797, 693 Utah Adv. Rep. 7, 2011 UT 63, ¶ 7 (emphasis

added).

Prescinding from the foregoing, there is no "reasonably debatable" standard versus "arbitrary and capricious" standard, as Respondent is trying to make it appear. Rather, in determining whether a land use decision is "arbitrary and capricious", there is the "reasonably debatable" standard for legislative enactments and the "substantial evidence" standard for administrative decisions. U.C.A. § 10-9a-801(3)(c) expressly provides the "substantial evidence" test for determining whether a land use decision is arbitrary and capricious. Although there is no counterpart express provision linking the "reasonably debatable" test under § 10-9-801(3)(a) to the "arbitrary and capricious" standard, this is nonetheless apparent from case law that the former is the test for the latter when it comes to land use regulations.

Respondent tries to veer away from the clear explanation of the standards in *Bradley*. In a footnote in its Motion, Respondent argues 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." *See* Motion to Dismiss, p. 7 (5), referring to the present wording of the provisions in the current Utah Code.

Yet, *Peterson*, a case cited by the Respondent, invalidates its own theory. Section 10-9a-801 of the Utah Code used in *Peterson* contains similar provisions to the current Code, without the preemption clause mentioned that was added in 2017:

> (3)(a) The courts shall:
> (i) presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and
> (ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious or illegal.

> (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.
> (c) A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.
>
> *Peterson*, 2010 UT 58, 243 P.3d 1261, at ¶ 9, citing 2007 Utah Code § 10-9a-801 (3)

The provisions for land use regulations and land use decisions have already been separated in the 2007 Utah Code applied in *Peterson*. The district court's decision in *Peterson* to uphold Riverton City's denial of a rezoning application because "it was not **arbitrary, capricious**, or illegal because there was **reasonable basis** for it" was affirmed on appeal. *Peterson*, 2010 UT 58, 243 P.3d 1261, at ¶ 5 (emphasis provided). *Peterson* also cited *Bradley* as authority. *Id.* at ¶ 10. And it has already been mentioned that *Bradley* expressly discussed that the "reasonably debatable" test is for determining whether a legislative enactment is arbitrary or capricious.

*Harmon*, *Bradley*, and *Peterson*, all cited by the Respondent, affirms Petitioner's position. Respondent has not presented any authority that the aforementioned line of cases has been abandoned. However, even assuming *arguendo* that the "arbitrary and capricious" standard is an absolutely different animal compared to the "reasonably debatable" standard, the actual allegations under Petitioner's second cause of action pertained only to the "reasonably debatable" standard in connection with legislative enactments. Paragraph 123 of the Petition cites Hurricane City Ordinance § 10-7-5(A)(2) as well as the cases of *Bradley* and *Peterson*, all referring to the "reasonably debatable" standard.

In Paragraph 125, Petitioner categorically alleges that "[t]he approval of the Application cannot be said to be reasonably debatable." The rest of the paragraphs support such claim, explaining why Hurricane decision could not be considered reasonably debatable considering the severe deficiencies of the Application. Petitioner argued that:

> 126. Because the Developer did not meet the requirements of the code, the City did not have sufficient information or evidence before it to grant any kind of general plan map amendment.
>
> 127. The determination of the City on the Application cannot be said to be reasonably debatable where the City lacked so much information.
>
> 128. The Application is devoid of evidence and instead relies on conclusory statements.
>
> 129. The Developer has not met his burden of showing the amendment is justified.
>
> Petition for Review, ¶¶ 126 – 129, p. 22.

In another footnote, Respondent claims that aside from a reference to *Bradley*, "the remainder of the Petition asserts that the decision to approve the Application was not supported by substantial evidence in the record", even though Petitioner never did invoke the "substantial evidence" test. *See* Motion, p. 8 (6). The Petitioner was citing the deficiencies of the Application, such as the lack of studies and analysis, incorrect information, failure to address the public opposition to the project, in arguing that Respondent Hurricane could not have made a "reasonably debatable" decision given the circumstances. That lack of basis is not only applicable to the "substantial standard" test, but also to legislative enactments that "could be attacked if there was 'no reasonable basis therefor'". *Bradley*, ¶ 14, citing *Dowse*, 255 P.2d at 724. To recall, the

"reasonably debatable" standard is a highly deferential variant of the "arbitrary and capricious standard". The principle is the same – there should be basis for Hurricane's act. It is just that the Court will be more deferential to the wisdom of the City Council in legislative decisions. Petitioner alleges that there was not a basis on which to exercise their wisdom in the first place and that the decision therefore fails the reasonably debatable standard.

**II. The Petition for Review is correctly filed in accordance with §10-9a-801(3)(a), Utah Code; however, should this Court feel that reference should be changed, amendment of the Petition should be allowed.**

The Petition mistakenly references U.C.A. § 10-9a-801(3)(b) in Paragraph 77 of the Petition. Respondent has taken the position that all other allegations are therefore filed under U.C.A. § 10-9a-801(3)(b). However, from the actual allegations in the Petition, including references to state law requirements and the reasonably debatable standard, show that the Petition seeks review of Respondent's ***land use regulation***, as governed by §10-9a-801(3)(a). As such, Petitioner has correctly pleaded his claims under the applicable standards thereunder and dismissal is not appropriate.

"Under our liberal standard of notice pleading, a plaintiff is required 'to submit a short and plain statement ... showing that the pleader is entitled to relief' and 'a demand for judgment for the relief.'" *MBNA Am. Bank, N.A. v. Goodman*, 2006 UT App 276, ¶ 6, 140 P.3d 589 (citing *Canfield v. Layton City*, 2005 UT 60, ¶ 14, 122 P.3d 622 (which quoted Utah R. Civ. P. 8(a)(1)-(2))). Under this standard, a "… plaintiff must only give the defendant fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *Id.* (quotations and citation omitted). *Id.* The actual allegations throughout the complaint indicate

that Petitioner seeks district court review of the decision by Hurricane because it was enacted "contrary to state law" or, in other words, is illegal, and, alternatively, because it does not meet the reasonably debatable standard under Hurricane Ordinances or Utah Code.

It is Petitioner's position that the actual allegations throughout the Petition are sufficient under Utah's notice pleading requirements. Sky Mountain has explicitly documented how the general plan amendment was "enacted contrary to state law" by alleging significant numbers of instances in which the City did not follow its own ordinances. As such, the enactment, by being contrary to state law, is illegal. Sky Mountain has also explicitly alleged that the legislative decision of the land use regulation fails under the reasonably debatable standard, which is a deferential version of arbitrary. However, should this Court feel that paragraph 77 of the Petition, which incorrectly includes reference to U.C.A. § 10-9a-801(3)(b) negates the significant and substantial notice of claims provided throughout the remainder of the Petition, then Sky Mountain respectfully seeks leave to amend that Paragraph of the Petition under Utah R. Civ. P. 15(a) and to have said amendment relate back under Utah R. Civ. P. 15(c).

### III. Based on the facts alleged in the Petition, Respondent Hurricane's decision to approve the Application was improper, and thus should be struck down – a claim which may be granted relief by this Court.

"To survive a motion to dismiss, a complaint [or a Petition, in this case] must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 173 L.Ed 2d 868, 556 U.S. 662, 77 USLW 4387 (2009) (internal citations omitted). The Petition should be dismissed only if "as a matter of law it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."

*Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). Under Utah's notice pleading standards, and the multitude of allegations in the Petitions citing specific factual instances of Hurricane acting contrary to state law by not following its ordinances and of the approval not meeting the reasonably debatable standard, relief could be granted in the form of this Court reversing the decision of Hurricane.

The facts in the Petition deemed admitted for purposes of the Motion to Dismiss (and which the Respondent did not even attempt to contradict in its Motion) does not only provide "facial plausibility" relief, but actually shows that Respondent ignored several of the mandatory requirements for the amendment of the general plan. The Developer did not satisfy the requirements of Hurricane City Ordinances § 10-2-2(H)(2), and the City approved the Application despite severe deficiencies. The City even outlined fourteen (14) specific areas of concern that needed to be addressed prior to approval. Without addressing any of those concerns, the City approved the amendment. There was no map of adjoining uses, no clear statement of potential uses, no justification why the general plan was no longer feasible, and there were factual errors in the Application, to name some of the deficiencies. The Developer was not even able to address the concerns raised during the public hearings. Yet, the Application was still inexplicably approved over great opposition from the public. Without complying with its own ordinances, Respondent's approval of the Application is resultantly contrary to state law, or, in other words, illegal.

The approval likewise fails under the "reasonably debatable" standard (a deferential standard of arbitrary). The facts alleged in the Petition show that there is "no reasonable basis" for the decision of the City and that it is not reasonably debatable. Consequently, the "general

welfare of the public" is not protected and the other factors that are requirements under Hurricane Code for such an amendment are not met. Because the Developer did not meet the requirements of the code, the City did not have sufficient information or evidence before it to grant any kind of general map amendment. The determination of the City on the Application cannot be said to be reasonably debatable where the City lacked so much information and directly contradicted the decision of the Planning Commission. Neither could the City have determined from the scant submissions of the Developer that the amendment is for the general welfare of the public or that it met the other requirements of Hurricane Code.

## CONCLUSION

In sum, Petitioner correctly invoked the applicable standards for the review of Respondent Hurricane's decision and alleged facts in its Petition to support its causes of action. As such, Respondent's Motion to Dismiss must fail.

DATED this 6th day of June, 2019.

**DUNN LAW FIRM:**

/s/ Adam C. Dunn
ADAM C. DUNN

## CERTIFICATE OF SERVICE

The undersigned does hereby certify that she is an employee of the Dunn Law Firm and that on the 6th day of June, 2019, a true and correct copy of the forgoing OPPOSITION TO MOTION TO DISMISS was served on the party below via the Court's electronic pleading delivery system, addressed as follows:

Paxton R. Guymon
Daniel C. Dansie
YORK HOWELL & GUYMON
10610 South Jordan Gateway, Suite 200
South Jordan, Utah 84095
paxton@yorkhowell.com
dansie@yorkhowell.com

/s/ Melissa Strate
Employee of Dunn Law Firm