

A Utah Citizen's Guide to
**Land Use
Regulation**

*How It Works and
How to Work It*

State of Utah
Department of Natural Resources

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CONTENTS

Introduction	1
To the Reader—How to Understand ..	
Legal Citations	7
 Chapter 1: What is Land Use Planning?	11
 Chapter 2: The Players: Who Cares and Who Controls	19
Citizen Planners	19
Professional Planners	21
Applicants/Property Owners	23
Neighbors/Third Parties	25
Who’s in Charge?	27
 Chapter 3: How Projects are Reviewed and Decisions are Made	29
How is a Legislative Decision Challenged?	31
How is an Administrative Decision Challenged? .	36
 Chapter 4: “In the Beginning”—Adopting the General Plan and Land Use Ordinances	43
Step One: Adopting the General Plan	43
Step Two: The Land Use Ordinances	47
 Chapter 5: Specific Legislative Issues and How They are Resolved	51
1. Adopting or Amending the General Plan	51
2. Adopting or Amending Local Land Use Ordinances, Rules and Codes	56
3. Annexing Land into a Municipality	60

4. Changing the Zoning of a Particular Parcel of Land	64
5. Temporary Land Use Ordinances (aka moratoria)	71
Chapter 6: Specific Administrative Issues and How They are Resolved	77
1. Routine Development Applications—Staff Review	78
2. Conditional Use Permits	82
3. Subdivision Review and Approval	87
4. Variances	94
Chapter 7: Burdens on New Development	109
1. Imposing Conditions and Exactions on Development Approvals	109
2. Impact Fees	118
Chapter 8: Federally Mandated Rules	123
1. Religious Land Uses	123
2. Group Homes—Fair Housing Act	127
3. Cellular Towers and Communications Facilities	133
4. Sexually-oriented Businesses	134
5. Sign Ordinances	136
6. Billboards	138
Chapter 9: State Mandated Rules	143
1. Future Streets and Highways	143
2. Moderate Income Housing	146
3. Manufactured Homes	147
Chapter 10: Other Local Issues	151
1. Historic Districts and Aesthetic Values	151

2. Parks and Open Space	154
3. Trails and Pathways	156
4. Home Occupations	157
Chapter 11: Special Issues and Topics	161
1. Grandfathered (Non-conforming) Uses	161
2. Permits Issued by Mistake	163
3. Covenants, Conditions and Restrictions: Homeowner Associations	166
Chapter 12: Enforcing Local Land Use Ordinances	171
Zoning Enforcement—When You are in Violation	171
1. Criminal Procedure	171
2. Civil Procedure	172
Citizen Land Use Enforcement—When your Neighbor (or the Municipality itself) is in Violation	178
Chapter 13: Appealing Land Use Decisions	183
When <i>Can</i> you appeal?	183
When <i>Must</i> you appeal?	184
Levels of Appeal	187
1. Appeals to the Land Use Appeals Authority for Ordinance Interpretation	188
2. Building, Fire, Landmark, Impact Fee, and Health Code Appeals	196
3. Takings Appeals Procedures	198
4. Alternative Dispute Resolution — Mediation, Arbitration, and the Ombudsman	200
5. Legal Action—When It’s Necessary	203
Chapter 14: Mounting a Legal Challenge	207
State and Federal Constitutional Challenges ...	208

1. Loss of All Economically Viable Use	208
2. Severe Economic Impacts	212
3. Trespass—Excluding Others	215
4. Lack of a Public Purpose—Due Process Issue	217
5. Equal Protection	219
6. Free Speech Protections	220
7. Federal Statute Challenges	220
State Statute Challenges	220
8. Arbitrary, Capricious, and Illegal Acts	220
9. Following Required State Procedure	221
10. State Policy Mandates	222
11. Following Local Ordinances	223
Summary — Legal Issues	226

APPENDICES:

Appendix A: Access to Public Records	229
Appendix B: Open and Public Meetings	237
Appendix C: Checklist: Will a Local Land Use Decision be Overturned?	249
Checklist: Conditions and Exactions Imposed on Development	254
Index	257

Introduction

For some of us, land use planning is a career—an evolving process about how to manage change. For others, land use planning is like a transaction: a one-time event or experience involving getting a building permit or subdividing the family farm. Those in small business probably have more interaction with the process than most of us, but it is not something most lives revolve around.

If you are new to the land use process, perhaps your interest comes from wanting to influence the way some parcel of land near you is being developed. Perhaps you are concerned about the foothills or the lakeshore. Perhaps you are worried about a big-box retailer coming into town and the impact it may have on local merchants or the traffic you encounter on your way to take the kids to school.

Whatever the direction from which you approach land use issues, I hope this book is of some help. Thirty years ago, my wife and I restored an old house in Provo to put a restaurant in it. There were residences on two sides of our corner lot, but we got our approvals with no hearings before any public body, and the process involved a few visits from the building inspector and the health department. We had amazingly good relationships with the two retired couples who lived next door and looking back, I am amazed at the accommodations we made for each

other and how uncomplicated the process was. That is not to say that I think the resulting development was optimal—or even good. We could have done a lot more to make things more compatible.

Today, such a development would never occur. Our use would now be a “conditional use” and there would have been a series of meetings and hearings. Our neighbors would have had more opportunity to comment and express concerns. At the end of the process, we would surely have been told that we could not shoe-horn a restaurant into that residential area—even though it was located on an arterial street and zoned for commercial use.

If you live on a suburban lot surrounded by hundreds of similar homes in an area recently developed and insulated by land use controls, you may not think about land use regulation much. You read in the paper about battles over some “LULU” (Locally Unwanted Land Use) such as a big-box retailer or apartment complex, but it may not be of much concern.

It should be.

Land use controls have evolved over time, and they are based on a premise that some would really call fiction. The concept is that the community, together, in a democratic process, determines what it would like to be. Various proposals for land uses are sorted out and a consensus supposedly develops that results in a community that all consider to be optimal.

Granted, the structure is in place so that an optional result might occur, but as you would expect, most land use decisions are made by the few people who are most fervently engaged in a particular debate. When the process works, adequate notice is given to everyone who should care about a proposal before decisions are made. In the process of approval, those “stakeholders”

sort out a balance between the rights of a property owner to use the land as considered to be the most advantageous, and the counterbalancing interests of the community in avoiding nuisances, managing traffic, providing for adequate utilities, and promoting good appearances.

In reality, a few people who care a lot—property owners and citizen planners—often make all these decisions without the quantity or quality of public input that is anticipated by the theory behind the process. Citizens, in general, have a lot of other things going on in their lives and do not find endless planning commission meetings to be a very attractive place to be on Wednesday nights.

Our first encounter with land use regulation may be when we feel some development poses an immediate threat and we show up to comment—sometimes in a pretty shrill and unorganized manner—and wonder how those in charge of land use could be so short-sighted or stupid as to even consider the proposed development we oppose. We wonder how we are supposed to influence a process that seems as complicated and structured as it is. For lack of a better option, we create petitions and call the media—without knowing that in most cases “public clamor” and “community opinion” are supposed to be irrelevant to administrative decision-making.

Or our first encounter may be when we, as the applicant, hit a wall of complexity and a gauntlet of procedures that convinces us that we never should have attempted to get approval for our proposed land use in the first place. We wonder who gave local government so much control over us and our property. We may wish to get back some of that control.

If we really wish to be engaged in the land use arena and have some long-term impact on what is going on there, we need to

understand the rules, the process, and the options that are available to the local decision-makers. We ought to know the legal limits on local discretion. We should be able to pick the right step in the process where our input, and that of others who agree with us, can have the most influence.

We ought to know about our rights and how to defend them.

This book is my attempt to help you do that. In it I have attempted to outline the general process and some specific suggestions on how to influence land use decisions. I hope it is helpful.

This process is not worth much—perhaps it's more trouble than it's worth—if people do not participate. At its best, some wise people with good taste and sound judgment will produce for us communities of grace and beauty, where all the necessary functions of society, from mansions to junkyards, will co-exist in harmony and order.

At its worst, a few people with narrow agendas and minds will force out minorities, ignore private property rights, and build walls around a community. This will make life more expensive for everyone and push all the noxious uses to some other places where the locals have less political clout and savvy.

At the heart of all this has to be a respect for the dignity of the individual. We believe, as Americans, that all are equal before the law. If the result of our planning and zoning is to make sure those that have wealth get more, those who have power make all the decisions, and those with one way of looking at the world get to impose that perspective on everyone else, then we could hardly call this a democracy.

This book is provided in the hope it will help you participate and engage in land use decisions. I believe we need more people involved, not less. Even the brightest and best-intentioned citi-

zens who serve on local decision-making boards cannot guess by some kind of intuition what the citizens they serve want. If we are to share responsibility in building our communities together, we need to join in early rather than late, and with more tools in our tool boxes.

We need to keep the perspective that individual rights and responsibilities are fundamental to a democracy. There is only so much the community can do and, when it comes right down to it, we will fail if we insist on perfection when life simply does not allow for that as a practical matter.

We wish to have a tradition of open space, of preservation of historic buildings and tremendous resources, of peace and order. But we would be short-sighted and foolish in choosing to do so by destroying something even more important—the fundamental dignity that each citizen and each property owner has before the law. We need to remember that the Bill of Rights was written after the king was already out of the picture. It was not created to protect us from the crown, but to protect some of us from the rest of us, those who may have the tendency to use power too broadly and to restrict freedom in the name of all manner of noble pursuits.

One of my favorite quotes is from Colonel Potter on the television program *M*A*S*H*, who wisely said: “There is a right way and a wrong way to do everything. And the wrong way is to try to get everyone to do things the right way.”

Perhaps Edward Markham said it best:

We are all blind until we see,
That in the human plan,
Nothing is worth the making,
Unless it also makes the man.

Why build these cities glorious,
If man unbuilted goes?
In vain we build the world unless,
The builder also grows.

My hope would be that this book helps us build our communities in a manner that all participate, all share the responsibility, and all grow as a result of our common efforts and successes.

If we respect individual rights, participate as an entire community in our planning and vision, and realize that we can make the world a lot better without having to make it perfect, we will all be better for the effort.

Craig M. Call
September 2005

To the Reader—How to Understand Legal Citations:

Not everyone reading this book is a lawyer, so it seems appropriate to point out a few things about the footnotes. When a legal case is shown as a reference, lawyers use a system of abbreviations that efficiently identifies a case in the law books. For example:

Patterson v. American Fork City, ¶26, 2003 UT 7; 67 P. 3d 468, 474 (Utah 2003)

There are several rules about how cases are named and footnoted.

- The first name is the party bringing the action, or the plaintiff. If there are several plaintiffs, usually only the first one is named in a citation to that case.
- After the “v.” which stands for “versus,” the defendant’s name is mentioned. The defendant is the one brought into court by the filing of a complaint against them.
- After the names of the parties, there is a “citation” to a place in a law book or system of case files. In the case above, as you would expect, the number “2003” is the year of the decision.
- The use of the letters “UT” means that the case was decided by the Utah Supreme Court. Other appellate courts are identified in other ways. “U.S.” means the United States Supreme Court. “10th Cir.” means the Tenth Federal Circuit Court headquartered in Denver, CO. Utah belongs to the 10th Circuit and cases heard by federal judges in Utah are appealed there.
- The letters “UT App.” mean the Utah Court of Appeals, which was founded in 1986, and which has been involved in a number of land use cases since that time.

- The number “7” in this instance, is the case number for that year. So “2003 UT 7” means that this was the seventh decision published by the Utah Supreme Court in 2003. This simple identification is unique to the case, and those doing legal research can quickly find the case by reference to this exclusive citation.

Recently the Utah appellate courts also have begun numbering the paragraphs in their opinions. Reference to a specific part of a case might therefore be shown as “2003 UT 7, ¶26.” With this short combination of numbers and letters, we can quickly zero in on the exact place in a case where we find our issue addressed.

Using this ingeniously efficient system, we can easily identify where the case we may want to look up can be found. With the extensive resources of the internet and powerful search engines, legal research and access to written opinions have never been easier.

The “67 P. 3d 468” citation refers to the placement of the case in a series of published legal reporters. If the case citation is shown as “67 P. 3d 468 (Utah 2003),” that case is found in volume 67 of the third set of legal volumes of what is known as the Pacific Reporter, on page 468. Prior to 1999, when Utah began using the current system, the published reporters were the easiest (and perhaps the only) way to access cases. Thus, for example, in a case like *Xanthos v. Bd. of Adjustment*, 685 P.2d 1032 (Utah 1984), there would be no equivalent to “2003 UT 7.”

Again, these cases can be found on the internet or in the law library. You can locate them by carefully reproducing the exact citation. If you go to the Utah Supreme Court Law Library in the Matheson Courthouse in Salt Lake City or to the library at either of the law schools at the University of Utah or Brigham Young University, all those volumes are available and you can easily find what you are looking for. Some city and county libraries, as

well as university collections, also contain extensive legal holdings. Every county and city attorney also needs access to the body of the law, so he or she usually has a law library. Ask around if you want to read these cases. They are in a collection near you or easily accessible on the internet.

Statutes are simpler. In Utah, the statutes are commonly referred to as the "Utah Code Annotated," or U.C.A., so the reference "Utah Code Ann. §63-34-13" would be to the Utah Code Annotated, Title 63, Chapter 34, Section 13. Subsections are shown in parentheses such as "§63-34-13(4)(a)." Utah statutes also are available on-line and on CD. Just about every court, attorney, and legal office in the state has a copy of the Utah code, as do most libraries, city clerks, and other government offices.

My favorite internet sites:

Recent Utah cases can be found at
<http://www.utcourts.gov/opinions/>

Utah statutes are located at:
<http://www.utah.gov/government/utahlaws.html>

For general national research, statutes, and cases, see:
<http://www.findlaw.com/>

The United States Supreme Court collection I like best is at:
<http://straylight.law.cornell.edu/supct/index.html>

What is Land Use Planning?

Before we dive into the specifics of land use planning, it is important to understand the process of community planning and zoning and the permitting of individual projects on a general level.

Land Use Planning is:

Defined. There are rules and procedures in place that have been defined by statute and ordinance. When land use controls are imposed, local governments are required to adopt specific rules and standards that will govern what can be built in the community and what process must be used to get approval to build it. Following local procedures is essential to obtaining a legal approval. The process does not involve much guesswork or assumptions about what procedures must be followed. It's specific and it's written down somewhere.

Deliberate. Local ordinances and state statutes outlining particular steps in the process of regulatory land use must be followed with specificity. Deadlines for applications and appeals will be enforced strictly if anyone challenges a land use decision in court. The individual steps involved in the approval process cannot legally be sidetracked or skipped over.

Informal. Since land use is local and the final controls are in the hands of citizen planners who serve on planning commissions,

boards of adjustment, and city councils or county commissions,¹ the process has resisted every effort to make it stiff and formal. Although land use decisions can often be much more significant to a community than the average ruling by the district court, there is no comparison between them in terms of formality. Issues involving free speech, due process, property rights, and equal protection are common, but the few procedural safeguards to protect constitutional rights are commonly skirted in the land use process. This is so because we as a public wish it to be so. If every hearing became as formal as the court room, the inefficiencies would cause the entire system to collapse of its own weight. If those conducting the meetings and making the decisions are open and honest, then somehow the system works better than one might predict it would. One cannot have rigid formality and citizen control simultaneously.



Public. Land use decisions are not made behind closed doors. In a few cases, public bodies may deliberate in private, but their decisions must be made in open meetings that the public may attend. It is important to note the difference between a public meeting and a public hearing, however. At a *public meeting*, any citizen can attend and observe. Anyone has the right to tape record the meeting, but they have no right to participate by piping up with an opinion unless invited to do so. Public meetings include almost all situations where a majority of the members of a local decision-making body gathers, whether it is the city council, county commission, planning commission, board of adjustment, or design review committee. Public meetings include study sessions as well as the normally scheduled formal meetings. Public meetings must always be preceded by the posting of official notice and an agenda, unless certain emergency situations occur. Public bodies must not discuss issues over which they have control if they have not previously posted the appropriate agenda indicating when and where they will discuss the topic.



Public hearings, on the other hand, are public meetings where the public can participate and speak. Some public hearings are required by state statute and by local ordinance. Most of the time, local officials cannot make land use decisions until after they have conducted a public hearing as required by law.

Land use matters also involve public documents. With some exceptions for business and trade secrets, virtually all the paper that is generated by the process is public and accessible to any citizen to review and copy. For more information about open meetings and open records, see Appendix A that describes Utah's Government Records Access and Management Act (GRAMA) statute and Appendix B that describes the open meetings act.

Diffused. No one person is ever totally in charge of land use controls. There may or may not be a professional planner working in a community (sometimes there are entire hierarchies and agencies) but there are always a planning commission and a legislative body such as the city council or county commission making final legislative decisions. Sometimes the authority to make a specific approval may be delegated to one individual, but only within guidelines provided in ordinances along with standards adopted by a legislative body. There is always an appeals process available to challenge that individual's decision where somebody can second-guess the decision and provide a reality check.

Deferential. On appeal, the decisions of those at the lower levels of the planning hierarchy are usually sustained unless discretion has been abused. The courts have set precedents that clearly establish their obligation to avoid micro-managing local land use unless some municipal official or public has made a decision that clearly violates specific rights or laws. Particularly in dealing with the broad public issues involved in decisions made by a city council or county commission in their legislative role, the courts

almost never overturn local land use policy.

Local. While there are general rules and protocols that are common to just about every community, there is no land use regulation if the local government unit does not set up a land use scheme. According to the Utah League of Cities and Towns, there are 237 incorporated municipalities in the state of Utah along with 29 counties.² This means that there are more than 200 zoning ordinances, more than 200 planning commissions, and more than 200 maps with thousands of different sets of permitted uses in designated zones. There is absolutely no way to make sense of a planning and zoning issue involving a specific piece of property without reviewing the local zoning ordinance and other related land use regulations. Local rules govern local problems.

Self-Contained. There are exterior safeguards, checks, and balances beyond the local land use decision-makers, but they are, as a rule, cumbersome, expensive, time-consuming, and even less predictable than the local processes. It is usually far better, cheaper, faster, and friendlier to make every effort to resolve disputes within the local government processes than to count on the courts or a state ombudsman to resolve local problems.

Complicated. Perhaps the only thing that is predictable about planning and zoning is that anyone who says it is predictable will be shown to be wrong. Those who work in the arena on a full-time basis realize that there are so many variables involved in the process of developing and administering land use controls that no one really knows it all. The issues that come up in litigation, for example, are usually so individualized by the facts of a particular case as to make “black and white” tests impossible to impose. Each case is unique.

And each property is unique. The personalities, motivations, and resources of each individual involved are unique. In response,

the rules become more and more complex and tougher to reconcile with all the other rules as time goes by. The ongoing compounding of the complexities is probably the only reliable prediction that can be made about land use in the future. This is not to say that citizens should give up and refuse to participate in the process. The natural result of complexity is that those who master the process can better control it and thus gain more power over the result.

Polarizing. Property use conflicts are often emotional and exhausting. Fundamental values like property rights and home and family collide with the economics that drive our civilization. The stage is set for intense and open conflict in a society that is becoming more polarized and impersonal. In an arena where so much is at stake, it is not surprising that attempts by our local governments to forge a consensus and find middle ground are becoming more difficult.

Legal. Here in the West, it is common to rant and rave a little (or a lot) about our freedoms and the unfettered lives our pioneer ancestors enjoyed, free from government regulations and restraints. While that makes for interesting conversation, the fact is that very restrictive land use ordinances have been upheld around the country. In the French Quarter of New Orleans, LA, or historic Charleston, SC, for example, you *are* told precisely what color you may paint your house. These regulations have been upheld under the same Constitution that we all assume protects our freedoms in Utah, and it is not usually very helpful or constructive to thrash about claiming that harsh regulations are unconstitutional. Since the U.S. Supreme Court decision in *Village of Euclid v. Ambler Realty Co.*,³ where local zoning ordinances were upheld in 1926, any efforts to invite the courts to strike down local land use ordinances on a philosophical basis have met defeat. It is worth noting that this landmark court case was authored by the only Utahn to ever sit on the high court, Jus-

tice George Sutherland of Provo. The Utah Supreme Court held, in a 2003 case, that battles over land use decisions are “run-of-the-mill zoning disputes” and that issues raised when a property owner claims that his or her application for a permit was delayed, handled unfairly, or wrongfully denied do not “sound constitutional alarm bells.”⁴ Zoning and other land use controls have repeatedly been upheld by the courts and are difficult to challenge. You can spend a lot of energy fighting the system. It exists because most people like it the way it is, including those people who sit as judges down at the courthouse.

Important. Not least, but last, is this bottom line aspect of land use regulation: planning and zoning matters. If you care about the property you own and what use you can make of it, if you are engaged in attempting to preserve or improve your neighborhood, or if you aspire to local leadership, land use planning and control must be important to you. Three recent trends in Utah—exponential population growth, increasing property values, and a growing concern for our quality of life—have been prime factors in the geometric acceleration of local land use regulation.

If we care about what the world looks like around us or what freedoms we enjoy in using our homes and property, we cannot avoid being engaged in the land use arena. This guidebook is meant to provide a convenient, user-friendly orientation to the rules, the processes, and the players that you will encounter as you become engaged in this very public and spirited effort to plan for Utah’s future. Your efforts will not only affect the physical landscape but also the political landscape. The way citizens interact with each other in the public setting and the way local government relates to the people it was created to serve are, to a great extent, defined by how communities plan for land use.

¹For simplicity, I use the term "council or county commission" to include all varieties of local legislative bodies, including town boards and county councils.

²Utah League of Cities and Towns, 2003 Local Government Officials Directory, 17 (2003).

³272 U.S. 365 (1926); the Utah Supreme Court also upheld zoning ordinances in *Smith v. Barrett*, 20 P. 2d 864 (Utah 1933).

⁴*Patterson v. American Fork City*, 2003 UT 7, 67 P.3d 466 (Utah 2003).

The Players: Who Cares and Who Controls

Before we discuss how planning issues are reviewed and resolved, it may be helpful to understand who the players are. Basically, there are usually four types of people who show up for the meetings and engage in the conversation that results in a land use decision:

- Citizen Planners
- Professional Planners
- Applicants/Property Owners
- Neighbors/Third Parties

We will discuss each participant in turn.

Citizen Planners. These individuals are appointed to the planning commission, board of adjustment, or other land use body by the local mayor and/or the municipality's legislative body, or they are members of the local council or county commission who are elected directly by those residents who vote. These are everyday people who are usually not compensated for their time in reviewing land use questions.

Their goals. Citizen planners are supposed to take the broader, long-range view and consider land use issues in light of the community as a whole. They put in a lot of time, however. They would not invest so much if they did not feel that they are



accomplishing something that justifies the effort and hassle.) They are usually permanent residents who own their homes. They are rarely renters. By and large, they are middle-class, middle-aged, and middle-of-the-road philosophically. If they did not like local planning as a concept, they would not be on the board or commission. Sometimes they are individuals who are well thought of in the community, but were not involved in planning before their appointment. Sometimes they are appointed or elected because they have been vocal advocates for a planning philosophy that the legislative body or mayor wants to advance.

Citizen planners are usually comfortable with the use of regulatory power. They spend a lot of time together and like consensus decisions better than repeatedly disagreeing among themselves. Some are more independent than others. Some are comfortable expressing their opinions in public but others will rarely say a word. As would be expected, some members of a board or council may exercise informal leadership that influences how the decisions are made. Some are thorough and do a lot of homework on issues and others are more passive and remain to be convinced. They are subject to biases and problems with perception.

Their role. Since they represent the government, citizen planners control the process and the agenda. They set the meeting times and the rules for the discussion. Most land use decisions are made by a board or commission composed of citizen planners. The world turns on the opinions and conclusions of a simple majority—four of seven or three of five. The essential goal of someone who wishes to influence policy is to get the support of a majority of the board or commission empowered to make the decision.

Professional Planners. The local government entity may or may not have a professional planner on staff. Some large cities

have dozens. The professional does all the administrative work needed for a land use system to function if there is enough funding and business to justify hiring staff. Sometimes smaller municipalities may hire a consultant to handle specific applications or to help design a general plan or revisions to the zoning ordinance. If there is no staff planner, local governments usually attempt to minimize the cost of consultants and thus limit the role of those who charge an hourly fee. The citizen planners or the town clerk try to manage land use regulations as a sideline.

If a professional is involved, the process is likely to be more efficient, understandable, and deliberate. There is a smaller chance of delay from confusion and mistakes in applications, but the process can still be slower than applicants wish. Citizen planners will often just look for the desired result and attempt to get there without a lot of complication, but that approach can be fatal if they use a faulty process that is later attacked. Professional planners, if allowed to function properly by the citizen planners who hire them, will help keep the process organized, legal, and defensible.

Their goals. Professional planners typically have the long-term view. Citizen planners also may look long-term, but they are often serving a four-year term and have a lot more going on in their lives besides planning. Professionals usually choose this career because they want to see long-range improvement of the community. They are concerned about how their work will be viewed by the citizenry and by others in their profession. They usually hope to keep their jobs, however, and many express frustration that compromise is too common and the vision of the general plan is not implemented consistently. Professionals want to get home at night and do not enjoy late night meetings any more than anyone else does—perhaps less.

Their role. Professional planners can be very helpful to others in

the process by acting as referees and coaches. While the land use gauntlet can be very complicated, the planners understand better than anyone—even the lawyers—exactly what the local ordinances and standards say. They should be willing to fully inform all those involved in the process about what the issues are and how decisions are made. They should meet with applicants prior to public hearings to maximize the chances that an application will be complete and ready for hearing when it appears on an agenda. They should be equally willing to visit with neighbors and other concerned citizens and provide all the public information available about an issue so the public debate can proceed fairly.

On occasion, staff planners will attempt to act as informal gatekeepers on the planning process and totally control access to citizen planners. Applicants may be told that their requests will not be placed on an agenda or that applications will not be accepted because they are certain to be denied. This type of activity by staff is usually inappropriate and perhaps illegal unless specific responsibility to control the agendas of citizen planners is defined in the relevant ordinance. It is a fundamental tenet in a democracy that individual citizens and property owners are entitled to due process when significant aspects of citizenship are subject to regulation. The decision by one staff person to deny an applicant a hearing on his or her application is not due process.

Applicants/Property Owners. The applicant for land use approval is usually a property owner or someone who has an option to purchase property. An applicant may be a homeowner who wants to build a carport or an international conglomerate that desires to develop a big box retail store. They may be in the business of development and therefore appear before the community decision makers repeatedly. Applicants all tend to have some things in common, however. Their interests can be narrow-

er and short-term. Applicants are commonly interested in less regulation, not more, and they invariably have concerns about cost and delay.

Their goals. Applicants want a positive answer with minimal hassle, and they want it soon. They can be sophisticated or naïve, depending on how close they have been to the process, but they do not often see their particular proposal as representing a great threat to the health, safety, and welfare of the community. Unless they are appearing as a homeowner, they usually have a stake in the outcome that is related to their employment and how they make their living.

Their role. The job of the applicant is to present a complete proposal and explain and promote it to those who will decide whether or not it will be approved. They do not always do a very good job of that, of course, although sometimes they can work out a consensus and get approval without major aggravation. Most applications are not controversial, of course, and hundreds of small-time, routine approvals will be granted between the real block-buster fights that we read about in the newspapers. The most successful applicants start early to understand the local regulations, introduce themselves to the staff and neighbors, and embrace creative suggestions to forge “win-win” results.

There is a growing number of professionals, including planners, who make a living representing applicants in land use matters. Since the courts have proven to be incapable of resolving disputes quickly and economically, more and more lawyers have caught on to the importance of doing the legal work early. They appear before local decision-makers on behalf of property owners and applicants on a regular basis. This can be a positive thing, depending mainly on the nature of the application and the approach taken by the lawyer and their clients. In the best of worlds, an applicants' attorneys can work with neighbors and

citizen planners to reach middle ground and make sure that a consensus is delivered with the final project. If attorneys are involved, the final result of the process is more likely to survive a challenge and less likely to contain hidden defects that cause problems later.

Neighbors/Third Parties. I use the term “third parties” to represent all the third-party participants in the land use arena. They include the residents and business operators located near land that may be the subject of a proposal. They also could include organized groups who have a more general agenda such as limiting growth, preserving open space, implementing trail networks, and calming traffic. Sometimes local school officials and law enforcement will comment on proposals and voice support or opposition. One of the more creative aspects of the land use community is to make up acronyms for third-party participants who oppose development, including NIMBYs (Not In My Back Yard), BANANAs (Build Absolutely Nothing At All Near Anybody), CAVEs (Citizens Against Virtually Everything) and, for citizen planners, NIMTOs (Not In My Term Of Office.) Not every opponent is unreasonable, of course. Most are concerned about very real, significant issues in local land use.

The roles can be fluid. Today’s applicant will be tomorrow’s neighbor to another applicant, and by the next election, may be a citizen planner.

Their goals. The goals of third parties can be all over the landscape. They could be competitors of a proposed business with a financial stake just as significant and influential as the applicants’. They may be the proverbial “little old ladies in tennis shoes” that have only a community goal in mind, such as to preserve the old schoolhouse or to save the hillsides. They are usually just neighbors. They perhaps purchased their home or farm with the idea that the area seemed attractive as it was then and

do not wish to see it change now. Sometimes they want to influence change, but often they just want to stop it.

Their role. Third parties have the right to be heard (at the appropriate time, of course). They are guaranteed rights of free speech, access to public records and meetings, and, as provided in local ordinance, official notice of hearings and proposals. They are sometimes marshaled by applicants to support an application and sometimes whipped into opposition by vocal community leaders. They have a duty to be courteous and honest, and to respect the time and investment of others, but they are often the least sophisticated and most frustrated participants in the process. Their involvement is usually transactional, which is to say based on a specific proposal, and not generally extended over a series of decisions and conversations. Sometimes citizen planners are exasperated—after working to get community input on a long-term vision—to find their work criticized by those who just don't get the big picture or have any idea how much work went into forging the right balance. Third parties should realize that their most productive involvement is early, not late, in the process of land use management.

All in all, while the stage generally is set for a free-for-all, somehow the system works pretty well. The more the public, the media, and community leaders interact on a specific proposal, the more likely the result will be in line with current community values and goals. That is not to say that it will always be good public policy in the long run, but this is not an exact science. Sometimes part of the good accomplished is to involve citizens in the conversation, no matter what the result is. The key is for those involved in a controversy is to respect each other enough and understand the ground rules sufficiently that no more damage is done than necessary to the long-term relationships that make a community successful.

Who's in charge?

Before discussing the process, it may be helpful to note the forums in which the process occurs. In larger cities and counties, the citizen planners may have legislatively delegated to some staffers the ability to make routine decisions such as issuing building permits, reviewing project designs, and monitoring conditional uses. Under the state enabling statutes, however, there are some citizen planner functions that cannot be delegated and some decision-making bodies that must play specific roles in the process.

The city council or county commission plays a pivotal role. They and they alone can adopt local plans and ordinances. This is a legislative function and cannot be delegated to anyone else.¹

The mayor, city administrator, or county commissioners must act to administer the ordinances and create a process for receiving applications, creating agenda, issuing permits, and monitoring land use compliance. This is an executive function and normally is not performed by council members except in small municipalities.

There must be a planning commission and it must have the first opportunity to review and make recommendations on the general plan, the zoning ordinances, and other legislative and administrative matters. If there is not a planning commission, there cannot be any land use management.²

Another mandatory body or function is an appeals authority. In the past, this role was usually performed by the board of adjustment. Some cities and counties may still have a board of adjustment after the revisions made to the Land Use Development and Management Act by the 2005 Utah Legislature are put into effect, but others may have assigned or may in the future assign the variance and appeals processes to a hearing officer, planning

commission, city or county council or commission, board of appeals, or some combination of these. Although each community now decides how appeals will be heard, some appeal opportunity must be provided. I predict that in most situations, the appeals process will usually remain the province of citizen planners. The local ordinance now must explain how the legislative body has decided to handle appeals and variances.³

These boards and commissions are comprised of citizen planners, and their decisions are the basic components of land use controls. They set the agenda, conduct the meetings and discussions, and adopt the rules for the process of planning and zoning. They get the final say in adopting a system of land use management, and it is only through the ballot box or in court that the voters of the community can challenge or change their decisions. They are “in charge.”

¹*Bradley v. Payson City Corp.*, 2003 UT 16; 70 P. 3d 47 (Utah 2003).

²The existence of the commission is mandated by language expressly stating the general plan shall make and recommend a general plan and shall prepare and recommend land use ordinances. See Utah Code Ann. §10-9a-302 and §10-9-402 (§17-27a-302 and §17-27-402 for counties). The mandatory nature of the planning commission's role was an essential part of the holding by the Utah Supreme Court in the recent case of *Toone v. Weber County*, 2002 UT 103, 57 P. 3d 1079 (Utah 2002).

³Utah Code Ann. §10-9a-701 (municipalities); §17-27a-701 (counties).

How Projects are Reviewed and Decisions are Made

Before understanding the process of approval, one must grasp the difference between local *legislative* decisions and local *administrative* or *quasi-judicial* decisions. The Utah courts have pounded on this issue in a handful of cases over the past few years in a whole-hearted effort to help all those in the land use arena understand it.¹

Basically, the concept can be stated simply.

Legislative Actions: A legislative act is a decision made by a public vote of the city council or county commission that results in an ordinance, amendment to an ordinance, adoption of the general plan, amendment to the plan, or creation of an official policy, rule or code of general community-wide application. Only a body of elected council members or county commissioners can make legislative decisions. These actions by local legislators are afforded great deference by the courts. The local city council or county commission has the discretion of adopting any plan, ordinance, rule, or standard as a legislative act unless it can be proven that their decision does not advance the general welfare of the community. As long as it is “reasonably debatable” that the local decision advances the general welfare, and does not violate state or federal statutes and constitutions, it will be upheld.²

How Much Flexibility Does the Government Have?



*PUD actions may be legislative or administrative, depending on the exact provisions of the local ordinance.
 NOTE: This is a gross oversimplification of a complex subject, for purposes of illustration and discussion only. Much of the discretion afforded a local government entity is defined by the ordinances of that entity, which can vary from municipality to municipality.

Administrative Actions: When the council, commission, planning commission, board of adjustment, appeals authority, or their staff administers and enforces a legislatively adopted plan, ordinance, rule, or standard, however, their decisions are not legislative acts. They are administrative or quasi-judicial acts and they are not entitled to the same deference as legislative acts. These non-legislative decisions must be supported by substantial and factual evidence that must be included in a formal record of the decisions.³ All actions and decisions made by staff, executives, boards of adjustment, appeals boards, and hearing officers are administrative or quasi-judicial acts. Many decisions by legislative bodies are not legislative at all, since they do not result in an ordinance, general plan, code, rule or policy. Decisions involving individual subdivision approvals, variances, conditional use permits, and site plans are never legislative. They are administrative and must all be supported by substantial evidence in the record if they are to be legal and enforceable.

How is a *Legislative* Decision Challenged?

Case Law — Harmon's v. Draper

In a recent case involving a local legislative decision, the company that owns Harmon's grocery stores made application to the City of Draper for permission to build one of their prototype stores at 11400 South and 700 East. The area was shown on the general plan as commercial but had been assigned a residential zone on an interim basis, an assignment which would not allow the intensive use Harmon's proposed. Although the planning staff recommended approval and the planning commission also jumped on the bandwagon, the application hit the skids before the city council.

A group of vocal neighbors, predictably concerned about the impact of a 24-hour grocery store on their rear property lines, appeared



A zoning request to allow this Harmon's grocery store was first denied, then approved, by the Draper city council. It was within the discretion of the council to agree to change the zoning or not. The area zoning map and an aerial photograph of the site are found on page 53.

before the city council and argued against approval. In this case, the developer had done extensive studies and had its administrative "ducks in a row." The application included traffic studies, storm water management plans, landscaping schemes, and parking design. The architecture of the building was shown in detail and financial analysis was done to show what a sales tax machine the proposed businesses would be for the City of Draper.

All this was inadequate in meeting the concerns of the neighbors, however, and the city council agreed with them that the proposed use was not compatible with nearby neighborhoods. The project was denied, although there was clearly plenty of evidence offered upon which the council could have based an approval.

Harmon's took the matter to district court, claiming that the city council had abused its discretion and that there were insufficient reasons to support a denial. After losing in the trial court, Harmon's appealed to the Utah Court of Appeals.



Above are some of the attractive homes that are near the new Harmon's store. The Draper city council had to grapple with the decision of what kind of commercial use is compatible with Draper residents and how adjoining uses can be buffered.

In a decision published in 2000, the court upheld the city's action.⁴ Speaking unequivocally so as to not be misunderstood, the court said:

Harmon's presented ample information to the city council that would have justified Harmon's requested change in zoning classification. However, in attacking the city's action, Harmon's burden was not to show that the city council had no reason to deny Harmon's application . . . Rather the burden was on Harmon's to show that the city's decision to preserve the status quo . . . *could not promote the general welfare.*

Although Harmon's presented evidence to support the position that the proposed zone was reasonable, the city council, upon the record before it, could have reasonably concluded that the use of the property for residential purposes consistent with the current zoning status was entirely appropriate.⁵

The court also held that the public clamor that occurred at the hearing could be appropriately cited as a factor in the council's decision. Although the comments by neighbors were not based on specific facts or substantial evidence, legislative decisions need not be based on that kind of analysis. The court stated:

"It is a legislative body's prerogative to determine public policy, a judicial body's job to interpret the policy, and an administrative body's job to enforce the policy. 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."⁶

Validating the council's reliance on the concerns of neighbors, the court said, "In performing their duty it is both their privilege and obligation to take into consideration their own knowledge of such matters and also to gather available pertinent information from all possible sources and give consideration to it in making their determination."⁷

The bottom line with legislative decisions is that, as the court stated, it is nearly impossible to challenge them. Absent racial prejudice or some other poisonous motive, legislative decisions are upheld by the courts.

It is noteworthy that, despite its failure in the courts, Harmon's did build the store it originally proposed and it is in operation today at 11400 South and 700 East in Draper. How could this be after the neighbors and the city prevailed at the Court of Appeals?

Remember the standard—the principle is neither that developers always lose nor neighbors always win. The standard is that the legislative body virtually always wins on legislative questions. In a later city council vote (after an intervening election where new council members were elected and before a council composed of some new faces), Harmon’s won the zoning battle and received permission to build. Had the neighbors challenged that second decision, they would have faced the same problem Harmon’s faced originally—it is almost impossible to fight a local legislative decision. Just as Harmon’s lost in its attempt to fight city hall, the neighbors also would have lost if they had challenged the council. Local legislative land use decisions can rarely be challenged legally.

This standard is not unique to Utah. Indeed, Justice Sutherland laid down the language in that 1926 zoning case before the U.S. Supreme Court, stating that local zoning decisions need only be “fairly debatable” in order to be upheld.⁸

Legislative decisions include the following:

- ✓ Adopting the general plan.
- ✓ Adopting or amending the zoning ordinance.
- ✓ Rezoning property to a new classification.
- ✓ Adopting a subdivision ordinance or any other local law that will be placed in the ordinance book.
- ✓ Setting uniform, printed development standards, codes, and regulations that are applicable generally to land use within the city, as opposed to a specific development approval for a specific, isolated application.

How is an *Administrative* Decision Challenged?

Case Law — Wadsworth v. West Jordan

As a contrast to the way legislative decisions are reviewed by the courts, consider the recent matter of Ralph L. Wadsworth Construction, Inc. versus West Jordan City.⁹ Wadsworth, as the property owner, appeared before the West Jordan Planning Commission to ask for a conditional use permit to allow outdoor storage at their proposed construction yard and office in an industrial park. The land was already zoned M-1, which permits light manufacturing and construction services. West Jordan zoning ordinances defined open storage as a conditional use requiring approval by the West Jordan Planning Commission.¹⁰



The construction yard behind this building was the focus of a battle over conditional uses in West Jordan.

When a land use board or commission reviews a conditional use permit application it is involved in an administrative act. In this case, since the land was already zoned for outdoor storage, the issue involved limited discretion. The planning commission was only empowered to impose reasonable conditions governing the manner in which materials are to be stored outdoors. The previous legislative decision to designate outdoor storage as a conditional use allowed in the zone already settled the issue of whether or not outdoor storage was appropriate and acceptable in the zone. The commission could only prohibit outdoor storage outright in this administrative context if it could show by substantial evidence on the record, as considered under the standards set forth in the zoning ordinance, that the negative aspects of outdoor storage on the particular parcel involved could not be mitigated because of special characteristics of this parcel.

When the planning commission met to consider Wadsworth's request, representatives of neighboring property owners, including representatives of Dannon Yogurt, appeared before it and expressed concern that open storage would "induce rodent traffic" and create dust problems.¹¹ After delaying a decision for a few weeks so the staff could review the matter, the commission denied the application. Wadsworth appealed to the city council, which met on the matter a few months later. Again, the neighbors appeared and protested. Again, the conditional use permit application was denied.

As the basis for the denial, the council adopted these findings:

- (1) The city has made a significant investment in bringing Dannon to the area and the attributes which attracted Dannon to the area need to be maintained. Outdoor storage is detrimental to the area, making the area less attractive and injurious to the goals of the city.
- (2) Outdoor storage may be considered to be a nuisance to neighboring property owners.
- (3) Outdoor storage would encompass the majority of the parcel. The area and intensity of outdoor storage are much different than that of neighboring property owners.



The attractive industrial "campus" of Dannon Yogurt is near the site of a battle over outdoor storage. The more upscale industrial users in the area fought a construction company's request for less attractive uses in the industrial zone.

- (4) Outdoor storage is detrimental to the existing and future businesses in the area and is not harmonious with the goals of the city.¹²

Most city officials reading these findings would probably consider them typical of the type of conclusions commonly cited to support local land use decisions. The trial court deemed them adequate, but the Court of Appeals disagreed.

The standard for reviewing administrative decisions in Utah is that they will only be upheld if they are supported by "*substantial evidence in the record.*" This does not mean that all the evidence presented to the decision-makers must support the decision or even a preponderance of the evidence must be found in favor. All that is required is that the local decision-makers provide some credible, factual basis for their decisions and include it in the record of the proceedings. West Jordan did not do this in the Wadsworth matter.

The city had argued that the findings listed above were adequate in light of the “great deal of deference” owed to local decisions. The court held, however, that “there is a significant distinction in the degree of deference owed a municipality’s land use decision depending on whether it is made while the decision-making body is acting in a legislative capacity or an administrative/adjudicative capacity.”¹³ The court used strong language in reminding local officials that they must do more than just speculate on the impact of proposed land uses:

In denying [Wadsworth’s] application, the city council relied on its finding that “[t]he city has made a significant investment in bringing Dannon to the area and . . . [o]utdoor storage is detrimental to the area . . . and injurious to the goals of the city.” However, the only evidence in the record supporting this finding is the concerns expressed by neighboring landowners. The record does not reveal whether the commission’s staff actually investigated the concerns raised at the public hearing or why they concluded



This is the Wadsworth construction yard. The Utah Court of Appeals held that, absenting substantial evidence to the contrary, the West Jordan Zoning Ordinance must be applied to allow outdoor storage in this industrial zone.

that outdoor storage on [Wadsworth's] property—which is located in an M-1 zone—would be adverse to the city's goals.¹⁴

In other words, the city had already covered the issue of compatibility when it provided by ordinance that outdoor storage could be allowed as a conditional use in the zone. That legislative decision to define appropriate uses in the zone would have been given great deference if the neighbors had challenged the legislative act of allowing storage use in the M-1 zone when the zoning ordinance was adopted or amended. Having made that policy decision in legislative process, however, the city could not ignore its own conclusions as expressed in the ordinance. How could the city state in an ordinance that storage is appropriate and desirable if properly conditioned but then deny an application for storage with broad language saying that such uses were incompatible?

The city's inconsistency was too obvious for the court's taste and it went on to add:

Similarly, the sole evidence supporting the city council's determination that [Wadsworth's] outdoor storage "may be considered a nuisance" is the concern raised by neighboring property owners regarding potential increases in "rodent traffic" and dust. Although [the zoning ordinance] authorized the city council to deny [Wadsworth's] application if it was "deemed . . . a nuisance," the city council did not find that [Wadsworth's] storage would actually constitute a nuisance. Thus, this finding was also insufficient to justify denial of [the] conditional use application.¹⁵

Noting that there are other landowners in the area with outdoor storage, the court simply could not understand where the evidence existed that would show how outdoor storage on Wadsworth's lot would be detrimental to other landowners who also have outdoor storage on their lots. In the context of administrative decisions, the lack of evidence supporting a denial is fatal to the decision if appealed to court.

Administrative decisions include the following:

- ✓ Subdivision approvals.
- ✓ Approval of variances.
- ✓ Decisions interpreting the meaning of the ordinances.
- ✓ Appeals from decisions of zoning officials.
- ✓ Issuing and enforcing building permits.
- ✓ Zoning enforcement.
- ✓ Regulation of non-conforming (grandfathered) uses.
- ✓ Any other decision that is not made by the legislative body.
- ✓ Any decision, even if made by the legislative body, that decision does not result in a change to the city limits, the zoning map, the ordinances or the code books.

What is “Substantial Evidence”?

Substantial evidence is: more than a mere “scintilla” of evidence though something less than the weight of the evidence.¹⁶

Note that in the *Wadsworth* case, the administrative decision maker was the city council. Just because the legislative body is making the decision does not mean that the decision is legislative. Local boards, councils, and commissions often act in administrative capacities when they make land use decisions.

Of course, if the decision maker is not the council or county commission, then the decision being made cannot be a legislative decision. The judgment calls made by the board of adjustment, zoning administrator, appeals authority, building inspector, and staff are always administrative or quasi-judicial and must therefore always be supported by substantial evidence when challenged.

Those who master this principle will have covered a lot of ground in understanding local land use procedures. It may seem somewhat clear, but remember that the trial court in the Wadsworth case agreed with West Jordan, and it took the Court of Appeals to clear up the confusion about what constitutes substantial evidence. Don't be discouraged if a local decision seems marginal and the appeal unpredictable. Even the judges don't agree on some cases, and there are few bright lines in this business.

¹*Bradley v. Payson City Corp.*, 2001 UT App 9, 17 P.3d 1160 (Utah App 2001), vacated 2003 UT 16, 70 P.3d 47 (Utah 2003); *Harmon City, Inc. v. Draper City*, 2000 UT App 31, 997 P.2d 321 (Utah App 2000); *Wadsworth Construction v. West Jordan*, 2000 UT App 49, 999 P.2d 1240 (Utah App 2000).

²*Bradley, supra*, note 1; Utah Code Ann. §10-9a-801(3)(b) (municipalities); Utah Code Ann. §17-27a-801(3)(b) (counties).

³*Bradley, supra*, note 1; Utah Code Ann. §10-9a-801(3)(c) (municipalities); Utah Code Ann. §17-27a-801(3)(c) (counties).

⁴*Harmon City, supra*, note 1.

⁵*Id.* ¶ 28. (emphasis added).

⁶*Id.* ¶ 18.

⁷*Id.* ¶ 27, quoting *Gayland v. Salt Lake County*, 358 P.2d 633, 634 (1961). (emphasis in original).

⁸*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388–89 (1926).

⁹2000 UT App 49, 999 P.2d 1240. (Utah App. 2000)

¹⁰Cited by the Court of Appeals as *West Jordan, Utah*, ordinance §10-9-102(f) (1991).

¹¹*Wadsworth, supra*, note 1 ¶ 3.

¹²*Wadsworth, supra*, note 1 ¶ 15.

¹³*Wadsworth, supra*, note 1 ¶ 16, quoting *Harmon City, Inc., supra*, note 9, ¶ 8.

¹⁴*Wadsworth, supra*, note 1 ¶ 17.

¹⁵*Wadsworth, supra*, note 1 ¶ 18.

¹⁶*Patterson v. Utah County Bd. of Adj.* 893 P.2d 602 (Utah App. 1995).

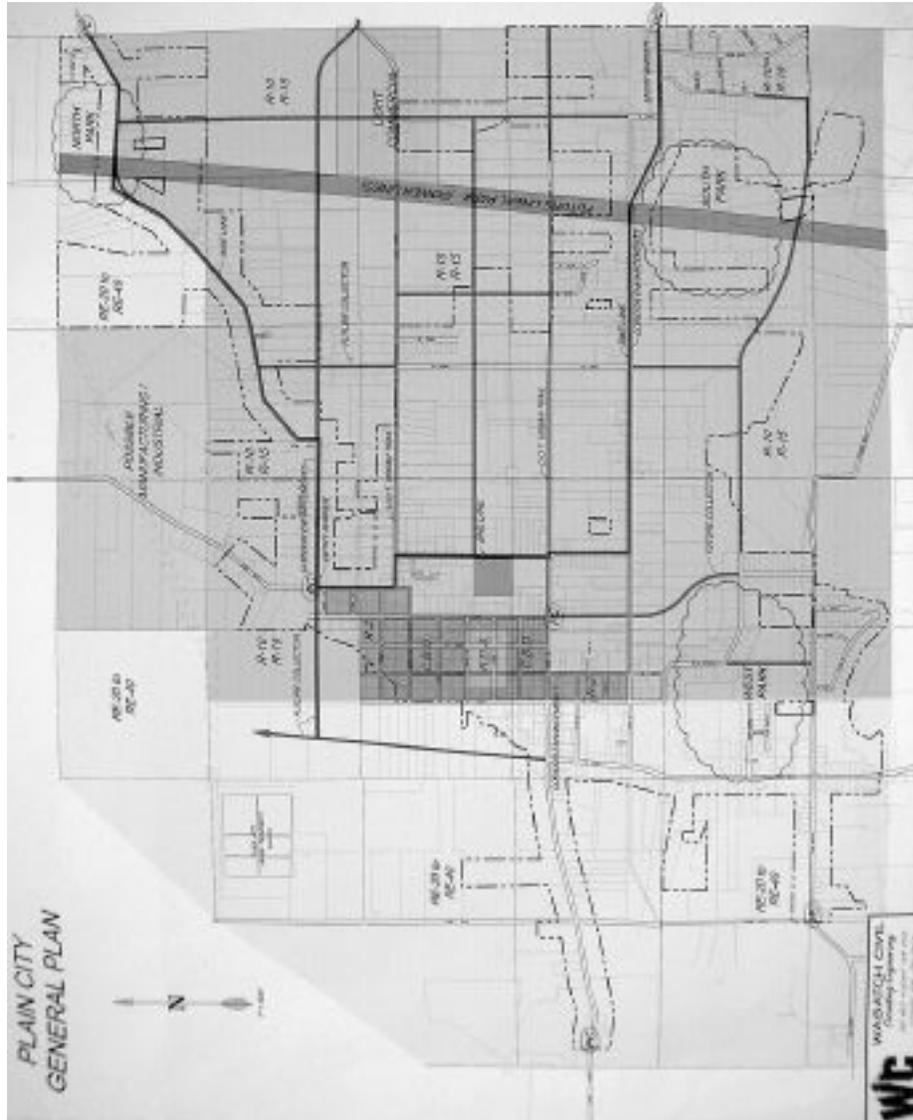
“In the Beginning”: Adopting the General Plan and Land Use Ordinances

Step One: Adopting the General Plan

Once a community decides it wants land use planning, what do those with a stake in the process do to start? In Utah, the first step is to appoint a planning commission and proceed to adopt a general plan. Every town, city, or county that has land use controls has to have a general plan if it intends to control land uses.

The tendency when a specific issue looms importantly over the municipal landscape, however, is for government officials and citizens alike to skip the preliminaries involved in understanding the general plan and how the land use ordinance came to be. That is short-sighted. The entire concept of local land use planning was intended to move from the general to the specific and to make lot-by-lot decisions in light of general community goals. Land use decisions that avoid this context are more likely to fail if challenged and more likely to breed cynicism in those most affected.

An extended discussion of how to create a general plan is beyond the scope of this discussion; my goal is to help you negotiate the permitting process once the general plan is in place and the land use ordinances adopted. But it is still worthwhile to pause at the beginning and describe what a general plan is—and isn't.



Most General Plans include a map showing the eventual development of compatible uses throughout the community.

It should be noted that since cities and counties in Utah are "creatures of statute and limited in powers to those delegated by the legislature,"¹ they can only pass land use laws that are enabled by state statute or "necessarily implied to carry out such responsibilities."² Where the state laws are specific, the local governments have no discretion to go beyond them.

As stated above, the general plan is mandatory. As the statute reads:

In order to accomplish the purposes set forth in this chapter, each municipality shall prepare and adopt a comprehensive, long-range general plan for: (a) present and future needs of the municipality; and (b) growth and development of the land within the municipality or any part of the municipality.³

According to code, the plan may provide for:

1. health, general welfare, safety, energy conservation, transportation, prosperity, civic activities, aesthetics, and recreational, educational, and cultural opportunities;
2. the reduction of the waste of physical, financial, or human resources that result from either excessive congestion or excessive scattering of population;
3. the efficient and economical use, conservation, and production of the supply of:
 - a. food and water; and
 - b. drainage, sanitary, and other facilities and resources;
4. the use of energy conservation and solar and renewable energy resources;
5. the protection of urban development;
6. the protection and promotion of air quality;

7. historic preservation; and
8. an official map . . . ⁴["official map" refers to a transportation plan for future street and highway improvements].

The statute concludes that the municipality may determine the comprehensiveness, extent, and format of the general plan within certain guidelines. Unless otherwise provided by local ordinance, the general plan is advisory only so any decision related to it would be almost impossible to challenge legally. The adoption of the plan is really a conversation about what direction the community wants to go in its land use, traffic, housing, and other goals. If there is no ordinance mandating that local land use decisions be consistent with the general plan, there is usually no need to worry about appealing a general plan decision.⁵

Counties must also adopt a general plan if they wish to engage in land use planning; the wording of the statute is somewhat different, though generally similar.

There is a specific process that must be followed to adopt a general plan, and it must involve the planning commission. As you will learn in dealing in land use issues, the planning commission's role cannot be ignored. Only the planning commission can propose a general plan, and the city council or county commission cannot approve one without the recommendation of the planning commission.⁶

If you are involved in advocating for one side or the other of a controversial land use decision, take the time to review the general plan and note the guidance it provides for your situation. Using quotations from the municipality's own general plan in support or opposition of your arguments before a land use panel can be persuasive and will be a significant part of the record of the decision if it is appealed and reviewed in litigation or arbitration.

The general plan does not control with an iron hand the land use decisions that a community makes, but also it is not mere window dressing. If the local decision-makers ignore a clear directive from the plan, their decisions may be more effectively challenged as arbitrary and capricious. Often the consideration of a request for a change in the zoning for a particular property will include an amendment to the general plan to be certain that there is philosophical consistency between the plan and the re-zoning, if granted.

Remember, every local government that wants to be in the business of regulating land use must have a general plan. If the planning department or recorder is unable to provide one on request, zoning decisions may be struck down as void and illegal. If the local officials refuse to provide one, an interested citizen can demand to review it under the Government Records Administration and Management Act (GRAMA).⁷ For more information about GRAMA, see Appendix A.

The general plan is adopted under specific procedures. There must be at least one public hearing and open discussion to enhance the chances that the legislative decision by the city council or county commission to adopt the plan represents community consensus.⁸

Adoption of the general plan is a legislative decision, and the judgments made by the citizen planners in adopting it are virtually unchallengeable if the relevant statutes are followed.

Step Two: The Land Use Ordinances

A general plan alone cannot be used to enforce land use controls. The "teeth" behind the general plan are the land use ordinances. Every community which desires to control land use also must have a land use ordinance.⁹ As you would expect, land use ordi-

nances come in all shapes and sizes, running from a few pages that regulate uses that have the most negative impact on a neighborhood to those with complicated overlay zones that comprise more than half the local code book.

Land use ordinances can be adopted on a temporary basis if property in the community is unregulated and the legislative body decides that there is a compelling public interest in doing so. A temporary land use ordinance (a "TO") cannot be effective for more than six months, but the state statutes anticipate that the need for a quick "time-out" is sometimes important. A "TO" must be adopted by the council or commission in a public meeting but may be adopted without holding a public hearing and without the input of the planning commission.¹⁰

Permanent land use ordinances, on the other hand, can only be imposed after review by the planning commission and hearings held before the city council or county commission. Specific times and notice periods are set out in statute.¹¹

The land use ordinance and land use decisions made in enforcing it must conform with the state statute that allows local government to regulate land use. The statutes require that each community have a zoning map, for example. If that and similar specific requirements are not met, the land use ordinance may be declared null and void.¹² For example, Weber County's decision to sell property without a review by the planning commission, as required by an obscure sentence in the former state land use statute, was declared void by the Utah Supreme Court in 2002.¹³

There are some essential attributes of any land use ordinance. A valid ordinance must regulate land use and development.¹⁴ It must provide enough information that someone reviewing the ordinance can determine how a given parcel of property is zoned and how it may be used.¹⁵ The use of properties within a zoning

district is to be regulated in a uniform manner.¹⁶

Land use ordinances are adopted by legislative action, so they are entitled to significant deference by the courts, as was discussed in Chapter 3. It is very difficult to challenge the substance of the ordinance. Efforts to invalidate ordinances only succeed when the local action is extraordinarily harsh or clearly prompted by some motivation that the courts have condemned such as racial discrimination or interference with free speech.

The essential thing to know about land use ordinances is that you must read the ordinance that applies to the issue about which you care. Since each community has its own, there is no way of knowing how to approach a land use issue without a copy of the local ordinance to review.

¹*State v. Hutchinson*, 624 P.2d 1116 (Utah 1981). *Ritholz v. City of Salt Lake*; 283 P.2d 702, 703 (Utah 1955).

²*Dairy Product Services v. Wellsville*, 2000 UT 81, 13 P.3d 581 (Utah 2000).

³Utah Code Ann. §10-9a-401(1).

⁴Utah Code Ann. §10-9a-401(2) (municipalities); Utah Code Ann. §17-27a-401(2) (counties).

⁵Utah Code Ann. §10-9a-401(3) (municipalities); Utah Code Ann. §17-27a-401(5) (counties).

⁶Utah Code Ann. §10-9a-302(1) and 403(1)(a) (municipalities); Utah Code Ann. §17-27a-302(1)(a) and 403(1)(a) (counties).

⁷Utah Code Ann. §63-2-101, et seq.

⁸Utah Code Ann. §10-9a-404 (municipalities); Utah Code Ann. §17-27a-404 (counties).

⁹Utah Code Ann. §10-9a-501 (municipalities); Utah Code Ann. §17-27a-501 (counties).

¹⁰Utah Code Ann. §10-9a-504 (municipalities); Utah Code Ann. §17-27a-504 (counties).

¹¹Utah Code Ann. §10-9a-205(1)(a), 502, 503 (municipalities); Utah Code Ann. §17-27a-205(1)(a), 502, 503 (counties).

¹²See, for example, *Hatch v. Boulder Town*, 2001 UT App 55, 21 P. 3d 245 (Utah App. 2001).

¹³*Toone v. Weber County*, 2002 UT 103, 57 P.3d 1079 (Utah App. 2002).

¹⁴Utah Code Ann. §10-9a-501 to 519 (municipalities); Utah Code Ann. §17-27a-501 to 519 (counties).

¹⁵*Hatch, supra*, note 12.

¹⁶Utah Code Ann. §10-9a-505(2) (municipalities); Utah Code Ann. §17-27a-505(2) (counties).

Specific Legislative Issues and How They are Resolved

The first actions taken in land use regulation are legislative. Before the specific provisions of rule and ordinance are adopted, a community must first think “big picture” and set some overall goals and objectives.

As time goes by, there will be a repeated need to fine tune the plan, adjust and supplement the ordinances, and consider other legislation.

1. Adopting or Amending the General Plan

Nature of the decision

Broad policy-making function, where local officials set the vision of what they hope the community will become.

Who makes the decision?

These are legislative matters, so the final decision is always made by the legislative body—the city council or county commission. The planning commission *must* propose the original plan and hear any proposed amendments to the plan and make a recommendation before the legislative body can enact the plan or an amendment.¹

What notice is required?

There is no duty to provide each property owner with individual notice of city-wide general plan changes and amendments because to do so would be very cumbersome. General public notice has to be given of *hearings* and *meetings* to consider the general plan or amendments to the general plan. There is a difference between them, however. A meeting is any gathering of the board or commission. A hearing involves a chance for the public to comment on an issue. The public does not always have the right to comment at every meeting, so every meeting is not a hearing.

The local government entity must, ten calendar days before the *hearing* to be held by the planning commission:

1. give specific notice to affected governmental entities and utilities as defined in statute;² *and*
2. provide public notice by publication in a newspaper of general circulation; *and*
3. post a notice either
 - a. in three locations in the community or
 - b. on the local government's official Web site.³

Notice before a *meeting* (meetings are not necessarily hearings) to consider the general plan or amendments to the plan need only be given by:

1. submitting notice to a newspaper *and*
2. posting the notice either
 - a. in three locations in the community or
 - b. on the local government's official website.⁴

Each body typically meets the notice requirements for meetings when it posts an agenda as required by the Open and Public

Meetings Act.⁵ When the planning commission or legislative body discusses these issues, the required notice will allow someone who checks the local agenda on a regular basis to be aware of proposed changes (if the agenda is specific enough to describe what the amendments are). Otherwise, there is no effective way for property owners and citizens to know what changes are proposed and adopted, except perhaps through the local media if the issues are significant enough to warrant news coverage.

What public input is required?

At least one public hearing must be held—by the planning commission—before a change in the general plan is adopted.⁶ Note that there is no duty for a legislative body to conduct a hearing on the general plan or an amendment to the plan.⁷ It need only consider the advice of the planning commission and make its decision in a public meeting. Check local ordinances to determine if any hearing is required before the legislative body.

What are the issues?

Those making the decision must decide if the proposed plan or change to the plan promotes the general welfare of the community.

Public clamor is acceptable as a factor in local legislative land use decisions. Opposition by citizens may be noted by the council members or commissioners, and they may base their decision on public support and comment.⁸

How is the decision appealed?

Unless otherwise provided by local ordinance, the general plan is advisory only so any decision related to it would be almost impossible to challenge legally. The adoption of the plan is really a conversation about what direction the community wants to



The zoning map (above) and an aerial photograph of the existing land uses compare the anticipated uses in the general plan for Draper, Utah. This area is the location of the new Harmon's grocery store discussed in Chapter 3.



go in its land use, traffic, housing, and other goals. If there is no ordinance mandating that local land use decisions be consistent with the general plan, there is usually no need to worry about appealing a general plan decision because it has no ultimate legal effect until some other decision is made to carry out the general plan in an ordinance.

Tip for participants

Make arguments related to the public good, build political coalitions to influence elected officials, feel free to involve the media if appropriate and generally comment on all the noble-sounding community values that support your side of the argument. It's all relevant in this context. Remember that the real issue is



Whether the city is small or large, the same land use formalities and rules are required. Both the hamlet and the metropolis must justify its decisions with the same level of formality.

whether or not the proposed plan is desirable. The decision is typically one of preference and there is no legally “right” or “wrong” answer.

2. Adopting or Amending Local Land Use Ordinances, Rules and Codes

Nature of the decision

Policy-driven legislative decisions set the legal framework to promote the general welfare of the community. The result includes comprehensive building, fire and health codes, landmark controls, standards for streets and traffic controls, subdivision ordinances, and a host of others.

Decisions involving a land use ordinance trigger special procedures mandated by state statute. Not every ordinance affecting land is a land use ordinance, which is defined in statute as including planning, zoning, development, or subdivision ordinances. The term does not include the general plan.⁹ Building, fire, and health codes also are not land use ordinances.

Who makes the decision?

Any change to an ordinance, code, or rule is a legislative decision, so it is always made by the legislative body – the city council or county commission. The planning commission *must* hear any proposed land use ordinance or amendments to land use ordinances and make a recommendation before the legislative body can enact such an ordinance or amend it.¹⁰

What notice is required?

Both the planning commission and city council or county com-

mission must be involved in adopting or amending a land use ordinance.

Notice has to be given of both hearings and meetings. The local government entity must, 10 calendar days before the *hearing* to be held by the planning commission:

1. give specific notice to affected governmental entities and utilities as defined in statute;¹¹ *and*
2. post a notice in three locations in the community or on the local government's official Web site;¹² *and*
3. provide additional public notice by:
 - a. publication in a newspaper of general circulation; *or*
 - b. by mail three calendar days in advance to:
 - each property owner whose land is directly affected by the proposed change; *and*
 - each property owner within the parameters specified in the local ordinance, if there is such a requirement.¹³

Be sure to note the use of the terms *and* and *or* in the above list of required notices. These rules were effective in 2005.

Note there is no requirement in state statute that any landowners be notified of changes in ordinances if a publication is made in the local newspaper. The only notice required by state law related to land use ordinances is the newspaper notice.

Notice before *meetings* (which as described in this section, are not necessarily *hearings*) held by the planning commission or the city council or county commission to consider an ordinance or change to an ordinance need only be given by:

1. submitting notice to a newspaper; *and*

2. posting the notice:
 - a. in three locations in the community; *or*
 - b. on the local government's official Web site.¹⁴

It is common for a community to consider broad rezoning decisions and dramatic changes to the zoning ordinances, such as the imposing of overlay zones, changes in densities, adjustment of minimum lot sizes, elimination of agricultural and commercial uses, and other such significant amendments to plans, ordinances, and maps without any mailed notice to anyone. This is not illegal. Absentee landowners and concerned citizens must maintain "eternal vigilance" to insure that these kinds of changes do not go unnoticed by the majority of affected property owners. There is nothing unusual about this – citizen planners could hardly notify everyone who might be concerned about a change, and we as citizens need to be constantly involved in community decisions if we expect to have our influence felt.

What public input is required?

At least one public hearing must be held by the planning commission before a change is made to a land use ordinance. The city council or county commission can then take action without a public hearing but they do need to do so in a public meeting.¹⁵

What are the issues?

Local government entities have broad discretion to adopt and amend land use ordinances. The issues involved are simple: is there a legitimate government interest in advancing the goal that prompts consideration of the ordinance? It is reasonably debatable that the ordinance advances the general welfare? The decision will be completely legal and enforceable if it meets these

tests, unless it violates a state or federal statute.

There are constitutional issues involved in local land use decisions, but they are relatively rare.

This means that these decisions are more political than legal, and the preferences and opinions of local leaders will be given broad deference by the courts. It is usually a waste of time to argue the law or claim a violation of fundamental rights unless there are significant issues of free speech (as with sign ordinances or sexually-oriented businesses), unless the proposal clearly has no public benefit at all, or unless the purpose of the decision is an illegal one.

Public clamor can be considered in decisions adopting and amending the ordinances. The background knowledge of decision makers and their opinions as to what is appropriate and not, what is compatible and not, and the general preferences of the community can legitimately be the basis for legislative decisions.

How is the decision appealed?

The decision is not ripe for appeal until the council or county commission has voted. At that time, the only appeal is to the district court or, if an unconstitutional taking of private property has occurred, to the Property Rights Ombudsman. Be wary of details and deadlines as discussed in Chapter 13.

Tip for participants

Influencing legislative decisions such as the enactment of ordinances can be as frustrating as any part of land use regulation. Decision makers need not explain their votes, need not provide any evidence to support their decisions and will be afforded extraordinary deference by the courts.

Much of the time, applicants and concerned neighbors do a lot of talking about rights and mandates when discussing amendments to the law, but this is really not very helpful legally. While those on the council or commission are likely to be sympathetic to the discussion of burdens and rights, they are not forced into making legislative decisions based on objective evidence and law. These are subjective judgment calls.

The message to be understood here is that it is better to attempt to work out compromises, seek common ground and strike a proper balance in these discussions. No one attempting to influence legislative decisions is going to gain much ground by pretending to be able to force local government officials to decide one way or the other using potential lawsuits or constitutional claims as a hammer. The better option is to appeal to the decision-makers' sense of what is fair, what is reasonable, and what is in the common interest.

An exception to this general advice would involve specific areas of state and federal preemption as described in chapters 8 and 9 (billboards, religious uses, group homes, sexually oriented businesses, etc.) and constitutional issues (takings of private property, equal protection and free speech) as outlined in Chapter 14.

3. Annexing Land into a Municipality

Nature of the decision

This is a legislative decision that is made in two phases: First, a municipality that is willing to grow (some are not) must adopt an annexation policy plan.¹⁶

Second, once the plan is adopted, individual annexation requests can be considered as legislative acts. The proposal usually begins with a petition by the owners of more than 50 percent of the

property in the proposed annexation area.¹⁷ The issue on a specific annexation request is whether or not the community wishes to make the annexation. The municipality usually has no duty to do so and has virtually complete discretion in making an annexation or not (except in Salt Lake County under certain circumstances).¹⁸ In some cases, if enough landowners or residents within the proposed annexation area protest the annexation, the annexation cannot occur.¹⁹

Who makes the decision?

The city council or town board, by majority vote, adopts the annexation policy plan based on recommendations from the planning commission. A decision to annex requires a simple majority of the council after receiving the recommendation of the planning commission.²⁰

What notice is required?

For an annexation policy plan, there are several stages of meetings required and public notices provided for, but no specific notice to a particular property owner is required.²¹ When a particular property or area is slated for annexation, there is yet another set of public notice requirements, but still no requirement that affected property owners be notified directly. See the statute for specifics as it is a little more detailed than we have room to cover here.²²

What public input is required?

There are relatively extensive notice periods, public meetings, and public hearings required in the preparation of an annexation policy plan.²³ Once the petition for a specific annexation is received, not only are public notices required, but specific notices to the county, school board, and other affected entities also must be provided.²⁴

What are the issues?

Outside of Salt Lake County, where special rules apply, the question of annexation is simple: Is this addition a good thing for the community? Annexations can be refused unless those proposing to join the community donate water shares or make other dedications to offset the burdens that newly annexed territories will add to the community's public services.²⁵

The Utah Supreme Court stated:

The determination of the boundaries of a city and what may or may not be encompassed therein, including annexation or severance, is a legislative function to be performed by the governing body of the city. The courts are and should be reluctant to intrude into the prerogative of the legislative branch and will interfere with such action only if it plainly appears that it is so lacking in propriety and reason that it must be deemed capricious and arbitrary, or is in excess of the authority of the legislative body.²⁶

[The trial court] called attention to the fact that it was the responsibility of the City Council to consider the total circumstances, including the fact that if new territory is annexed to the City, without making provision for the added burdens, there may result a dilution of municipal services and an increase in tax burdens upon the present citizenry. He expressed what we regard as the sensible view that to require the plaintiffs to convey the amount of water mentioned, in reciprocity for annexation, represented prudence in planning for the City's needs; and he further observed that he was not persuaded that such action was inconsistent with or in excess of the Council's powers, or in any degree unreasonable or arbitrary. To those thoughts we give our approval . . .²⁷

How is the decision appealed?

Property owners can protest the petition to annex and refer it to a local appeals body called the boundary commission. This also can be done by the local school district, special service district (a government utility provider), the county itself, or a neighboring town.²⁸ Once the boundary commission has spoken, the local city council is to follow the commission's directive and annex the land or deny the request as instructed.²⁹

Within 20 days of the boundary commission's decision, those who disagree must file a petition with the district court or their challenge will be too late.³⁰

Tip for participants

This area of land use control is controversial and complicated and is about as political as anything you will encounter in the public arena. Those opposing annexations have a smorgasbord of choices about where to start their protests. If 25 percent of the property owners included do not officially oppose the annexation, then the local school board, sewer district, township, next-door municipality, or even the county itself can trigger a boundary commission review.³¹ There are numerous ways to get the issue into a larger arena for review.

Property owners opposing the annexation must remember to read the statute to be sure they protest the way the statute requires them to protest. It may not be enough to simply go to a meeting and complain. There are specific ways official protests are to be filed and places they are to be delivered. **If your protest is in the wrong form, in the wrong place, or late, it will not meet the criteria and your protest will fail.**³²

4. Changing the Zoning of a Particular Parcel of Land

Nature of the Decision

A rezoning has long-term effect and is often necessary in order to manage specific development proposals or fine-tune the ordinance as the vision of a community's needs evolves. While an application for rezoning is legislative by nature, it is often combined with administrative decisions such as conditional use permits, site plan review, or subdivision plat approvals related to the same parcel. When combined, these decisions are still distinct, and care should be taken to analyze each category of decision under the standards and requirements set by law for resolving that particular land use issue, whether legislative or administrative.

Who makes the decision?

This is a legislative matter, so the final decision is always made by the legislative body—the city council or county commission. As with any amendment to an ordinance, the rezoning of any property in the community can only be enacted after the proposed change has been submitted to the planning commission for its recommendations.³³

What notice is required?

Both the planning commission and city council or county commission must be involved in adopting or amending a zoning map. Specific notices and hearings must be provided for:

The local government entity must, 10 calendar days before the required *hearing* to be held by the planning commission:

1. give specific notice to affected governmental entities and utilities as defined in statute;³⁴ *and*

2. post a notice in three locations in the community or on the local government's official Web site;³⁵ *and*
3. provide additional public notice by:
 - a. publication in a newspaper of general circulation; *or*
 - b. by mail three calendar days in advance to:
 - each property owner whose land is directly affected by the proposed change; *and*
 - each property owner within the parameters specified in the local ordinance, if there is such a requirement.³⁶

Be sure to note the use of the terms *and* and *or* in the above list of required notices. These rules are new in 2005.

Note there is no requirement in state statute that any landowners be notified of proposed zone changes if a publication is made in the local newspaper. The only notice required by state law for land use ordinances is the newspaper notice. Any mandatory notice to neighbors will only be required by local ordinance. If none is required they will not know of a proposed zone change if they do not check the agenda posted 24 hours in advance or read the newspaper notices.

If local ordinances do provide for notice to neighbors or other "third parties," this optional opportunity for notice can be accomplished by requiring a mailing to those property owners who own land within a certain distance of the property which is the subject of a proposed zone change or by requiring that a sign giving notice of the rezone be physically posted on the property involved. The size, durability, print quality, and location of the sign must be reasonably calculated to give notice to passers-by.³⁷

Notice before meetings (which are not necessarily hearings) held by the planning commission, city council or county commission to consider a change to the zoning map need only be given by:

1. submitting notice to a newspaper; *and*
2. posting the notice:
 - a. in three locations in the community; *or*
 - b. on the local government's official Web site.³⁸

Again, if there are no requirements in local ordinance to notify the neighbors, then the neighbors will not be legally entitled to any notice of a proposed rezoning.

What public input is required?

At least one public hearing must be held—by the planning commission—before a change in the zoning map is adopted. The public meeting held by the planning commission on the matter includes an opportunity for public input. The city council or county commission also may hold a public hearing, although this is not required by state law. Their decision must still be made in a public meeting, however. Check the local ordinance for specific requirements.

What are the issues?

The issues in all legislative decisions are similar. The question is “what is desirable?” The decision must advance some legitimate public interest, but public interests are very broadly defined.

Public clamor is acceptable as a factor in local decisions involving a zoning change. The opposition of a majority may be noted by the council members or commissioners, and they may base their decision on public support or opposition. Simply stated, zoning decisions are based on compatibility. If it is reasonably debatable that the proposed uses are compatible with other uses in the zoning district or in the adjoining districts, the council or commission can approve the change. If it is reasonably debatable that they are not compatible, then the proposed change can be denied. Most of the time, it is reasonably debatable.

How is the decision appealed?

The decision is not ripe for appeal until the council or county commission has voted. At that time, the only appeal is to the district court or, if an unconstitutional taking of private property has occurred, to the Property Rights Ombudsman. See Chapter 13.



Zoning ordinances must determine what uses are compatible next to other uses; local legislative bodies will be given broad discretion to decide such issues. The field in this photo was “downzoned” from commercial to residential. That decision was upheld in the case of Smith Investment v. Sandy City in 1998. Photograph courtesy of Sandy City.

How Can a Zoning Decision Be Challenged?

Case Law — Bradley v. Payson City

In a recent case, the City of Payson considered whether or not to allow moderate-density residential units near an industrial park. The general plan anticipated moderate densities in the area. The applicant made a good case for the change. The staff recommended approval, and the planning commission also endorsed the plan. Neighboring industrial landowners, however, objected because of a concern that late night deliveries to a 24-hour trucking terminal operated by Associated Foods nearby would disrupt those living in the proposed rental units at night. Operators of a fruit-processing plant were worried about the noise and smell they generate so close to housing uses. The Payson City Council noted the concern and denied the change in zone.

Utah's Supreme Court later upheld the city's decision, stating clearly what the standard is for rezoning:

We have long recognized that zoning decisions that are made as an exercise of legislative powers are entitled to particular deference . . . The wisdom of the zoning plan, its necessity, the nature and boundaries of the district to be zoned are matters which lie solely within that discretion. It is the policy of this court . . . that it will avoid substituting its judgment for that of the legislative body of the municipality.³⁹

Though a municipality may have a myriad of competing choices before it, [t]he 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 itself evidence an abuse of discretion.⁴⁰

In the Bradley case, the Supreme Court said that the city council did not need to base its decision on substantial evidence, but could consider public input and the experience of the council members. The general concerns expressed about trucking noises, fruit smells, and a

desire to have agricultural amenities preserved were each endorsed by the court as “a legitimate ground for denying the Plaintiff’s proposed zoning change. Payson City has the right to deny a zoning change if it has a ‘reasonable basis to believe that it will conserve the values of other properties and encourage the most appropriate use thereof.’”⁴¹

Bradley argued that the testimony of an expert witness about the desirability of affordable housing should have trumped the compatibility talk. The court simply did not want to weigh what uses are most important to the community. “The city council’s decision to give greater weight to [the opponents] and deny the rezoning simply reflects the exercise of legislative policy preferences that are entirely within its discretion.”⁴²



Industrial neighbors of some proposed multi-family housing in Payson complained that their 24-hour operations were not compatible with houses. In a 2003 case, the Utah Supreme Court affirmed the Payson City Council’s decision to deny a rezone to residential uses.

Tip for participants

The notice requirement for zoning changes is an important point to understand. There are no vested rights to existing zoning, nor any guarantees that your property or the neighbor's land will remain in the zone that it had when originally acquired or that it has now.⁴³ The zoning of your property can be changed without notice to you if you are not the applicant for the rezone, and your neighbor's land can be rezoned without notice to you, unless local ordinance provides otherwise. If you miss the chance to protest or comment, the decision will be very difficult to challenge since it is a legislative decision that will be upheld if it is simply debatable that it could promote the general welfare. If you are counting on your property being worth a certain value or being able to be used for the purpose you intended when you purchased it, you must keep up with local land use decisions.

When you communicate with citizen planners to discuss proposed zone changes, remember that much of the time, applicants and concerned neighbors do a lot of talking about rights and mandates when discussing zone changes and amendments to the law, but this is really not very helpful legally. While those on the council or commission are likely to be sympathetic to the discussion of burdens and rights, they are not forced into making legislative decisions based on objective evidence and law. These are subjective judgment calls.

Any time the decision-maker has the broad discretion it does in a rezoning request, you have the option of participating and providing factual data to support your opinion or simply making more general objections. Although the governing body can make a decision on opinion alone, this does not mean they cannot base their decision on factual information, too, or that the facts you might provide are irrelevant.

At a recent meeting a concerned neighbor stood before our local city council and demanded to know how many people she needed on her side to stop the rezoning of nearby land for a convenience store. The council did not know how to respond—obviously wondering what size horde she could summon to descend on them—but the answer is simple. If there are five on the council, then she needs three. It does not matter how many townspeople object—it is not a referendum or a pure democracy. In a representative democracy, the matter turns completely on how a majority of the council votes. She needs to somehow figure out what is going on in the six inches of gray matter between the ears of three council members and get them to agree with her.⁴⁴

5. Temporary Land Use Ordinances (aka moratoria)

Nature of the Decision

Sometimes when development pressure is intense enough or the local leaders are particularly concerned about loopholes in the law or the lack of an adequate ordinance to protect the public interest, a moratorium stopping all development is desired. This is a land use “time-out” and can be imposed very quickly if the political will is there to do so.

Who makes the decision?

It’s a legislative decision, so again only the council or county commission can adopt a temporary land use ordinance. The planning commission need not comment beforehand.⁴⁵

What notice is required?

The only notice required is that which must be posted twenty-four hours in advance under the Open and Public Meetings Act.⁴⁶

What public input is required?

None is required. The decision must be made in a public meeting, but a public hearing is not required in state statute.⁴⁷

What are the issues?

Technically, there are some specific findings that the local council or commission must enter as a finding on the record—that there is a “compelling, countervailing public interest” that justifies the quick imposition of the ordinance or that the area affected is “unregulated.”⁴⁸

The legislative body also must establish the period of time the temporary zoning ordinance will be in effect, which is usually limited to six months.⁴⁹

Tip for participants

These maneuvers can sneak up on you. If you didn't see a “T.O.” coming, it's probably already too late to figure out what to do about it. There is not much room for influencing the short-run decision when no public hearing is allowed and only 24 hours' notice given. Of course the local officials can give notice if they choose to and can allow input if they consider it appropriate—they just don't have to.

Moratoria have been declared legal and the temporary loss of use involved is not a “taking” of property for which compensation must be paid.⁵⁰ Of course the decision must advance some legitimate public purpose and can be challenged if it does not. The statutory requirement that the legislative body find a “compelling” public interest raises the bar of discretion, however. If challenged, a temporary land use ordinance should be the toughest type of legislative decision to defend.

It is usually not very productive to challenge temporary land use ordinances, however, since the process of appeal can easily take more time than the temporary ordinance will be in effect. On the other hand, if development that would otherwise proceed could be permanently hindered if the ordinance is enacted, a challenge should be brought as soon as it is ripe for review, which is generally within 30 days of a written decision.⁵¹ Since the legislative body is making the decision and the impact is immediate, those seeking to overturn the temporary land use ordinance can probably go directly to court or seek arbitration for a taking of property rights without seeking any other local appeal.



The pristine waters of Lake Tahoe on the California/Nevada state line were a “natural treasure” that justified a building moratorium lasting almost three years according to a 2002 case before the U.S. Supreme Court. Photograph courtesy of American Planning Association.

Despite this instant access to court, it is likely that your best efforts should be directed to influencing the decision that must occur six months later—when the temporary ordinance is made permanent. At that time, a full hearing will be required under the traditional method of adopting land use ordinances and amendments to the ordinance.⁵²

How is the decision appealed?

The decision is not ripe for appeal until the council or county commission has voted. At that time, the only appeal is to the district court or, if an unconstitutional taking of private property has occurred, to the Property Rights Ombudsman. See Chapter 13.

If you think the decision was made illegally because even the minimally required notice was not given or the correct findings were not made by the council members or commissioners, remember you have only 30 days to make an appeal.⁵³

¹Utah Code Ann. §10-9a-404, 503(2) (municipalities); Utah Code Ann. §17-27a-404, 503(2) (counties).

²Utah Code Ann. §10-9a-203, 204(2)(b) (municipalities); Utah Code Ann. §17-27a-203, 204(2)(b) (counties).

³Utah Code Ann. §10-9a-204(2) (municipalities); Utah Code Ann. §17-27a-204(2) (counties).

⁴Utah Code Ann. §10-9a-204(3) (municipalities); Utah Code Ann. §17-27a-204(3) (counties).

⁵Utah Code Ann. §52-4-6(2).

⁶Utah Code Ann. §10-9a-204(3) (municipalities); Utah Code Ann. §17-27a-204(3) (counties).

⁷Utah Code Ann. §§10-9-402, 403 (municipalities); §§17-27-402, 403 (counties).

⁸Utah Code Ann. §10-2-401.5, et seq.

⁹Utah Code Ann. §10-9a-103(14) (municipalities); Utah Code Ann. §17-27a-103(17) (counties).

¹⁰Utah Code Ann. §10-9a-302(2), 502, 503 (municipalities); Utah Code Ann. §17-27a-302(b), 502, 503 (counties).

¹¹Utah Code Ann. §10-9a-205(2)(a) requires notice as provided in §10-9a-203 to affected entities (municipalities); Utah Code Ann. §17-27a-205(2)(a) requires notice as provided in §17-27a-203 to affected entities (counties).

¹²Utah Code Ann. §10-9a-205(2)(b) (municipalities); Utah Code Ann. §17-27a-205(2)(b) (counties).

¹³Utah Code Ann. §10-9a-205(2)(c) (municipalities); Utah Code Ann. §17-27a-205(2)(c) (counties).

¹⁴Utah Code Ann. §10-9a-205(3) (municipalities); Utah Code Ann. §17-27a-205(3) (counties).

¹⁵Utah Code Ann. §10-9a-502 (municipalities); Utah Code Ann. §17-27a-502 (counties).

¹⁶Utah Code Ann. §10-2-418 provides the municipality may, without the landowners asking for

annexation, initiate the joining of certain peninsulas of unincorporated land into the municipality. Check the statute for details.

¹⁷*Bradley v. Payson City*, 2003 UT 16, ¶28, 55 P. 3d 47 (Utah 2003).

¹⁸Utah Code Ann. §10-2-408(2) provides that under certain conditions, cities in Salt Lake County cannot deny petitions for annexation.

¹⁹Utah Code Ann. §10-2-407 outlines the protest procedures. If sufficient protest is received, the matter can be referred to a boundary commission created for the purpose of hearing annexation issues under Utah Code Ann. §10-2-409 and related provisions of that chapter.

²⁰Utah Code Ann. §10-2-408.

²¹Utah Code Ann. §10-2-401.5.

²²Utah Code Ann. §10-2-406.

²³Utah Code Ann. §10-2-401.5.

²⁴Utah Code Ann. §10-2-406.

²⁵*Bradshaw v. Beaver City*, 493 P.2d 643 (Utah 1972); *Child v. Spanish Fork*, 538 P.2d 184 (Utah 1975).

²⁶*Id.*, ¶137.

²⁷*Child, supra*, note 25, at 186.

²⁸See definition of “affected entity” in Utah Code Ann. §10-2-401(1)(a).

²⁹Utah Code Ann. §10-2-408.

³⁰Utah Code Ann. §10-2-414.

³¹Utah Code Ann. §10-2-407.

³²Utah Code Ann. §10-2-407(2).

³³Utah Code Ann. §10-9a-503(2) (municipalities); Utah Code Ann. §17-27a-503(2) (counties).

³⁴Utah Code Ann. §10-9a-205(2)(a) requires notice as provided in §10-9a-203 to affected entities (municipalities); Utah Code Ann. §17-27a-205(2)(a) requires notice as provided in §17-27a-203 to affected entities (counties).

³⁵Utah Code Ann. §10-9a-205(2)(b) (municipalities); Utah Code Ann. §17-27a-205(2)(b) (counties).

³⁶Utah Code Ann. §10-9a-205(2)(c) (municipalities); Utah Code Ann. §17-27a-205(2)(c) (counties).

³⁷Utah Code Ann. §10-9a-206 (municipalities); Utah Code Ann. §17-27a-206 (counties).

³⁸Utah Code Ann. §10-9a-205(3) (municipalities); Utah Code Ann. §17-27a-205(3) (counties).

³⁹*Bradley supra*, note 17, ¶12, citing *Crestview–Holladay Homeowners Ass’n, Inc. v. Engh Floral Co.*, 545 P.2d 1150,1152 (Utah 1976).

⁴⁰*Id.*, ¶24.

⁴¹*Id.*, ¶29, citing *Smith Investment Co. v. Sandy City*, 958 P.2d 245, 255 (Utah Ct. App. 1998).

⁴²*Bradley, supra*, note 8, ¶30.

⁴³*Smith Investment, supra*, note 41, at *id.*

⁴⁴Other recent rezoning cases that provide insight are *Harmon City, supra*, note 9; *Smith Investment Co., supra*, note 29, and the Utah Court of Appeals opinion in the *Bradley* case, 2001 UT App. 9. These cases are worth reviewing to get a clear picture of just how much discretion the courts are willing to give to local government in legislative matters.

⁴⁵Utah Code Ann. §10-9a-504 (municipalities); Utah Code Ann. §17-27a-504 (counties).

⁴⁶Utah Code Ann. §10-9-404(1) (a) provides that no public hearing is required and, therefore, no notice is required to be given to specific landowners. Utah Code Ann. §52-4-6(2) of the Open and Public Meetings Act, requires that an agenda be published for all public meetings.

⁴⁷Utah Code Ann. §10-9a-504 (municipalities); Utah Code Ann. §17-27a-504 (counties).

⁴⁸Utah Code Ann. §10-9a-504(1) (a) (2) (municipalities); §17-27a-504(1) (a) (i) (counties).

⁴⁹Utah Code Ann. §10-9a-504(2) (municipalities); §17-27a-504(2) (counties). The code specifically allows a temporary ordinance relating to a proposed highway corridor to be renewed for up to a total of 18 months in §10-9a-504(3) (6) (2) (municipalities) and §17-27a-504(3) (6) (2) (counties).

⁵⁰*Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Town of Alta v. Ben Hame*, 836 P.2d 797 (Utah App. 1992).

⁵¹Utah Code Ann. §10-9a-801(2) (a) (municipalities) and §17-27a-801(2) (a) (counties).

⁵²Utah Code Ann. §§10-9a-205, 403 (municipalities); §§17-27a-205.

⁵³Utah Code Ann. §10-9a-801(2) (a) (municipalities) and §17-27a-801(2) (a) (counties).

Specific Administrative Issues and How They are Resolved

Once the community has hammered out the general plan and the land use ordinances, it is time to get down to the basic work of controlling land use and enforcing the rules. While much of the process is case-specific and community-defined, there are some general observations that may be made about some different types of decisions and procedures.

Again it is important to remember that each municipality or county that has decided to manage land use has its own ordinances and procedures. When discussing ordinances, it is important to remember three things:

- You must read the ordinance.
- You must read the ordinance.
- You must read the ordinance.

There is no way that a general description of Utah land use can possibly anticipate or cover all the variations that are present in individual local ordinances. What I have written here relates to the general minimal standards in state statutes and case law. If you just review this skeleton of the procedures and do not read the local ordinance, you are likely to know less than you did before you read what I have to say.

You should read the ordinance even if some well-intentioned local staffer describes the process to you. The municipality is not bound by the promises or commitments made by anyone except a majority vote of the legislative body, and if you are misled or the person assisting you did not really understand the question you asked, you cannot fix your misunderstanding by bringing a lawsuit against the community. Governmental entities have immunity and are usually not liable for the representations of their employees and administrators.

1. Routine Development Applications—Staff Review

Nature of the decision

This category includes all the run-of-the-mill approvals given by the building inspector, the zoning administrator, and other staff. The 2005 Utah Legislature, in its revision of the land use codes, specifically charged the planning commission in each jurisdiction to propose streamlined methods of dealing with routine administrative matters.¹ This was envisioned to include even subdivision approvals (to the extent allowed by state statute), variances, conditional use permits, and other land use decisions. The concept in the 2005 amendments was to allow uncontested matters to be handled without formality, but to allow any affected party, whether the city, applicant, or neighbors, to trigger a formal review if desired.

Who makes the decision?

Each different type of routine review will be outlined in the local ordinance and may involve different decision-makers depending on the nature of the application. The building code which is adopted statewide indicates the chief building official or his designee will issue building permits, but there are a lot of varia-

tions on the theme. Usually, in every town or county of any size, there are many routine matters that are not considered by the council or county commission.

What notice is required?

None. The long-term policy questions have been settled on these matters, so the issuing of permits and approvals by staff should be relatively mundane and standardized. The neighbors are not legally entitled to notice of any part of the process if there is no decision-making body involved or no notice provision in local ordinance.²

Provisions for notice of the consideration of normally routine matters and a more formal review can be implemented by local jurisdictions under local ordinance. If a routine matter is contested, alternative provisions for notice, public hearings, and appeals would be triggered.³

What public input is required?

None, unless a means to contest some administrative decisions is provided in local ordinance as described above.

What are the issues?

Does the application comply with the appropriate ordinances, rules, standards, and codes adopted by an act of the council or county commission? If so, it should be approved. According to statute, [an] applicant is entitled to approval of a land use application if the application conforms to the requirements of an applicable land use ordinance in effect when a complete application is submitted," except for narrow exceptions provided in state law.⁴

How is the decision appealed?

It depends on the specific issue involved. Building permit issues can be appealed to a board of appeals that is provided for in the applicable building code. Health departments also have a board of health that is designated as an appeals body for relevant staff decisions. Appeals of other land use decisions are provided for in state statute (see Chapter 13: Appealing Land Use Decisions) or local ordinances.

Tip for participants

Check the local ordinances. There are many variations on how staff decisions are to be made and how they are appealed. Those who do not agree with staff decisions must comply with the terms of the ordinance with specificity. For example, a recent case in Draper involved a property owner who had been given building approval. Like many cities along the Wasatch Front, Draper regulates building on steep slopes. A property owner named Brendle appeared before the planning commission to get permission to build on a slope that exceeded 30 percent. Both the planning commission and the city council turned them down, much to the relief of affected neighbors.

The developer/seller of the lot suggested that the Brendles give it another try, however, and so a new application was made to the planning commission. According to the statement of facts in the Court of Appeals decision, the commission was informed that things had changed and the neighbors no longer opposed the construction. Taking that at face value, the commission blessed the plan. No one appealed the approval within the very short 14-day period provided for in local ordinance.

Naturally, the next step was to pour concrete. This caused an immediate uproar and the neighbors complained that the house was ille-



Residents living on the foothills in Draper challenged the issuance of a permit for a new home on slopes greater than 30 percent. The city council heard their appeal and attempted to revoke building permits that had been issued. Since neither the residents nor the council had filed the necessary appeal within the short time allowed by the local ordinance, the Utah Court of Appeals reinstated the permits and the house was completed.

gally located on the lot. The problem? The 14-day appeal period had run out before the concrete ran in. The Court of Appeals ruled that since the ordinance said any appeals “shall” be filed within 14 days and no appeal was, in fact, filed within 14 days, there was no opportunity to challenge the approval—the door for appeal was slammed shut. Subsequent deliberations by the planning commission and city council were conducted without any ability to reconsider the matter, said the court.

According to the opinion, if the City of Draper wanted to allow more flexibility in such appeals, it could do so. But since the local ordinance said any appeal *shall* be made within 14 days, failure

to do so was fatal to any opposition, even opposition from the city council itself. The Brendles built the house.⁵

2. Conditional Use Permits

Nature of the decision

In most zoning ordinances, some “permitted” uses are allowed in each zone with no more review than that required by the building code, health code, or other specific regulations. Staff can review and approve permits for permitted uses without any further input from citizen planners.

Other uses are designated as “conditional” uses, which in state statute are defined as being subject to special case-by-case scrutiny.⁶ The conditional use may be allowed, allowed with conditions, or in narrow circumstances, denied. Conditional uses must be approved if reasonable conditions are proposed, or can be imposed, to mitigate the potential negatives involved. Conditions must relate to applicable standards in the ordinance adopted by the local city or county to regulate conditional uses. They may not be denied unless it is shown that “the reasonably anticipated detrimental effects of a proposed conditional use cannot be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards.”⁷

Who makes the decision?

Usually the local ordinance provides that the planning commission or the council or county commission considers conditional use permits. State statute does not impose that duty on any particular body, so local ordinances rule.



All of the commercial and manufacturing zones on the above map have been designated "C-D-C" or "M-G-C" zones. This means that every use in that zone is a conditional use. Some cities have dramatically increased their micromanagement of development by such a strategy, and every proposed use must go through the process of getting a conditional use permit.

What notice is required?

The local ordinance may provide for hearings, but state statute does not. If the decision is made by a public body, however, an agenda and public meeting would be required and the application must be heard in public.

What public input is required?

None is required by state law. If the decision is made by a hearing officer or staff, no public notice or participation in the decision might occur. Local ordinance could allow for notice to the public or neighbors, could provide for an optional protest proce-

dure that would trigger a public process, or otherwise deal with such issues with or without public or neighborhood participation.

Of course, the applicant must be notified of any meeting or hearing where the application is considered.⁸

What are the issues?

Is the proposed use acceptable in the proposed location and under the proposed method of operation?

The presumption is that the use should be allowed since the ordinance would not provide for a use if the use were not deemed desirable in the first place.

If the use can be conditioned to be compatible with adjoining uses, then it should be so conditioned and approved. If it cannot, then the conditional use should be denied.

The decision-maker must enter upon the record substantial evidence to support its decision.⁹

The major issue is the conditions, so the central issue is: what conditions would be appropriate and what conditions might not? For a more thorough discussion, see "Imposing Exactions and Conditions in Development" in Chapter 7.

How is the decision appealed?

Under statute, the local council or county commission can appoint itself or some other body to hear appeals involving conditional use permits.¹⁰

Tip for participants

Conditional uses are often used, but not often understood. There

is a tendency by citizen planners, once a matter of some discretion is before them, to attempt to act as if they had legislative discretion and, therefore, can impose any decision they consider desirable.

The significant case of *Davis County v. Clearfield City* indicates otherwise, however. This battle was typical of the type of war that goes on when someone proposes to build group homes for the treatment of those with special challenges near a neighborhood or school.

Standards for a Conditional Use

Davis County v. Clearfield City

Davis County proposed using a remodeled home as a center for the treatment of those suffering from substance abuse. The house was adjacent to another older home used by the Addiction Recovery Center at the time and across the street from a junior high school. Neighbors appeared and protested. The citizen planners voted to deny the required conditional use permit in response to “public clamor.”

In stating that the denial was arbitrary, capricious, and illegal, the Court of Appeals stated:

Nowhere in the transcripts . . . is there believable information or evidence on which the Clearfield City Council could have rationally believed that the proposed mental health facility would pose any special threat to Clearfield City’s legitimate interest.

The court also found that the maps presented and relied upon . . . were arbitrarily drawn and were not presented or explained to the public.

With regard to concern over real estate values . . . no studies were made and no opinions were given by professional real estate appraisers nor was any credible evidence of reduced property values produced at the hearings.

[The opposition] did not have factual support in the vague reservations expressed by either the single family owners or the commission members . . . [The] reasons did not justify denial of the permit *'even though they would have been legally sufficient had the record demonstrated a factual basis for them.'*¹¹

. . . [T]he denial of a permit is arbitrary when the reasons are without sufficient factual basis . . .

[T]he consent of neighboring landowners may not be made a criterion for the issuance or denial of a conditional use permit.¹²

[T]he opposition of neighbors is not one of the considerations to be taken into account when determining whether to issue a development permit.¹³

[Local government] must rely on facts, and not mere emotion or local opinion, in making such a decision.



This is one of the homes that Davis County wanted to use as treatment facilities in Clearfield. Local Clearfield residents objected strenuously to the idea. Although the city council denied the conditional use permit, the Utah Court of Appeals overturned the decision since it was only supported by public clamor.

What do we know about the basis for considering a conditional use permit? We know three things:

1. If you are an applicant and you want your application for a conditional use permit to be approved, come prepared with factual evidence supporting the application. Be prepared to respond to the evidence you anticipate that those against the idea will use to oppose it.
2. If you want a conditional use application denied or conditioned, clamor all you wish, but while you are clamoring, provide some substantial evidence that can be placed on the record to justify your opposition. The citizen planners cannot legally support your position if you don't do your homework and give them the evidence they need to support a vote in your favor.
3. If you are among the citizen planners involved, don't deny an application unless you have evidence to support your denial. With a conditional use permit application, the question you are addressing is not "Why?"— it's "Why Not"? If you don't have evidence to deny and there are conditions which can be imposed to mitigate the negatives in the proposed, you must approve.¹⁴

Remember that substantial evidence is "more than a mere 'scintilla' of evidence though something less than the weight of the evidence."¹⁵ The decision-maker need not have all the evidence in support of its decision, or even the majority of evidence, but simply some good, solid, credible evidence.

3. Subdivision Review and Approval

Nature of the decision

This administrative decision either involves land that is already zoned for the density requested or the application includes a

petition to rezone the property to the desired density. If a rezoning is requested at the same time as a subdivision approval is sought, each of these land use matters is a separate issue and there are two decisions to be made, each to be handled according to the rules for that issue. The information in Chapter 5 about zoning changes for individual parcels would apply just as this discussion about subdivision processes would, and both processes would have to be completed successfully in order for the development to proceed.

The nature of the decision depends on three issues: 1) does this proposed change in the configuration of land fall into what the state law defines as a "subdivision"? 2) if a subdivision, is this subdivision exempt from the requirements that it be shown on a subdivision "plat"? 3) if subject to the platting requirements, who has the local legislative body appointed as the land use authority with the authority to approve or deny the plat?

The definition of a subdivision does not include changes involving two or more parcels of agricultural land where the changes are made for agricultural purposes. Boundary adjustments also are not considered subdivisions, nor are lot consolidations, as long as the resulting parcel is legal.¹⁶

Local ordinance can provide for some subdivisions to be exempt from a platting requirement if they include 10 or fewer lots.¹⁷ State statute also exempts agricultural subdivisions under certain narrow conditions.¹⁸ Be sure to check the state statute if this may apply to a subdivision of your property, because the limitations here are specific and the result of creating a separate parcel of property with no building rights can be very significant to a future owner and the original subdivider.¹⁹ To hold an exempt parcel as a buildable lot can result in civil liability years later as some future owner buys land and thinks it can be used for non-agricultural purpose only to find out it cannot.

The process of subdivision approval will vary widely from jurisdiction to jurisdiction. A local government entity can provide for approval of subdivisions by staff with no public input or can require any lot split resulting in a buildable lot to go through a full formal procedure including sketch plan, preliminary plat, and final plat approval.²⁰ There are few, if any, cities or counties on either end of this spectrum, but the process can get a little complicated.

Who makes the decision?

It depends on the stage of the process. The legislative body must enact an ordinance determining what body or person can approve a subdivision in a final form to be platted and recorded at the county recorder's office.²¹ Sometimes when the proposed lot division results in a few lots, the governing body delegates authority to staff or the planning commission to approve small "metes and bounds" subdivisions.²² Check the local ordinance.

What notice is required?

State law requires some minimal notice before holding the required hearing to approve a subdivision. The local government entity must either mail notice within three calendar days of the hearing to the owners of property within certain parameters of the land to be subdivided or post a notice on the property for at least three calendar days before the hearing.²³

If the proposed subdivision involves multiple-unit residences or commercial or industrial development, more extensive notice is required, including notice to other governmental entities.²⁴ If a previously platted public street is to be vacated or changed then state law requires a four week notice by publication in the local newspaper or by posting on the property. The details can be technical, so be sure to check the law.²⁵

As with other notice requirements, local ordinance can require more notice and conduct more hearings. Be sure to check the ordinance to verify. Under the 2005 revisions to the land use management statutes at the state level, local governments are encouraged to develop streamlined approval processes, so while a hearing may be required for subdivision approval, that hearing need not be before the planning commission or the city council or county commission. The duty to conduct hearings and make decisions about subdivisions can be delegated to staff, a hearing officer, or any other "land use authority."²⁶

What public input is required?

A public hearing is required before the person, board, commission or council that considers a subdivision application. Local ordinances may provide for the time, place, manner and format for the hearing.²⁷

What are the issues?

Prior to final approval, there is usually a series of public meetings held on the subdivision issue. Often there are three stages: "sketch" or "concept" plan approval, preliminary plat approval, and final plat approval.

At each stage of the process, the issues are approximately the same, but as the applicant moves along, the characteristics of the subdivision become more specific and defined. This step-by-step, staged review process is used to minimize the cost invested in a proposal before it has been approved in concept, but it does tend to draw things out and take more time.

There is no substitute for reading the local subdivision ordinance to understand how each county or municipality handles subdivision applications.

As with other administrative decisions, the issues are defined by the local ordinance and the search for substantial evidence to support a land use decision. The applicant proposes a division of the property that he wants approved. The staff is usually involved before the citizen planners hear the matter, but the applicant does not have to agree with staff or adopt all the suggestions made. When the planning commission hears the proposal, it reviews it in light of the provisions of the applicable local ordinances. It then responds with comments and ultimately a motion to recommend approval or denial to the council or county commission.

Sometimes the planning commission has final say at one stage of the process or the other. The local ordinance may give it the ability to approve a concept for the subdivision which the applicant then refines into preliminary plat form. The planning commission then may review it again and, perhaps after that, the legislative body can take action on the preliminary plat.

Ultimately there must be some final plat approval by the legislative body or some other land use authority appointed by the legislative body which is the concluding step in the process.

At any stage, the planning commission or legislative body may consider the application incomplete, out of compliance with the local ordinances, or otherwise not approvable. At this point, it may simply agree to continue the item so the applicant can revise the proposal. If she asks for a vote, however, she is entitled to it. If the subdivision request does not comply with the ordinance, the citizen planners should recommend denial or act to deny, depending on whether the entity making the decision has authority to deny or just to make recommendations. It must be remembered, however, that under Utah law, if a subdivision application meets the conditions of the land use ordinance it must be approved. See page 79.

A common issue in subdivision approval is the imposition of conditions on development. For a thorough discussion of what conditions can be legally imposed in subdivision approval, see “Imposing Conditions and Exactions on Development Approvals” in Chapter 7.

How is the decision appealed?

After the local administrative processes are “exhausted,” those who disagree with the resulting vote can appeal the matter to district court. Property owners also can appeal decisions that raise constitutional issues to the Property Rights Ombudsman for mediation or arbitration.

Tip for participants

Subdivision reviews are the most common land use issues with which most local governments deal, especially if they are booming bedroom communities. Once the subdivision is finished, it is pretty routine to issue building permits, so the staff usually does that without public input or notice.

Superficially, the first issue of density and suitability is resolved at the rezoning phase. The subdivision review involves a lot of pretty technical detail from a variety of codes and regulations, but it is not about density or land use unless combined with a request to change the zoning of the affected land.

There are some issues that are almost always involved in subdivision review, and appropriately so. These include:

- Road and sidewalk standards and circulation patterns, as well as street names.
- Public utilities, including storm water management, and the manner in which they are provided and installed.

- Minimum lot sizes, dimensions, setbacks, and property addresses.

Other issues that are commonly addressed in local ordinances:

- Open spaces, trails, greenways, and other amenities.
- Slopes, vistas, sensitive lands, and environmental issues.
- Covenants and restrictions, along with the nature of any homeowners association involved and common area maintenance.
- Clustering, architectural design, and density bonuses allowed in return for project enhancements.
- Completion guarantees and bonding.

Those applying for subdivision approval need to be prepared for an extended, somewhat unpredictable, process. Land use decisions can be routine, but they are notoriously hard to manage since there are many people involved and final approval is usually given with a fair degree of caution because of the finality involved. Once approval is granted, it usually cannot be revoked.

The less development going on in a community, the more unpredictable the process can be. It is common for a first-time, small developer to be naïve about the time and cost involved. Remember that no one government official is in charge here, and no staffer or elected official will usually be able to control the variables even if they are inclined to try. More and more control is imposed beyond the local planning department as the fire department, health department, federal Corps of Engineers, utilities, and others must sign off before development occurs. Talk to someone familiar with the process in your community before embarking on your own to do development.

For neighbors seeking to influence subdivision approval, remember earlier is better. There is a gradual “vesting” that

occurs in the process, and the community may not legally roll back decisions after a property owner has expended funds and commenced development under approvals granted.

4. Variances

Nature of the decision

Sometimes a strict reading of the zoning ordinance creates an unusual hardship on a specific property owner. If the effect is significant and unnecessarily unfair, state statutes allow for granting a variance—a special waiver of some rules—under certain circumstances. If a variance is requested, the property owner or applicant is the one who initiates the application and bears the burden of proving that he is entitled to the variance.

Variances can be granted for setbacks from streets, environmentally sensitive areas and ridges, and other minor adjustments that may be needed to allow property to be used in a manner similar to its neighbors. A variance cannot change the uses allowed in a zone, but can address the minor details about how a permitted use can be configured on a lot in a zone where it is already legally allowed.²⁸

While this process is common, it is very limited in scope.

The local ordinance will provide for the process of requesting a variance. Traditionally, variances have been considered by the local board of adjustment. This is no longer standard operating procedure, and a local ordinance can designate some other land use authority to hear requests for variances and other appeals.²⁹

Who makes the decision?

Variances to the zoning ordinance can only be granted by the land use appeal authority designated in the local ordinances.³⁰

What notice is required?

Only the 24-hour posted notice required under the Open and Public Meetings Act would be necessary unless local ordinance provides otherwise. Check the local ordinance. If the land use appeal authority hearing variances under a local ordinance is a single individual, no notice is required by state law.³¹

What public input is required?

Only that required by local ordinance. There is no state requirement for public hearings by an appeal authority. The only requirement is that its meetings be public meetings if more than one person is acting as the appeal authority.³²

What are the issues?

The burden of justifying the request for a variance rests on the property owner seeking it.³³

The variance can only be granted if the board of adjustment finds that all of the following standards are met:

1. Literal enforcement of the zoning ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the zoning ordinance.
2. There are special circumstances attached to the property that do not generally apply to other properties in the same district.
3. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district.
4. The variance will not substantially affect the general plan and will not be contrary to the public interest.

5. The spirit of the zoning ordinance is observed and substantial justice done.³⁴

These standards may be supplemented by additional standards set in local ordinance. It is important to note that the decision-maker must make specific findings in the record that each standard has been met or the approval of a variance is illegal.³⁵

Sometimes conditions can be imposed on variance approvals. For a more thorough discussion of what conditions can be imposed legally, see "Imposing Conditions and Exactions on Development Approvals" in Chapter 7.

How is the decision appealed?

The decision by the land use appeal authority to deny or approve a variance is normally appealed only to the district court. If a constitutional taking of private property is alleged, the property owner also can request arbitration by the Property Rights Ombudsman. There is no appeal from the local land use authority to another local body, since the state statute specifies the appeals procedure for variances.³⁶

Tips for participants

There is hardly anything that local land use officials do that involves less discretion than the variance process, but the strict guidelines related to variances are routinely ignored. It is so tempting to listen to the concerns of neighbors or the sad story of a property owner and to make the decision on the basis of emotion. Most appeals authorities considering variances never enter the findings required in the record. They make seat-of-the-pants decisions based on preferences, not fact.

First of all, before embarking on the variance process, be certain that you need one. The variance is used to relieve landowners from the harsh application of the ordinance, but the first question

is whether the ordinance actually prohibits the desired land use. See the discussion in Chapter 8 on interpreting the zoning ordinances. Perhaps an appeal for a different interpretation of the ordinance, which is a much easier case to make, is a better option than requesting a variance. If the ordinance does not clearly prohibit the action you want to take, appeal that before you get caught in the “variance box.”

If a variance is needed, however, then the process is pretty straight forward.

When is a Variance Legal?

Case Law — Wells v. Salt Lake City Board of Adjustment (Market Street Broiler)

An example involves the business known as the Market Street Broiler in Salt Lake City. This is one of the flagship establishments of Gastronomy, Inc., the highly successful food service business which operates a number of restaurants in Salt Lake City. They also have been very active in historic preservation and saved some local landmarks.



Gastronomy collided with the historic district ordinance on 1300 East, however, when it was noted that its restaurant in an historic fire station did not comply with the local regulations. Since the building was in an historic district, the ordinance provided it could only be used for commercial purposes if a 10-foot, landscaped buffer area existed in the rear yard of the building. Over time, both the patronage and the volume of trash generated soared. As the trash piled up, so did the complaints. A remodeling project resulted in the dumpsters being located in the 10-foot buffer area and the neighbors objected.

As a result, Gastronomy sought to have its garbage solution ratified by the granting of a variance allowing them to build a two-dumpster trash enclosure in the buffer strip. The Salt Lake Board of Adjustment must have been impressed by the general proposal and granted the variance, stating "the neighborhood would be better served by addressing the garbage issue and the only available space should be used as a buffer after both dumpsters are enclosed." The board made no other express findings in the record.³⁷



This trash enclosure behind the Market Street Broiler on 1300 East in Salt Lake City was the focus of a variance battle involving the local board of adjustment.

Not willing to put up with that decision, the neighbors sued. The trial court held that the variance was properly granted, but the Court of Appeals reversed and held that the single sentence justifying the issuance of the variance did not even come close to the necessary findings.

The court noted that the board's actions would generally be entitled to substantial deference if the board had acted within the boundaries established by statute, but then went on to hold that the board gave them nothing to support.

According to the court, if the board wanted its decisions upheld, it had no choice but to provide the required findings. The board could not grant variances except for the reasons stated in the statute. The court refused to "define" the findings or intentions of the board since it said there was no evidence in the record that the board had individually considered each of the statutory requirements. Even if such



There is little room between the historic fire station that houses the Market Street Broiler and the north property line. Lot restraints in historic neighborhoods can sometimes justify variances.

consideration had been made, however, the board's decision would have had to have been supported by substantial evidence in the record.³⁸

If you drive up the alley behind the Market Street Broiler this week, however, you will see the offending dumpsters are there behind the chain link enclosure that obscures them. While there may be some organic activity in the dumpsters, this is clearly not "landscaping" as required by the local code. How can this be if the court found the variance was given in a manner that was arbitrary, capricious, and illegal?

Answer? Gastronomy asked for a variance a second time, and this time the board did its job and placed the required findings, backed up by substantial evidence, in the record. Thus supported, the variance was legal and would have survived appeal. The trash enclosure remained.

This convoluted odyssey points out the strictness of the process. The board could have saved everyone a lot of grief by making the proper findings or denying the variance in the first place. Consider the issues, specifically:

1. Literal enforcement would cause a hardship that is unreasonable and unnecessary.

To support a variance, the board could have noted that the options were to put the trash in front of the restaurant (to the east) or on the south side which is also public. This factual situation could have been noted and a finding entered in the record that the best location for trash in the historic district would be on the least significant historic façade. The board could have found that the west façade was the least historic and that the ordinance prohibits placing the trash container there absenting a variance. Perhaps an historical consultant could have noted for the record that the east and south façades were more historic than the west façade, in the rear. The ordinance itself is specifically geared to preserving historic values, so the facts related to what is historic and what is not would have been very relevant.

The testimony of the applicant could have noted that the presence of trash in the front of a fine dining establishment would be detrimental to the business. Certainly the principals of Gastronomy, Inc., would be credible experts on such matters.

2. Special circumstances apply to this property.

Supporting a variance as uniquely necessary should have been somewhat easy when dealing with a specific property in an historic district, especially when it is the only old fire station. Each historic building is unique by definition. All that would have been required to provide the required evidence in response to this standard would have been to note again the building is historically significant, its location on the property is unique, and the city is blessed by its preservation. Any commercial use would generate trash and it would have to be stacked somewhere. It cannot be placed on the north because the lot line is too close. If the dumpsters are not placed on the west, they must be placed on the historic south or east façades. Since there is no room for both landscaping and trash bins in the rear, the landscaping requirement must be varied.

But denying the variance also could have been justified. The board could have found the circumstances are not unique enough, of course, and the trash could have been kept in an enclosure toward the back of the south façade, albeit with a loss of parking. It would have been a matter of discretion, and their decision could have been supported either way.

3. Variance essential to a substantial property right.

To support the variance, the board could have noted that an efficient parking layout, the ability to avoid having trash in the front yard, and the opportunity to enjoy an expanding business if you create it were substantial property rights. The property owner could have produced testimony from the State Historical Society that if the trash enclosure were located on the south façade, perhaps the property would not have been eligible for historic tax credits or it could have lost its listing on the National Register of Historic Places.

A denial of the variance under this standard could have been supported if the board had determined the parking configuration proposed was not the only acceptable arrangement, the trash did not have to be exposed even if placed on the south side of the building, and the business owners could have seen the obvious restraints on their expansion when they started a business here and, thus, should not expect to change the rules now. The board also could have determined that parking, trash placement, and business growth were not substantial property rights.

4. Impact on the general plan and public interest.

Supporting approval gets even easier under this standard. If the goal of the general plan is to promote business, save cultural amenities, and keep trash out of front yards, then a variance would seem to be in the public interest. The board would only need to note factual findings based on the applicant's testimony that the variance would enhance its business, keep it cleaner, and help it continue to preserve the fire station.

A denial is not out of the question, however. If the board was not persuaded, it could inquire of the applicant as to whether or not the business would fold if the variance were denied, if the front and rear are the only places to keep the trash, and if the plan is to demolish the building if the board does not help out. It could enter the facts so determined in the record and note that the routine granting of variances runs counter to the general plan and is not in the public interest. The public interest might be better served by denial if the neighbors bring evidence in the form of the testimony of a real estate professional that the change will lower value of adjoining properties or the testimony of people adjacent to other restaurants that discarded seafood, in particular, creates foul odors and is a nuisance.

Again, evidence supporting either option would be upheld by the courts on appeal if the appropriate findings and evidence are placed in the record.

5. Preserving the spirit of the ordinance and doing substantial justice.

This is the final judgment call. Evidence in support of the variance might include a finding that a positive vote would help save the building, keep it in use by a viable occupant with a sterling reputation for preservation, and enhance the historic district. Another real estate professional could counter the testimony of the neighbors' expert and testify that adjoining properties would continue to be valuable if the variance were granted. The board could believe either one.

If denying the variance, however, the board could conclude the historic district ordinance was designed to save the entire district, not just individual buildings, and the landscaping requirement does that by preserving the neighbors' residential uses and keeping the area from deteriorating. In denying the variance, the board could note that the compatibility of a business with its neighbors and the entire character of the historic district may be more important than a few parking spaces and the cost of an appropriate screen wall. The applicant should figure out how to make a trash enclosure on the south side of the building that does not destroy its historic value. The board could find the ordinance has already struck the proper balance without need to issue variances.

As you see, the board still has a lot of discretion in choosing who to believe. It does not have the freedom to disregard its duty to explain its conclusions and to justify them on the record.

Important note: In order to grant the variance, the board must find substantial evidence to satisfy every one of the five standards. If there is evidence to support only four, but not five, the variance must be denied.

Summary

Note that the hardships associated with property must come from the property and not from the actions of the property owner or a previous property owner.

For example, a variance could be granted in these cases:

- A property owner wants to encroach into an area where slopes exceed 30 percent in violation of the slope ordinance because if a typically-sized house is placed on the lot without impacting the slope, the remaining front yard would violate the setback standards.
- A property owner with no garage wants to build one and the only reason the side yard setback cannot be met is the city widened the street in a road improvement project after the house was built.
- Archaeologists have discovered an ancient Native American site on the property. In order to keep the area undisturbed, the property owner wishes to locate his building closer to the street than the setback standards allow.

A variance could not be granted in these cases:

- An elderly neighbor is pleased her grandson came over and built a carport on the side of her house over the weekend. But the carport is located in the sideyard setback area where the local ordinance does not allow it. The carport could have been built on the back of the house and been in full compliance. Now she does not want to have to tear off the carport and seeks a variance. It must be denied.
- A property owner divided his land to make two commercial properties. He now wants a variance allowing a driveway to be closer to the corner than the ordinance allows on the second lot. If he had not divided the property, no variance would be necessary. Since he created the hardship, no variance can be given.
- A property owner sold an easement to the natural gas company across a residential lot. Now he cannot build on the gas line easement and there is not enough land left on the lot to meet setback standards in the ordinance and

build a normal-sized house. The gas company paid him damages for the loss of his right to build, but now he wants a variance so the land can be developed anyway. There is no hardship. He has already been compensated for the loss of use and he created the problem by selling the easement. A variance cannot be given.

Three important concepts to understand:

1. A variance cannot be given to resolve hardships that were created by the property owner or a predecessor owner if the ordinance from which the owner wants a variance was in effect when the owner created the hardship.
2. A variance may not be needed if the ordinance could be interpreted as allowing the proposed use and does not clearly prohibit it. The property owner should appeal the decision that interpreted the ordinance against the use instead of seeking a variance. See the discussion about appeals that follows in Chapter 13.
3. The land use appeal authority does not have the power to legislate, to amend the ordinance, or to grant use variances. For example, it cannot allow someone to build a gas station in a residential zone. Just because the board cannot approve a variance does not mean that the local government cannot offer some help to the property owner. It means they are before the wrong body. The council or county commission has the power to amend the ordinance in such a way that a variance is not necessary. That is where the issue should be resolved if the board cannot issue a variance. It is not the job of the board to correct the ordinance as it was enacted by the legislative body. The board can grant variances where variances are clearly justified by situations that fit the requirements. It is not a legislative body and cannot correct defects in the ordinance

just because it disagrees with what the clear meaning of the ordinance requires.

¹Utah Code Ann. §10-9a-302(5) (municipalities); Utah Code Ann. §17-27a-302(1)(e) (counties).

²Utah Code Ann. §52-4-2 (Open and Public Meetings) defines what a meeting is and who is subject to the Act. Typically, staff functions do not trigger a duty to post an agenda or give public notice.

³Id.

⁴Utah Code Ann. §10-9a-509 (municipalities) Utah Code Ann. §17-27a-508 (counties).

⁵*Brendle v. City of Draper*, 937 P.2d 1044 (Utah App. 1997).

⁶Utah Code Ann. §10-9a-103(5) (municipalities); Utah Code Ann. §17-27a-103(5) (counties).

⁷Utah Code Ann. §10-9a-507 (municipalities); Utah Code Ann. §17-27a-506 (counties).

⁸Utah Code Ann. §10-9a-202 (municipalities); Utah Code Ann. §17-27a-202 (counties).

⁹Utah Code Ann. §10-9a-801(3) (municipalities); Utah Code Ann. §17-27a-801(3)(c) (counties).

¹⁰Utah Code Ann. §10-9a-701(4) (municipalities); Utah Code Ann. §17-27a-701(4) (counties).

¹¹*Davis County v. Clearfield*, 756 P.2d 704 (Utah Ct. App. 1988), note 9, citing *C.R. Invs., Inc. v. Village of Shoreview*, 304 N.W.2d 320 (Minn. 1981) (emphasis added).

¹²Id. citing, *Thurston v. Cache County*, 626 P.2d 440 (Utah 1981).

¹³Id. citing, *Board of County Comm'rs v. Teton County Youth Services, Inc.*, 652 P.2d 400, 411 (Wyo. 1982).

¹⁴Utah Code Ann. §10-9a-507 (municipalities); Utah Code Ann. §17-27a-506 (counties).

¹⁵*Patterson v. Utah County Bd. Of Adj.*, 893 P.2d 602, 604, note 6 (Utah Ct. App. 1995).

¹⁶Utah Code Ann. §10-9a-103(34) (municipalities); Utah Code Ann. §17-27a-103(37) (counties).

¹⁷Utah Code Ann. §10-9a-605(1) (municipalities); Utah Code Ann. §17-27a-605(1) (counties).

¹⁸Utah Code Ann. §10-9a-605(2) (municipalities); Utah Code Ann. §17-27a-605(2) (counties).

¹⁹Utah Code Ann. §10-9a-605(3) (municipalities); Utah Code Ann. §17-27a-605(3) (counties).

²⁰Under Utah Code Ann. §10-9a-603 (municipalities) and Utah Code Ann. §17-27a-603 (counties), local government can impose platting requirements on any subdivision as defined in state statute. The city council or county commission need allow no exemptions for those subdivisions of 10 lots or less, but it may if it wishes to under Utah Code Ann. §10-9a-605 (municipalities) and Utah Code Ann. §17-27a-605 (counties). If not exempted by local ordinance, every lot split must go through the entire formal process. Land previously created by an legal agricultural subdivision may not be used for a nonagricultural use unless it can conform to current ordinances allowed under Utah Code Ann. §10-9a-603 (municipalities) and Utah Code Ann. §17-27a-603 (counties).

²¹Utah Code Ann. §10-9a-604 (municipalities); Utah Code Ann. §17-27a-604 (counties).

²²For example, see a recent Utah Court of Appeals case, *Busche v. Salt Lake County*, 2001 UT App 111.

²³Utah Code Ann. §10-9a-207(1) (municipalities); Utah Code Ann. §17-27a-207(1) (counties).

²⁴Utah Code Ann. §10-9a-207(2) and (3) (municipalities); Utah Code Ann. §17-27a-207(2) and (3) (counties).

²⁵Utah Code Ann. §10-9a-208 (municipalities); Utah Code Ann. §17-27a-208 (counties).

²⁶The planning commission is charged to recommend the designation of a "land use authority" to consider land use applications and to propose streamlined approval processes under Utah Code Ann. §10-9a-207(1) (municipalities); Utah Code Ann. §17-27a-207(1) (counties). The planning commission also is to propose a subdivision ordinance under Utah Code Ann. §10-9a-602 (municipalities); Utah Code Ann. §17-27a-602 (counties) under which plats are to be approved by a "land use authority" as described in Utah Code Ann. §10-9a-604 (municipalities); Utah Code Ann. §17-27a-604 (counties). "Land Use Authority" is defined at Utah Code Ann. §10-9a-103(13) (municipalities); Utah Code Ann. §17-27a-103(13) (counties).

palities); Utah Code Ann. §17-27a-103(16) (counties), to include a single person or a board or commission charged to act upon a land use application.

²⁷Utah Code Ann. §10-9a-207 (municipalities); Utah Code Ann. §17-27a-207 (counties).

²⁸Utah Code Ann. §10-9a-702 (municipalities); Utah Code Ann. §17-27a-702 (counties).

²⁹Utah Code Ann. §10-9a-701(1)(a) (municipalities); Utah Code Ann. §17-27a-701(1)(a) (counties).

³⁰Utah Code Ann. §10-9a-701, 702 (municipalities); Utah Code Ann. §17-27a-701, 702 (counties).

³¹A multi-person appeal authority would be considered a public body subject to the Open and Public Meetings Act at Utah Code Ann. §52-2-2(3)(a). A notice would therefore need to be posted 24 hours before a meeting is held as for any public meeting. See appendix B – Open and Public Meetings.

³²Utah Code Ann. §10-9a-701, 702 (municipalities); Utah Code Ann. §17-27a-701, 702 (counties) govern the establishment of an appeal authority in each county or municipality. The appeal authority can be a single person, or a multi-person board. The former law, which was repealed in 2005, required the Board of Adjustment to comply with the Open and Public Meetings Act (Utah Code Ann §52-2-1 et. seq.) when hearing appeals, but a single person is not subject to the Act, so need not comply. There is no requirement that an appeal authority conduct hearings in the state statutes cited in this footnote, but their meetings would be public meetings. Under recent case law precedent from the Utah Supreme Court, the deliberations of a quasi-judicial body are not subject to the Open and Public Meetings Act. See *Dairy Prod. Servs., Inc. v. Wellsville*, 2000 UT 81, 13 P.3d 581 (Utah 2000).

³³Utah Code Ann. §10-9a-702(3) (municipalities); Utah Code Ann. §17-27a-702(3) (counties).

³⁴Utah Code Ann. §10-9a-702(2) (municipalities); Utah Code Ann. §17-27a-702(2) (counties).

³⁵*Wells v. Board of Adjustment of Salt Lake City*, 936 P.2d 1102 (Utah App. 1997). Also see Utah Code Ann. §10-9a-801(3)(c) (municipalities); Utah Code Ann. §17-27a-801(3)(c) (counties).

³⁶Utah Code Ann. §10-9a-708 (municipalities); Utah Code Ann. §17-27a-708 (counties).

³⁷*Wells, supra*, note 35.

³⁸*Id.*

Burdens on New Development

1. Imposing Conditions and Exactions on Development Approvals

We consider these separately because the issues involved overlap several areas of land use activity, such as:

- **Subdivisions.** When a subdivision is approved, what requirements can be placed on the developer or property owner as conditions of the approval?
- **Conditional Uses.** When a conditional use permit is approved, are there limits to what the local officials can demand in order to make the use compatible with the zone and neighborhood?
- **Variances.** When a property owner seeks a variance, can the land use appeals authority impose requirements and conditions on the variance? How are those additional burdens limited?
- **Other Situations.** When a property owner seeks access to a state road; when any special approvals are required that allow for conditions; when a homeowner seeks to connect to utilities and is told there are conditions to do so; and in other similar situations.

What can the government require a property owner/applicant to do in order to get a permit or approval?

The United States Supreme Court has laid down guidelines for conditions that offer some help in evaluating the balancing that must be done in making sure that government does not go too far in burdening changes in land use.

The Utah State Legislature wrote these standards into statute in 2005 by enacting new language which reads:

A municipality (or county) may impose an exaction or exactions on development proposed in a land use application if:

1. an essential link exists between a legitimate governmental interest and each exaction; and
2. each exaction is roughly proportionate, in both nature and extent, to the impact of the proposed development.¹

The basic issues are:

1. Does the proposed condition or requirement advance some legitimate government function? Is it the kind of issue that local planners should even be involved with? Does it relate to an issue that is within the jurisdiction of local land use controls?
2. Does the proposed condition or requirement solve some problem created by the development or mitigate some negative aspect of the proposed land use?
3. Is there a roughly proportionate balance between the problem and the cure? Is the condition or requirement "overkill" or does it fairly balance the duty imposed on the applicant and the burdens the proposed development places on community resources?

4. Is there a less intrusive way to solve the problem? Does the proposed condition address the issue, but in a manner that limits very significant property rights or impose a heavy burden when some other, less intrusive option would also solve the problem without imposing such a harsh burden?

Who Can Impose Conditions?

Case Law — *Nollan v. California Coastal Commission*

A prime example of an illegal condition was brought to light in the story of the Nollan family, who owned property near Santa Barbara, California. They went to get a permit to demolish their beachside bungalow and replace it with a larger house. The California Coastal Commission is given statutory authority to comment on the building permit. When the Nollans went to the commission, they were told they would have to deed an easement for public access to their beach to the State of California. Nollan objected. He objected all the way to the United States Supreme Court, which agreed that the commission had gotten a little carried away. The court held the purpose of the



The California Coastal Commission illegally demanded the Nollan family give away easements for public access to this beach in order to get a building permit. Photograph courtesy of Prof. Daniel Mandelker.

commission was to preserve access to the beach, but that charter did not include a mandate to demand easement for access across the beach. The commission was operating outside its authority and was attempting to solve problems it was not created to solve. The requirement to “exact” the easement was therefore a “taking.”

What Conditions Can Be Imposed?

Case Law — Dolan v. Tigard, Oregon

In another case, Florence Dolan wished to expand her hardware store in Tigard, Oregon. The City of Tigard required her to dedicate land to the city for a bike path, but Florence could not understand why. She saw no connection between her expanding a hardware store and the city's worthy desire for a bike path. (It may be that in all her years of selling plumbing supplies, no one had ever taken a toilet home on a bicycle!)

The city's condition was struck down by the court because Tigard had not shown that the bike path solved any problem that Florence had created.



Above is Florence Dolan's hardware store in Tigard, Oregon, which she wanted to expand. Her refusal to accept the conditions imposed by the city led to her victory before the U.S. Supreme Court, which held the conditions imposed on Ms. Dolan constituted a “taking.” Photograph courtesy of Prof. Daniel Mandelker.

Rough proportionality

Even if the bike path the city demanded of Florence Dolan was necessitated by the occasional cycling handyman, the court also stated that showing some vague relationship was not enough. Government entities must show, by an individualized analysis in each case, that the dedications and exactions imposed on development are roughly in balance, imposing a burden sufficient to offset generally the burdens created by the development and not significantly more.

For example, if a homeowner has an adult child who wishes to build a home near the parents and the family decides to divide a two-acre lot into two one-acre lots, then it would be appropriate to require them to provide the normal amenities for that new home. If the roads in the area are 60 feet wide in single family neighborhoods, then it could be required that the road in front of the new lot be widened to become 60 feet. This width has already been established by the community as the normally required road width for single-family occupancies.

But if the community has a plan that an arterial highway be built along the roadway where this lot split is occurring, it is often tempting to require the homeowners to dedicate enough land for the future four-lane highway. This would be inappropriate and illegal since the proposed home is not creating the need for a four-lane highway.

If the proposal was to build a truck stop, then maybe the four-lane road would be justified. But the property owner can only be required to solve problems in a manner that is “roughly proportionate” to the burdens his development is creating.

Least intrusive solution

Lastly, it needs to be considered that even if the goal of the con-

dition is an appropriate goal, and even if it solves a problem the proposed land use creates or aggravates, and even if the condition is roughly equal to the problem it is meant to solve, there is still one more issue to consider.

There are some particularly sacred rights that the courts have recognized for all property owners. For example, in the case of Florence Dolan, the city also attempted to force her to dedicate to the city an environmentally sensitive creek that ran along her property. The goal was to create a public parkway, which had no connection to Dolan's store, but the city claimed that the dedication of the land was necessary to protect it as a floodway. There is no doubt the city has a duty to protect floodways, but the same result could have been reached by simply limiting her ability to build along the creek. By making her keep it clear for the storm water that her expanded parking area was going to create, the city could solve the flooding problem. There was no legal justifi-



Above is the creek behind Florence Dolan's hardware store. The U.S. Supreme Court said, while the city could restrict development along the creek, it could not require the creek be deeded to the city as a condition of development.

cation for its attempt to grab the title to the land along the creek in order to use it for a city park when building development restrictions would have adequately protected the flood plain. The city had raised an appropriate issue, but the wrong solution was imposed. Indicating the right to exclude others from her property was a sacred, protected right, the U.S. Supreme Court struck down the dedication requirements as too intrusive.

Utah courts have held that local land use processes cannot impose conditions, impact fees, dedications, and other burdens on development if those who will use the property will not benefit from the public improvements and amenities they finance or donate.² For example, a city could require the property owner to install curb and gutter along the front of the property, but not force the property owner to cure an existing storm water problem up the street above his property which was caused by the lack of curb and gutter in front of someone else's lot.

Other examples of inappropriate burdens and conditions:

- A subdivider may be required to meet a city-wide standard for open space, but that does not mean he can be required to convey title to the open space to the city.
- Those developing land on hillsides cannot be required to install trails across private property when those developing land in other parts of the city have no requirement to dedicate trails.
- A property owner cannot be required to pay an impact fee for water lines and then also have to build water lines, completely at his expense, which the impact fee is supposed to pay for.
- If a development demands an 8-inch water main to serve its residents, local officials cannot demand that a 12-inch main be provided because that is what is needed to pro-

vide for other potential development in the area. The city should pay the cost of upsizing the water lines for the additional capacity.

However, it is important to note:

- A developer can volunteer public improvements if they wish to.
- There are sometimes legitimate trade-offs where the community gives bonuses in density and lot sizes in return for voluntary public improvements.

Legal conditions and exactions on development must meet four tests:

1. advance a legitimate public purpose and be within the scope of the government entity to impose;
2. address some burden created by the development;
3. be roughly proportionate to the burden imposed on the development; and
4. solve the problem in the manner which is least intrusive on protected property rights.

Tips for participants

This corner of land use activity is a busy place to be. Local governments continually seek to accommodate development and change without adding new tax burdens on the existing population. A developer is a tempting target. They are usually from out of town. They are here to make money and supposedly have some to share. They are promoting a change and are considered the root cause of some of the problems the municipality faces, so requiring them to solve some problems seems only fair.

As far as it goes, of course, there are fair and logical justifications

for imposing burdens on development. The problem comes from the fact that sometimes the locals get a little carried away and impose disproportionate burdens that are out of balance.

As a practical matter, however, there is no easy way for the landowner to fight the imposition of burdens on his proposals. Any appeal of the burdens imposed is going to take time, and landowners don't usually have time. They usually have more money than time, and if they don't get moving, they could miss their development opportunity.

Those who make their living in the development business also have a valuable ongoing relationship with the building official, the zoning administrator, and citizen planners. They worry about whining too much or fighting back against unfair requirements because they need to work with local officials and there are always issues where a developer needs cooperation. Where local officials have so many ways to regulate development, those who are regulated have learned that it does not pay to kick up too much of a fuss.

If you are getting started in the development business, when you attempt to get approval for your first project you need to be very pessimistic about the cost and time involved in the process. You can, of course, insist upon an absolutely legal approval process if you are willing to take the time to run appeals and do the necessary work to make sure that every condition of approval is legal and fair. But it is quicker, and often cheaper, to go with the flow, accept some inappropriate regulation, and get the job done sooner, if not less expensively.³ (I am not advocating what the U.S. Supreme Court has called "an out-and-out plan of extortion" but only pointing out the realities.)

In Chapter 10, we discuss appeals. Perhaps there might be some method among those outlined there that could fit a given situa-

tion and allow an appeal of disproportionate burdens in a manner that resolves the issue without taking too much time or resulting in long-standing hostilities. This is an area the Property Rights Ombudsman is hired to assist with, so do not hesitate to call.

2. Impact Fees

Impact fees are imposed on each house, business, or other development based on the expected cost of public facilities to service that unit of development. They are general and usually apply community-wide. They are set by ordinance, based on a community capital improvements plan, and can usually be relatively easily predicted and calculated. Counties, cities, towns, special



Local government continually strains to meet the utility requirements of new growth while battling the decay of old "infrastructure." Impact fees are a major source of revenue in handling the expansion, but not replacement of utilities.

districts (government utilities), and even private utility companies can set impact fees. They all have to follow the same basic rules, however.⁴

Impact fees can only be assessed for capital expansion projects related to water, waste water, storm water, municipal power, roads, parks, recreation, open space, trails, police and fire stations, and environmental mitigation.⁵

Under state statute, a local government entity also must follow precise procedures to enact an impact fee ordinance.⁶ If those specific statutory requirements are not followed, then a fee can be attacked and invalidated on that basis alone.⁷

In two 1999 Utah Supreme Court cases, the Home Builders of Utah challenged the formalities associated with the imposition of impact fees. The court held that municipalities must first disclose the basis upon which impact fees are imposed to anyone who challenges the reasonableness of the fees. The person opposing the fees must then show a failure by the governmental entity to comply with the constitutional standard of reasonableness. This burden is logical when it is understood that impact fees are imposed by ordinance, and therefore the courts will uphold them as long as they comply with state law it is reasonably debatable that they advance some public interest.⁸

The court also held the conditions required by case law and statute to make an impact fee legal need not be specifically analyzed by each city council member or commissioner before the fee is imposed. Decision makers may rely on the expertise of others in setting fees. If, in a later appeal, it is determined that the fees meet the statutory legal guidelines, then they will be upheld. Whether the fees are reasonable is not a matter of mathematical exactness. Such precise equality is neither feasible nor constitutionally vital.⁹

Among the impact fee requirements are:

1. a comprehensive review of the expected growth in the community, the needed public facilities to accommodate that growth, and the cost of those facilities;
2. the cost to provide adequate facilities for each house, business, or other component of the expected growth;
3. a calculation of how the cost of those facilities is to be provided. There is no requirement that all of the incremental cost be borne by impact fees, although that may be the preferred option chosen by the governing body of the entity imposing the fees;
4. the capital facilities plan need not be created in its full formality if the entity imposing the fee has fewer residents or serves a population of 5,000 or less. These smaller entities must simply base their impact fees on a "reasonable plan;"
5. strict notice rules must be followed as the impact fee structure is set up;
6. accounting of the receipt and expenditure of the fees must be as outlined in the statute, and the funds must be kept separate from other monies; and
7. impact fees can only be imposed to accommodate new growth. The proceeds cannot be used to cure pre-existing deficiencies.¹⁰

In an earlier case, the court held that the presumption of constitutionality applies to a municipality's establishment of impact fees. In order to avoid the impact fee, that presumption must be attacked by competent, credible evidence that the fees are unreasonable.¹¹

Impact fees can be appealed in a variety of ways. One can go to court, ask for an appeal to the governing body of the entity that imposes the fees, or even demand arbitration of the amount, pro-

cedures, or accounting related to impact fees.¹² It gets a little complicated, but at least all the rules are in the same place in the statute. Take a breath, plow through them, and you should be able to figure it out. Be sure to read both applicable sections about appeals.¹³

Of all the different aspects of land use management about which a citizen may wish to get information, impact fees are among the easiest to analyze. Since there are specific requirements that must be met to impose them, there is a defined paper trail that can be reviewed and scrutinized. The stakes are too high, generally, for the local utility or government entity to play fast and loose with the documentation. If you would like to see it, simply make the request and you will usually be satisfied with what you receive to justify the fees.

If the documents are not available, there is trouble in the heartland because some serious accountability errors have been made. Impact fees may not always seem fair, but the analysis to support them must be made available for you to make that judgment on your own. If there is no documentation to support them, they are void and unenforceable.¹⁴

¹Utah Code Ann. §10-9a-509 (municipalities); Utah Code Ann. §17-27a-507 (counties).

²*Banberry v. South Jordan*, 631 P.2d 899 (Utah 1981).

³*Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

⁴See, generally, the Utah Impact Fees Act, Utah Code Ann. §11-36-101 et. seq.

⁵Utah Code Ann. §11-36-102(12).

⁶Utah Code Ann. §11-36-101, et. seq.

⁷Utah Code Ann. §11-36-401(4).

⁸*Home Builders v. City of North Logan*, 1999 UT 63, 983 P.2d 561 (Utah 1999).

⁹*Home Builders v. City of American Fork*, 1999 UT 7, 973 P.2d 425 (Utah 1999).

¹⁰See, generally, the Utah Impact Fees Act, Utah Code Ann. §11-36-101 et. seq.

¹¹*Banberry*, id. at note 2.

¹²Utah Code Ann. §11-36-402.

¹³Utah Code Ann. §§11-36-401, 402.

¹⁴Utah Code Ann. §11-36-201.

Federally Mandated Rules

1. Religious Land Uses

In a world where we are getting used to the federal government's involvement in many areas of our lives, we must accommodate an increasing interest from Washington, D.C., in local land use management. An example of this is the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),¹ a bill co-sponsored by Utah's own U. S. Senator Orrin Hatch and fellow Senator Ted Kennedy.

RLUIPA basically provides that if the user of land is a church, then no land use regulation can be applied which imposes a "substantial burden" on the religious exercises unless the local government involved demonstrates two things:

1. the regulation furthers a "compelling" government interest; and
2. the regulation is the "least restrictive" means of achieving the end desired.²

The property user must establish the regulation is a substantial burden. Once that is accomplished, the government entity imposing the burden must establish the compelling need and that there is no less restrictive means of accomplishing the goal of the regulation.³

The local regulator also bears a burden in showing its regulations treat a religious use no more harshly than non-religious uses;⁴ the rules do not discriminate against any particular religious uses;⁵ no rule acts to eliminate religious uses from a municipality or county;⁶ and no rule “unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.”⁷

The law also provides these rules are to be interpreted broadly to protect religious freedom.⁸

The Utah State Legislature enacted a similar statute in 2005, guaranteeing the right to use land for religious purposes would be protected by state, as well as federal law.⁹

These burdens are no small thing. As we discussed in Chapter 4, local regulations typically will be upheld if it is “reasonably debatable” they advance some public good. But under RLUIPA, religious uses only can be substantially burdened by regulation if the need for the regulation is “compelling,” which means the city or county must prove the issue involves a significant matter of public safety and health.

The U.S. Supreme Court said that the duty to show a “compelling state interest” to justify a local regulation is “the most demanding test known to constitutional law.”¹⁰

So, for example, occupancy and adequate exits from an auditorium probably could be regulated, but building color, height, materials, design, and setbacks probably could not. Purely aesthetic rules might be suspended for religious uses, if they impose “substantial” burdens.

This, of course, raises some interesting questions:

- What is a “church” anyway?
- What is “religious exercise?”

How Can Religious Uses Be Regulated?

Case Law — Martin v. The Church of Jesus Christ of Latter-day Saints

A case well-known to some Utahns illustrates the point. In 2000 in Belmont, a suburb of Boston, MA, the Church of Jesus Christ of Latter-day Saints dedicated a temple which did not have a steeple.



After months of delay, the steeple is placed onto the LDS Temple near Boston, Massachusetts. This only occurred after the state's highest court ruled that religious uses were exempt from the local height restrictions. Deseret Morning News.

The house of worship was built on a five-acre site in a residential zone. Churches are an allowed use in the zone, but architectural controls limit the height of buildings there.

The Church of Jesus Christ of Latter-day Saints modified the plan to propose a lower steeple, but one that still exceeded the limit significantly.

In the trial that some neighbors brought against the church, the local judge ruled that the height of the steeple was not "essential to the worship" of the church. The Massachusetts Supreme Judicial Court (the highest court in the commonwealth) ruled the trial court was wrong:

It is not for judges to determine whether the inclusion of a particular architectural feature is "necessary" for a particular religion. A rose window at Notre Dame Cathedral, a balcony at St. Peters Basilica, are judges to decide whether these architectural elements are "necessary" to the faith served by these buildings? [sic] The judge found, as she was compelled to do in the face of overwhelming and uncontradicted testimony that temples "are places where Mormons conduct their sacred ceremonies." No further inquiry as to the applicability of the law [granting religious structures exemptions from local land use regulations] was warranted."

The law apparently does not apply to the non-religious uses of a church, but only the religious ones. So a church that operated a cannery would be regulated just like any other cannery, but a house of worship would be exempt from many controls.

While this case in Massachusetts was not under RLUIPA, the state statute that was the basis for the church's defense read in a similar manner to the new federal statute and the new Utah law. As the new laws are interpreted by the courts, we can expect similar results.

A federal circuit court of appeals also held in 2003 that members

of a local city council could be personally liable for their actions in denying an individual application for permission for religious assembly.¹²

Attorneys' fees are allowed as if any violation of RLUIPA were a civil rights act violation.¹³

So, if the user of property in your community is a church, be prepared to suspend the normal rules. The real potency of the act is that it gives a religious institution that feels "put upon" by a local land use regulation an immediate appeal to federal court. This is a very powerful tool, since normal land use claims must go through the state court system only, never receiving what some consider the more sophisticated and unbiased services of a federal judge.

The best advice to all involved in the review and approval of religious land uses is, of course, to engage in an earnest discussion of what can be accommodated without resorting to legal wrangling and court action. Once RLUIPA is understood by all, the issues should be much easier to resolve. Those working to resolve problems in good will can save time, hassle, and money, including the limited resources of a church.¹⁴

2. Group Homes—Fair Housing Act

As with religious uses, the U.S. Congress has entered the arena of local land use regulation when housing for those with disabilities is involved.

The federal Fair Housing Act¹⁵ provides that it is unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny a dwelling to any buyer or renter because of a handicap.¹⁶

A person is handicapped if he or she has a mental or physical impairment.¹⁷ This could include a wide range of limitations on a person's life and health, including the effects of recovering from drug and alcohol addiction.¹⁸

A local regulation may be found in violation of the act if it is shown to have a "disparate impact" on a particular group of people that the act was enacted to protect.¹⁹ Another standard in the act is that local rules are in violation if they fail to make "reasonable accommodations," in allowing people with disabilities an equal opportunity to live in a dwelling.

When these rules are applied, the local government must balance the interests of the person with a disability against the demands of public health, safety, and welfare. What is forbidden is for



St. Stephen's Church is located beside Truman Elementary in West Valley City. A case decided in 2000 involved a proposal to locate a group home for those recovering from substance addictions next to the church and school.

local policies or practices to have a discriminatory effect. A group which claims discrimination must establish that others in a similar situation are treated differently even if that discrimination is unintentional.²⁰

If all group homes in a community are treated the same, then no violation of the Fair Housing Act would occur. But if homes for recovering substance abusers are not given the same allowances as sorority houses, for example, then the red flags of the act may be triggered.²¹

The other issue is whether or not the community is making a reasonable accommodation of a proposed group home use. "Reasonable accommodation" has been interpreted to mean that the city or county must change any rule that is not justified by a compelling state interest so that the rule does not place onerous burdens on handicapped individuals.²²

Remember, of course, that the word "reasonable" is used here. The community must only adjust the rules if to do so is reasonable under the circumstances. Factors such as traffic, congestion, and cost may be used to review what is reasonable, but they may only be applied to limit dwelling units for the disabled if there are no less burdensome options available to offset the impact of group living. The characteristics of a proposed group home that are used to consider what accommodations are reasonable cannot include those that would only apply to a group home for the disabled.²³

Of course the analysis involved in these cases is an administrative one and any conclusions drawn must be based on substantial evidence on the record. To deny or overly burden a proposed group home with only the complaints of neighbors as a basis will surely run afoul of the act.²⁴

The act also has been interpreted to impose the burden of making accommodations on the local government, not on the applicant. If the community determines the use does not fit in a certain area, for purely empirical reasons, it still may bear the burden of suggesting some options that would allow the group home to locate in town. In a Utah case, the court held “the responsibility rested with the city to *initiate* and *make* the accommodation.”²⁵

The obvious discomfort this places on local political office holders is predictable. There could hardly be anything in the land use arena more unpleasant than to tell the neighbors rallying against a home for those recovering from substance abuse that they must not only endure the placement of the home in their neighborhood but “accommodate” it. Despite the belief of this author that many of the negatives associated with some land uses are more perceived than real, it would be unrealistic to discount the strong reaction that neighbors have when such uses are proposed in their own back yards.

How Can We Regulate Group Homes?

Case Law — Episcopal Church v. West Valley City

An example of this comes from West Valley City where the Episcopal Church of Utah is affiliated with a residential treatment facility for recovering drug addicts and alcoholics known as The Haven. The proposal was to meet the increasing need for such a facility by using the vacant lot adjacent to St. Stephen's Church at 4615 South 3200 West in West Valley City.

The work of the Episcopal Church in Utah is legendary, and there is no way to really over-praise the tremendous efforts made for the homeless and disadvantaged in our state that the church has achieved. But when they proposed a group home next door to the playground at Harry S Truman Elementary School, the local residents

objected. They objected strongly and they objected long and loudly. Ironically, there was no forum for them to voice that objection formally because the prospective group home, as proposed under the West Valley zoning ordinances, did not need any approvals that required a public hearing.

The premises were zoned R-1-8, which allowed residential uses. The group home is a residential use and, under the Fair Housing Act, it must be allowed in any residential zone just like a single family home. Since someone proposing to build a single family home just needs to get a building permit, then a building permit is all the act says is needed for a group home.

West Valley City was understandably reluctant to grant the approval as casually as a building permit for a home is handled, so a lawsuit resulted.



St. Stephen's Episcopal Church as seen behind a playground at Truman Elementary in West Valley City. The proposed group home would have been on land to the right side of the church in this photograph.

The federal court in Salt Lake City held that the church had not established that the denial of the permit was discriminatory, because no evidence was offered by the church that other group homes were treated differently than theirs. But the church won on the “reasonable accommodations” test.

While the city claimed to have offered help in the location of the group home, the court held that:

In the present case, no evidence whatsoever has been established other than the complaints of neighbors. Regardless of who bears the burden here, it is clear that the City has made no attempt to accommodate this facility. In fact, a decision was made to deny the permit for the facility before the application was even received.²⁶

On the other hand (the church) has asserted that there is a great need for Haven West to be a group facility located in a residential neighborhood. Those recovering from addiction have been shown to benefit from living with others in similar situations, and their presence in residential neighborhoods allows the recovering individuals to re-integrate into the community at large. It thus appears that there is currently no other way for recovering addicts who require this facility to receive housing in West Valley City.²⁷

The church won the case and is now working with West Valley City to design “reasonable accommodations” that will allow this facility to be built.

Like the federal act related to religious uses, the Fair Housing Act has teeth, allows for immediate access to federal courts, and for legal fees for successful plaintiffs. Those who must deal with proposed group homes in a community would do well to understand the broad provisions of the Fair Housing Act as they make the “reasonable accommodations” necessary to allow such uses and comply with the act.

3. Cellular Towers and Communications Facilities

The federal Telecommunications Act of 1996 (TCA) was passed with the clear intent to “preempt certain areas of local zoning control.”²⁷ The justification for doing this was that there was a national need to provide “a framework designed to accelerate rapidly private sector deployment of advanced telecommunications services to all Americans.”²⁹

The TCA basically provides that local regulations must not play favorites between different providers of wireless services and should allow personal wireless services to be provided.³⁰

The law also provides that local land use regulators may not cite “environmental effects of radio frequency emissions” as a basis for regulation if the facilities comply with the rules of the Federal Communications Commission.³¹

A wireless company who wishes to complain about inappropriate regulation has direct access to state court, federal court, or even the FCC with its complaints.³²

The theme here, if not already apparent, is that the hands of local governments will be tied by Congress when enough anecdotes about irrational or discriminatory land use decisions make it to the ears of powerful legislators.

In the case of the wireless rules, it is obvious there are influential lobbyists who convinced a few senators and members of congress that the competitive nature of the marketplace depended on federal preemption of local law because NIMBYs and small-town politicians were making irrational decisions based on rumors of health problems near radio towers. The quick solution? A federal law that put an end to such local excesses and tied the hands of local regulators from sea to shining sea.

On the other hand, local regulation of communication towers has been upheld where they relate to some proper zoning purpose. Restrictions on location, placement, height, fencing, minimum land area, setback, screening, painting, landscaping, or even disguises are likely to be upheld if they do not so burden the use as to be unreasonable.³³

Subsequently, as participants in the land use arena, we must understand these federal rules resulted from what Congress determined was excessive regulation by local government. If we exercise self-restraint in our tendency to regulate, such heavy-handed federal regulations will often be unnecessary.

4. Sexually-oriented Businesses

SOBs, as they are unaffectionately known in local land use circles, are as volatile a subject as there is in this corner of the law. Few are willing to admit to frequenting them, but they generate tens of billions of dollars in revenues nationwide. The major advantage is that the U.S. Supreme Court has allowed them to be included in the definition of “free speech” that the Bill of Rights is supposed to protect.

This means that when those who wish to promote adult entertainment—bookstores, cable channels, video stores, and other similar uses—go to court to challenge local land use regulations, they often win.

There are abundant provisions in state law that are designed to allow local government to regulate SOBs.³⁴ But the preemptive power of the federal courts makes regulation very tricky in actual practice. Basically, there are some ways that SOBs can be regulated if done carefully, and some that are just simply off-limits.

The most effective way most communities have found to limit



Adult businesses are more common and more profitable than ever. While they may be regulated, communities seeking to totally eliminate them will run into the free speech protection of the first amendment.

the negative effects of SOBs has been through licensing rather than through land use restrictions. A discussion of this option is beyond the scope of this book, but those interested would do well to investigate licensing as well as land use rules to design the kind of regulation is most likely to be upheld.³⁵

The general guidelines that apply to SOB regulations are:

1. When a municipality attempts to regulate speech, the normal deference extended by the courts is lost, and there is no presumption of constitutionality. The burden shifts to local government to justify the regulations imposed.
2. The regulations must be shown to flow from external effects of the business and not from local political pressures. They must be carefully drafted, and this is no place for amateurs. The consequences of violating someone's free speech under the Civil Rights Act can be significant and personal.

3. A community cannot eliminate all SOBs within the city limits, either by attempting to do so outright or through the back door by imposing burdens that no business person can meet. There must be enough locations identified as being available for adult uses in the community that those wishing to establish an SOB can do so reasonably.
4. Ordinances can be upheld if they address undesirable secondary effects of SOBs and do so with sufficient evidence supporting their regulations. The rules should be “content-neutral” and apply to all situations where similar secondary effects may apply and not just to SOBs. Distance limitations to churches, schools, and other SOBs have been upheld. A ban on total nudity also has been upheld, although several cases involved in this specific issue are making their way through the Utah courts as this publication is being written.

5. Sign Ordinances

Regulation of business signs raises the specter of free speech because that's what signs do—they communicate “commercial speech” to the public. Some object to them as much as they do to adult uses because they consider signs ugly in any form. Others, including just about every mom and pop in business for themselves, consider their signs as one of their most significant business assets.

A growing inclination to regulate signs more heavily has caused considerable give and take in the land use arena over the past few years. Much of the discussion is about local options and discretion. Extensive regulation of signs will be upheld as legal, but there are some bedrock rules that must be considered first if sign regulations are to be appropriately enacted.

First of all, this is a free speech issue and the U.S. Supreme Court has laid down the base rules. Regulations cannot be arbitrary or unreasonable. They must be “content neutral.”³⁶ For example, the author recently read a local ordinance that prohibited all signs in residential areas except those related to “seasonal sales of locally produced fruit and vegetables.” Such an Ordinance would be stricken, since the ordinance cannot delve into content. A reasonable distinction between “commercial” and “non-commercial” signs can be upheld so that large directional signs can be used on the freeways without allowing similar overhead signs advertising businesses at each interchange.

On the other hand, if commercial signs are allowed, then non-commercial signs also must be allowed.³⁷ Some signs, such as those offering a property “for sale” or expressing a political view, cannot be banned in any neighborhood, although the size, quantity, and number of signs can be reasonably restricted. Signs can be banned on utility poles, trees, sidewalks and wires, but not on private lawns or in the window of a home.³⁸

An ordinance cannot ban all signs. Sometimes off-premise signs can be restricted more than the signs that advertise a business located on the same site as the sign.

Restrictions on the “time, place, and manner” of sign usage can survive challenge if they are shown to be reasonable and necessary in advancing a legitimate public purpose.³⁹

Existing signs often are protected as “grandfathered” and known as “non-conforming.” The Utah Legislature has provided special protection for some such signs.⁴⁰

The attractive appearance of a community can be the basis for a sign ordinance, as long as all new signs are treated alike.⁴¹ Certain death can be predicted for an ordinance that pretends to give

local officials the ability to accept or reject signs based on their opinions without clear standards and guidelines for the issuance of permits. Valid ordinances must be supported by evidence that they seek to further a compelling state interest, directly advance that purpose, and are narrowly drafted to be no more restrictive than needed to achieve the public good desired.⁴²

Once these basic, constitutional standards are accommodated, local sign ordinances become a matter of local discretion. Remember that the highly restrictive sign controls in Scottsdale, AZ, or Charleston, SC, exist under the same constitution that applies in Utah. The most significant aspects of a local sign ordinance are likely to remain political questions decided by majority vote, not the constitutional limits that can be accommodated by skillful draftsmanship.⁴³

6. Billboards

A brief discussion of billboards as distinctly regulated is justified mainly because of the unique status granted them under Utah state law. Such ordinances routinely differentiate between “on premise” signs and “off premise” signs. The off premise signs are usually billboards. On premise signs are generally allowed with much more flexibility and acceptance than those located off premises. At the local level, the sign that a “mom and pop” want to install is usually looked upon with some favor, while the absentee corporate owners of the large billboard panels are sometimes not afforded much hospitality.

At the state and federal level, however, the scale is tipped. The outdoor advertising industry has been very savvy and actively involved in political campaigns, lobbying, and influencing federal and state legislation.

The discretion of local municipal officials and the Utah Depart-

ment of Transportation is somewhat limited by targeted state statutes, which provide that:

Non-conforming billboards cannot be amortized (phased out over time) like other non-conforming uses or terminated by fire or other causality.⁴⁴

Billboards can only be acquired through eminent domain or voluntary agreement with the sign owner.⁴⁵

Outdoor advertising is regulated by state law as well, and the number, size, and location of signs can be regulated.⁴⁶ Special licenses and permits are required to install a billboard, but many existed before such laws came into effect. Under the Utah Outdoor Advertising Act, if a state highway project requires the removal of a sign, the owner has a statutory right to relocate it at the expense of the governmental entity funding the road project.⁴⁷ Billboard owners also have the right to raise their signs if visibility is reduced by soundwalls or other highway improvements.⁴⁸

Local government entities are directed by state statute to allow the relocation or height adjustment as a special exception to the zoning ordinance.⁴⁹

These protections are not extended to the signs of local businesses. The definition of "Billboard" in the code refers specifically to signs that do not advertise a business located on the same premises as the sign.⁵⁰

As you can tell, the land use rules that apply to billboards are unique. If one is interested in this corner of the law, state statutes must be reviewed since they will control if there is any conflict with local ordinances.

¹Codified at 42 U.S.C. §2000bb.

²42 U.S.C. §2000cc 2(a)(1).

³42 U.S.C. §2000cc 4(b).

⁴42 U.S.C. §2000cc 2(b)(1).

⁵42 U.S.C. §2000cc(2)(b)(2).

⁶42 U.S.C. §2000cc(2)(b)(3).

⁷42 U.S.C. §2000cc(2)(b)(3).

⁸42 U.S.C. §2000cc(5)(g).

⁹Utah Code Ann. §63-93-101 et seq.

¹⁰*City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

¹¹*Martin v. The Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints*, 747 N.E.2d 131 (Mass. 2001).

¹²*Kaachumanu v. County of Maui*, 315 F. 3d 1215 (9th Cir. 2003).

¹³42 U.S.C. §2000cc(4)(c) provides for attorneys' fees under 42 U.S.C. §1983 and 42 U.S.C. §1988.

¹⁴With thanks to Wendie L. Kellington, Esq. of Lake Oswego, OR, and her paper on RLUIPA presented to the Land Use Institute sponsored by the American Law Institute-American Bar Assn., August 12-23, 2003.

¹⁵42 U.S.C. §3601, et. seq.

¹⁶42 U.S.C. §3604(f)(1).

¹⁷42 U.S.C. §3602(h).

¹⁸*Episcopal Church of Utah v. West Valley City*, 119 F. Supp. 2d 1215 (Utah 2000).

¹⁹42 U.S.C. 3604(f)(3)(B).

²⁰*Episcopal Church. supra*, note 18.

²¹*Id.*

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶*Id.*

²⁷*Id.*

²⁸*Patterson v. Omnipoint Comm., Inc.*, 122 F. Supp. 2d 222, 229 (D. Mass., 2000)

²⁹*Id.*

³⁰47 U.S.C. §322(c)(7)(B)(i).

³¹47 U.S.C. §322(c)(7)(B)(iv).

³²47 U.S.C. §322(c)(7)(B)(v).

³³For an excellent general discussion of federal telecommunications regulations, see Ziegler Rathkopf's *The Law of Zoning and Planning* (2003), at Chapter 79, or see 81 A.L.R. 3d 1086.

³⁴See, for example, Utah Code Ann. §10-8-41, §47-1-2, §78-38-1, §76-1-803, §32A-10-106(23)-(25), §32A-5-108(q) and §32A-10-206.

³⁵For an excellent general discussion of regulations related to sex businesses, bars, and cabarets, see Ziegler, *supra*, note 33 at Chapter 24.

³⁶*Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1984).

³⁷*Id.*

³⁸*Los Angeles City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

³⁹*City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

⁴⁰See Utah Code Ann. §10-9a-512 (municipalities) and §17-27a-511 (counties), which provides that billboards can only be removed with the voluntary consent of the billboard owner or through the use of eminent domain (where the government entity would have to pay just compensation for the fair market value of the sign).

⁴¹*Los Angeles City Council, supra*, note 38.

⁴²*Central Hudson Gas & Elec. v. Public Service Comm'n*, 447 U.S. 557 (1980)

⁴³For an excellent general discussion of regulations related to signs and free speech, see Ziegler, *supra*, note 33, at Chapter 17.

⁴⁴Utah Code Ann. §10-9a-513, (municipalities), §17-27a-512 (counties).

⁴⁵Utah Code Ann. §10-9a-512, (municipalities), §17-27a-511 (counties).

⁴⁶Utah Code Ann. §§72-7-501, 505.

⁴⁷Utah Code Ann. §§72-7-510(6), 513.

⁴⁸Utah Code Ann. §72-7-510.5.

⁴⁹Utah Code Ann. §§72-7-510(6)(c), 510.5(3).

⁵⁰Utah Code Ann. §10-9a-103(3)(a), (municipalities), §17-27a-103(3)(a) (counties).

State Mandated Rules

1. Future Streets and Highways

Local governments have the right to plan ahead for transportation systems—whether roads, rail systems, or even airports. They also have the duty to do so. In today’s climate of growth and expansion with no end in sight, it would be folly to do anything else.

In anticipation of this need, the Utah Legislature worked with the Utah Department of Transportation, the Utah League of Cities and Towns, and others interested in the subject to enact the Utah Corridor Preservation Act of 2001.¹ The goal of the UCPA is to properly balance the needs of the community in keeping future corridors from being developed with the right of a property owner to use his land as he chooses to use it and as the law properly allows him to use it.

In past years, both state and local agencies would designate a corridor for a future roadway and then attempt to ban all development in that corridor, whether the proposed new construction was a single home or a subdivision. The constitution prohibits the imposition of disproportionate burdens of public projects on a single property owner without the payment of just compensation, however, so such actions could have been challenged as a violation of private property rights.

The UCPA has attempted to provide some guidelines that are pretty clear and specific. Communities following these guidelines will not have much of a problem with private property "takings" claims.

The purpose of the UCPA is to preserve corridors, of course, but within two balancing restraints:

1. Corridor preservation is a public purpose, but
2. the acquisition of private property rights for transportation corridors should be done voluntarily and not through the power of condemnation.

In order to preserve corridors, both state agencies and local government may adopt official maps that show where future roads are planned to be built. These government entities can then regulate land in the corridor to limit development and acquire property in those corridors up to 30 years in advance of need.²

However, those same government entities must protect constitutional property rights. The agency or municipality must respond to a request that the proposed acquisition of an easement be changed to the total acquisition of all the property if the property owner would rather sell the entire parcel involved. On the other hand, the government must consider acquiring only the portion of the property needed for road purposes if the landowner prefers to sell only part, even if the government initially wants to buy the whole parcel.³

The real impact of the UCPA will be found when a property owner wishes to develop his or her property. The UCPA defines "development" as:

- (a) the subdividing of land;
- (b) the construction of improvements, expansions, or additions; or

- (c) any other action that will appreciably increase the value of and the future acquisition cost of land.⁴

If the property owner wishes to do any of these things, and the local government will not allow it, then the property owner may request that all or part of the property be purchased at fair market value. If the state or local government entity involved refuses to purchase part or all of the property, as the property owner requests, then development must be allowed.⁵

This all sounds good to property owners, of course, but there are some severe practical limitations at work that all should understand. First and foremost, any court would need to determine what actions by the municipality or agency actually “limit or restrict development.”

My money is on the interpretation the government will not be said to have limited or restricted development until the property owner has applied for development and been turned down in a final decision and also after exhausting administrative remedies. In Chapter 13, we discuss how difficult that exhaustion could be. I do not expect the courts to start making governments shell out money to property owners until the community or state agency has had ample opportunity to avoid such a result.

Although it is far better to negotiate development and work out some solution, there is a clear right involved here. If the situation merits drawing a line in the sand, a property owner is entitled to press for development approvals and get an official denial so he can then sue and force the acquisition of the land at fair market value.

The real dilemma may be for the property owner who has a home or parcel of land in the planned corridor and wants to sell it. They may not find many buyers who wish to take over the property knowing that soon the bulldozers will be idling on the

property line and acquisition for a roadway is certain, if not imminent.

The same dilemma would face a potential buyer when the future of the land is somewhat in doubt. The question would be why buy a house slated for demolition when there are other homes or land available where the future would be more certain. There may be relief in the UCPA, but only if the landowner is willing to force the city's hand by pressing a development application and demanding acquisition.

Although the harsh result of pre-planning for roads and rails may be easily understood by those in the crosshairs of transportation projects, the prospects of not planning ahead also are unsavory. How would the property owner who improves his home or even buys a new home in a subdivision in the path of progress feel if government officials did not disclose that the house is slated to be scraped for a highway?

The UCPA attempts to strike a balance for property owners and planners alike. I do not believe it has eroded pre-existing rights—there was a specific effort to be sure that constitutional rights were protected and to weigh all factors fairly.⁶

2. Moderate Income Housing

Under state law, local governments are obligated to adopt a plan to encourage an adequate supply of moderate income housing.⁷

The Utah Department of Community and Culture is charged with assisting counties and municipalities in meeting this duty, and can help with grants and expertise.⁸

Each community must adopt a plan. Larger cities and counties must provide a copy to the Department of Community and Cul-

ture and the local association of governments, a regional planning and coordinating supported organization by government entities.⁹

As a practical matter, these plans do not have much teeth, but can be persuasive in a political climate when there is a need to advocate for work force housing and against exclusionary zoning that has the effect of artificially eliminating moderate income people who may wish to locate in the community.

There have been some lawsuits over moderate income housing plans. A series of actions filed against Bluffdale in Salt Lake County resulted in a settlement that allowed apartments to be built in a development called “The Bluffs” near the intersection of Redwood Road and Bangerter Highway.¹⁰

Imagine a similar case, where a developer might claim that a certain zoned density must be given him to accommodate the mandated moderate income housing. His claim would fizzle if there are sufficient acres of undeveloped land already so zoned. The local government would have met its duty to accommodate moderate income housing by providing the precise zone the developer demands, albeit not in the location the developer demands it. Any litigation over this would likely fail.

It is yet to be seen if the duty to provide moderate income housing plans results in real and measurable improvement in modestly priced housing.

3. Manufactured Homes

The state code prohibits the barring of manufactured housing from any zone where houses can be built.¹¹ If there ever was a state land use statute that is widely ignored, this is it.

The statute itself leaves a massive loophole by stating that a manufactured home must comply with local land use requirements.¹²

There are a few devices used to limit manufactured homes, including:

1. minimum square footage for houses;
2. minimum roof slopes;
3. requirement for brick veneers; and
4. manipulation of builders' covenants when subdivisions are approved.



One man's cabin is another man's palace, or so it may seem. Some dread a typical manufactured home that is more trailer than home. Others, in defense of lower cost housing point to permanent homes with landscaping and garages, and wonder why they should not be allowed wherever similar sized homes can be "stick built."

Some of these local regulations may be vulnerable if challenged as failing to promote the general welfare as land use ordinances are to do.

Practically speaking, there is currently no effective state requirement that manufactured homes be allowed. The law must either be defined more specifically by the courts or clarified by the legislature in order to have red teeth.

Provisions requiring that any manufactured home which is brought into a community comply with federal manufacturing codes (local codes related to construction standards for manufactured housing are preempted by federal law)¹³ are surely legal. Local ordinances also can prohibit homes manufactured before federal codes applied in 1978. There have been horrific events in Utah where the lack of second exits and adequate safeguards on propane tanks or heating devices has caused tragic loss of life. These rules are legal and must be followed.

¹Utah Code Ann. §72-5-101 et. seq.

²Utah Code Ann. §72-5-403.

³Utah Code Ann. §72-5-405.

⁴Utah Code Ann. §72-5-401(3).

⁵Utah Code Ann. §72-5-405(3).

⁶Utah Code Ann. §72-5-405(1) declares that all constitutional rights of property owners are to be protected in application of the Act.

⁷Utah Code Ann. §10-9a-401(2)(f), §10-9a-403(2)(a)(iii) and (b), §10-9a-404(5)(c), and §10-9a-408 (municipalities); Utah Code Ann. §17-27a-401(2)(f), §17-27a-403(2)(a)(iii), §17-27a-404(6)(c), and §17-27a-408 (counties).

⁸Utah Code Ann. §9-4-1204.

⁹Utah Code Ann. §10-9a-203 (municipalities); Utah Code Ann. §17-27a-203 (counties) both require an extended notice of the consideration and enactment of a general plan to "affected entities" such as school boards, neighboring jurisdictions and others. The moderate income housing plan is a mandatory part of the general plan under §10-9a-403(2) (municipalities) and §17-27a-403(2) (counties).

¹⁰*Anderson Development v. Bluffdale City*, Civil No. 990401941, (Third Jud. Dist. Court of Salt Lake County, 1999, Matthew B. Durrant, Presiding).

¹¹Utah Code Ann. §10-9a-514 (2) (municipalities) and Utah Code Ann. §10-9a-514 (3) (counties).

¹²Utah Code Ann. §10-9a-514 (municipalities); Utah Code Ann. §17-27a-513 (counties).

¹³The federal standards are found at 24 C.F.R. §§3280.1-3280.904. These regulations established a comprehensive building code and inspection process for the construction of manufactured homes nationwide. The code also forbids local imposition of local building codes on manufactured housing at 24 C.F.R. §5403(d). The federal law does not require that manufactured homes be allowed in any residential zone. That is a provision of state law.

Other Local Issues

1. Historic Districts and Aesthetic Values

The same constitution reigns in the French Quarter of New Orleans, the historic corners of Alexandria, Virginia, and Park City, Utah. Extensive discretion to manage appearances has been afforded local government in a long line of court decisions upholding the regulation of historic districts and other architectural controls.¹

Local governments may use their extended discretion to enact ordinances that recognize and preserve the aesthetic values of districts that have a common cultural value and/or individual landmarks that have significance of their own. Historic attributes of communities may be elements in a general plan.²

To be legal and enforceable, the regulations must simply be created in an ordinance that debatably advances some good purpose and then is administered fairly and evenly. This is the rub in many communities because some of the decisions appear to be so subjective and undefined that there hardly appear to be any standards for the decisions at all.

In an area of land use where there is a lot of experience with regulation and some clear federal guidelines (such as the Secretary of the Interior's Standards for the Treatment of Historic Proper-

ties³), it would seem to be folly to use other standards and attempt to over-regulate historic buildings.

As in any administrative scheme, the decisions made must be based on substantial evidence in the record and must substantially advance a legitimate state interest. If the ordinance is written to preserve historic buildings, then the decisions made by the local landmarks commission in enforcing the ordinance must substantially achieve that end.

If property owners object to conditions imposed in the name of historic preservation that actually are geared to drive up property values or eliminate moderate income housing, for example, perhaps they may have a legitimate complaint. Conditions and terms of approval imposed by a local landmarks commission which advance some cause beyond the historic preservation may lack the "essential nexus" that is required by U.S. Supreme Court decisions to be legal and enforceable.⁴

Historic district rules and approvals also must be designed to preserve some economically viable use for the property⁵ and to achieve the public goals without imposing too harsh an impact on



Rendering of 1968 design by Marcel Breuer for a proposed office tower over Grand Central Terminal in New York City which touched off a battle that raged all the way to the U.S. Supreme Court. The railroad lost.

property owners who have made substantial investments in good faith and are later treated with gross unfairness.⁶

It must be remembered, however, that courts are sympathetic to the community values furthered by aesthetic regulation, and it is an uphill battle to prove that the private burden is so harsh as to require compensation for excessive regulation. Although it would be hard to imagine an area of land use which has been more regulated than aesthetics, the cases invalidating such efforts by local authorities are few and far between.

One aspect of historic regulations that is most difficult for a property owner to counter is that such regulations tend to increase property values in a district or community. This simple fact makes



Local control of design and appearance will be upheld if carefully drafted and consistently enforced, as with this big box retailer near Park City.

it difficult to win the sympathy of a judge in such a subjective context. If the local government supports its decisions with substantial evidence in the record, it almost always wins.

2. Parks and Open Space

One of the prime concepts behind the latest land use buzz words such as “Quality Growth” is the desire of avoiding “urban sprawl” which usually means the gobbling up of open space by inefficient development.

State and federal laws regarding these concepts are widely accepted and praised. There are not many limits on open space laws beyond the community’s duty under state law to allow for moderate income housing and not to completely gentrify an entire area by making the average lot so expensive that only the elite can live there. Local laws protecting open space have usually been held valid. Across America, minimum lot sizes of huge proportions have been determined to be legal. In rural areas of Utah, development standards requiring 20, 40, or more acres for a building lot are in place and probably legal unless challenged as exclusionary zoning or surrounded by much denser development.

There are really two main principles to understand related to open space regulation:

1. the community can legally require the preservation of more open space than we citizens and land owners have the stomach to impose on development, and
2. just because land is set aside as open space does not mean it is public space.

Regulating for open space is not usually the problem. Where communities run afoul of the law is in their attempt to treat open

space as public property. Remember that the right to exclude others is a sacred right, protected by a long line of U.S. Supreme Court decisions.⁷

While a community can invite the developer of a subdivision to set aside public spaces, it cannot require him to do so in a manner that is widely disproportionate to the community's established ratios of private lands to public lands for public spaces, which is usually pretty low. If he pays a parks impact fee, he may have met the duty to provide public open space, and cannot be coerced to provide more public lands than his share. It is also not his job to correct existing deficiencies.

The question of who owns open space presents a dilemma. Communities can mandate that open space be owned by a subdivision homeowners' association, though there can be merit in allowing a local farmer to own the open space and keep farming it, or to encourage some other perpetual use. It may not always be wise to depend on those in the HOA (Homeowners Association) to get along and raise sufficient funds to keep the area well maintained and verdant. Perhaps it would be better to let one landowner keep title to the open space, as long as it is burdened by a "conservation easement" or other restriction that preserves it perpetually as open space.

In the final analysis, the best way to control open space and critical lands to which the public wants continual access is to buy the property. My hat is off to the taxpayers of Park City and Summit County that bit the bullet and raised money to preserve precious open space. Through community action, they literally bought the farm and now continue to attempt constructively to keep the community both green and safe from the litigation that comes from overreaching regulation.

3. Trails and Pathways

Without belaboring the subject, there are a few points to be made about the well-intentioned movement to criss-cross the state with a network of spectacular trails.

Such efforts are commendable and appropriate, as long as some basic self-restraint is used. Private property protections demand that compensation must be paid if a property owner is required to allow the public onto his property, whether the proposed corridor is a road or a trail.

We must keep in mind that the laws related to roads have only in the last century involved motor vehicles. Every road was a trail 100 years ago. They were created through several methods—by use (“adverse possession” or “prescriptive easement”), by direct condemnation, or by written easement or conveyance. If a trail has been used by the public for 10 years or more without physical interruption, then the underlying landowner has, by default, transferred to the public an easement for trail use. Complicating the issue is that the interest created can run the gamut from a very limited easement to full fee simple ownership (i.e. ownership of the actual land underneath the trail). In general, if a public easement has not been so created or conveyed in writing, however, putting the trail on a map or showing it in the master plan as a public trail does not make it a public trail and may violate property rights.

A property owner developing land can be legally required to acknowledge on his subdivision plat the trails that legally exist across his land. But to require a subdivider to create a system of new trails triggers the tests outlined earlier in Chapter 7 on imposing conditions and dedications on development. There must be a finding that the trails required of this subdivider are no more burdensome on him than the trails required of all other subdividers.

It would be illegal, for example, to require the property owners in the foothills to provide trails while those on the flats do not have to do so. There may be some incentives offered to encourage landowners to volunteer trailways in their development plans, but a single development cannot be coerced into providing trails simply because the land involved would be an attractive place for the public to hike. See the discussion of development exactions starting on page 109.

On the other hand, there are few amenities that can offer as many benefits for a community as public trails, particularly along the spectacular mountainscapes and river corridors of Utah. They can be tremendous resources, but only if created in a manner that is fair and legal to all.

4. Home Occupations

There are peculiar restrictions on businesses conducted in a person's primary residence. This is an area of land use regulation that is definitely on the rise. A wide variety of approaches to the real or perceived problems involved with home occupations are expressed in almost as many ways as there are communities and ordinances.

In my experience the home occupancy provisions of the local ordinance are likely to have been created in response to a specific problem or a specific request from a specific owner. These rules are tinkered with incessantly as the city council or commission attempts to accommodate every person coming in with a special problem.

There is little to justify, in my mind, the excessive regulation and apprehension that these ordinances express. One wonders if there would have been an Apple Computer or Hewlett Packard if the ordinances in San Jose had been so restrictive that Steve

Jobs or Bill Hewlett and David Packard could not tinker with electronics in their garages.

Of course, there is no question that having 20 employees labor in a sewing factory in a single family zone would be disruptive or that mechanic shops should be located in industrial zones. It just appears that the rules are a little excessive at times.

For example, I was once asked as ombudsman to assist a mother who wanted to tend three children plus her own child in her home. She was told she could not do so without a conditional use permit, which had to be granted with the same formality that would be required if someone were attempting to build a grocery store.

The planning commission required her to pour concrete and double the width of her driveway and to limit her use to three children. She could not understand why the driveway had to be widened and no evidence existed on the record to support the requirement, which may have assumed that she would need employees, and parents would drive children to her home.

In investigating the situation, I found the applicable ordinance, which was based on a definition which read:

“Home day care/preschool” means the keeping for care and/or preschool instruction of twelve or less children including the caregiver’s own children under the age of six and not yet in full day school within an occupied dwelling and yard.”

The “home day care” use definition then went on to require that in such a facility, children could not play in the front yard or in the back between nine p.m. and eight a.m. and there could be no sign on the property other than a name-plate sign.

What is the problem? Read the definition again. The definition is missing the essential requirement in the ordinance that a “pre-school” operator be *paid* for services provided. With no distinction between those who are caring for children as a business and those who are not, this ordinance prohibits any parent in that community from caring for their children without a conditional use permit! The only way each mother or father could avoid a fine or penalty would be to prove that, in fact, he or she does not care for his or her children or instruct them at home.

The same community’s ordinances also provided that any “use conducted entirely within a dwelling unit” could only be carried on by “one person residing in the dwelling unit.” No “stock in trade” could be kept on the premises except for “original or reproductions of works of art designed or created by the artist . . . including, but not limited to printed reproduction, casting, and sound recording.” There also was a prohibition from using any other building on the premises for the home occupation except for the main house.

Does that not sound like the result of a specific problem or request? One asks what the state interest is in making sure that any use in a home is only conducted by one person and not by two; that somehow the stock in trade of an artist is less objectionable than the stock in trade of a craftsman; or that some use carried on in the kitchen would be appropriate, but not one carried on in the garage.

Such ordinances are regulatory overkill. Remember that when a conditional use is allowed in the ordinance, absenting language to the contrary, the use is to be granted unless there is substantial evidence in the record upon which a denial is based.⁸ Without such evidence, home occupations should usually be allowed.

¹See, for example, the granddaddy of them all, *Penn Central v. New York City*, 438 U.S. 104 (1978), where New York City was allowed to refuse a massive addition over the top of Grand Central Terminal by the U.S. Supreme Court.

²Utah Code Ann. §10-9a-401(2)(h) (municipalities); Utah Code Ann. §17-27a-401(2)(h) (counties).

³36 C.F.R. §67. This reference is in the "Code of Federal Regulations" published by the U.S. Government and available in law libraries and online. The secretary's standards are available at www2.cr.nps.gov/tps/tax/rehabstandards.htm.

⁴*Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

⁵*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁶*Penn Central*, *supra*, note 1; *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Authority*, 535 U.S. 302 (2002).

⁷*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Nollan*, 483 U.S. at 825 n. 60; *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁸Utah Code Ann. §10-9a-801(3)(c) (municipalities); and §17-27a-801(3)(c) (counties).

Special Issues and Topics

1. Grandfathered (Non-conforming) Uses

Utah law recognizes that sometimes the law changes after a use is initiated and that to require an immediate compliance with the newly revised ordinance would be unfair.

A non-conforming use is one that:

1. was legal when established (before the current land use ordinance);
2. has been maintained continuously since the time the land use ordinances changed; and
3. because of subsequent zoning changes, does not conform with the land use ordinances that now govern the land.¹

If a use is non-conforming, then it may continue. A non-conforming use might be a house in a commercial zone or a business in a residential zone. It might be animals in a housing area or involve a lot that was originally created legally but is now smaller than allowed in the zone. If a vacant residential lot was legally created in the first place, building permits should be allowed even if the lot could not be created under the current ordinances, as long as the use of the lot does not create a significant threat to health and safety.

Difficulties arise when a grandfathered use that has been in place for some years is challenged. Sometimes it is difficult to prove whether the use was ever legal. For example, in college communities, some houses were divided into apartments, but often the required building permits were not issued to make the changes. Are they legally grandfathered uses? Probably not.

If you have a non-conforming use, be sure to document it, in affidavits signed and notarized, by those who remember its origins while they are still around to make a statement. Some cities have adopted "legalization" processes where those who own non-conforming uses must prove the legality of their use and, for doing so, get a certificate that puts their minds at ease about future enforcement. An undocumented non-conforming use or an originally illegal use that continues is a problem waiting to happen. Don't buy one, sell one, or rest thinking one is safe and secure unless it is well documented and/or legalized.



This power plant in Logan was deemed a non-conforming use even though it was city-owned. In order to expand the use, the city was required to obtain the permission of the planning commission.

Some communities have ordinances indicating that if a non-conforming use is destroyed by fire or casualty, it may not be rebuilt. These ordinances are invalid under state law² and case precedent in a 1976 Utah Supreme Court opinion:

We are of the opinion that even had this barn been prostrate in ashes in complete destruction, its soul, or Phoenix, if you will—a continuing non-conforming use—can rise and live on—unless the barn owner does not rebuild within a reasonable time—as required under the statute.³

There also is a provision in state law allowing a community to adopt an “amortization” process whereby non-conforming uses may be phased out over sufficient time to allow owners to recoup their investment in the use. These are allowed by statute and may likely be upheld in court, though no Utah court has addressed the issue.⁴

The planning commission or other land use authority is often assigned the regulation of non-conforming uses by the legislative body, and can manage their establishment, restoration, extension, alteration, or substitution.⁵

Remember that the owner of a non-conforming use does not have the right to maintain a nuisance or significant threat to health or safety, even if it was once legal.⁶

2. Permits Issued by Mistake

The \$50 word for the dilemma a property owner finds when a permit has been issued to him by mistake is “zoning estoppel.” What that term means is that a property owner who, in good faith, gets a permit that legally should not have been granted and embarks on construction, can later claim relief under this legal doctrine if someone later tries to force him to tear down the

building or stop the use he has commenced.

In order for a property owner to be saved from the consequences of embarking on construction based on a permit or approval that should not have been legally issued, he must establish several key facts:

1. the city or county must have done something or omitted doing something that the property owner could rely on before making a substantial change in position and/or incurring an extensive expense; *and*
2. the government action relied on must be of a clear, definitive and affirmative nature; *and*
3. if the action was an omission, it must have been a negligent or "culpable" omission where the government entity was under a duty to do something and did not (silence or inaction is not sufficient); *and*
4. the landowner had a duty to inquire and confer with the local land use authority on what uses of the property would be permitted and did so.⁷

Thus, the property owner claiming that it is too late to enforce a given land use rule or other ordinance against him must have clean hands and have innocently assumed that his project was permitted and legal because government officials looked at his plans and said it was permitted and legal.

When Can a Permit Issued by Mistake be Revoked?

Case Law — Dayley v. Summit County

A recent case in Summit County illustrates the point.⁸ A property owner bought a 10 acre building lot and, over a few years, prepared to build a large home on the summit of the knoll where the property is located. Before commencing construction, he purchased an additional 10 acres.

Prior to buying the lots, he inquired as to whether or not he could build on the ridgeline as he intended to do. He was told by local authorities that there weren't any rules against that. Before he actually pulled the permits, however, the county passed a ridgeline ordinance that prohibited his locating the home where he had planned it to be. The owner claimed he was unaware of this.

Then he took his building plans and site plan to the building department. They reviewed it and gave him a building permit. Although the



Bruce Dayley's house sat unfinished for a year while the Summit County Board of Adjustment and the Third District Court weighed whether or not the county could revoke his building permit. The court ruled it would be unfair to require demolition and allowed the house to be finished.

plan showed the actual lot dimensions and setbacks, there weren't any contour lines indicating lot slopes. He began construction, and by the time the county stopped work due to neighbors' complaints, had invested about \$250,000 in the framework and foundations.

The Summit County Board of Adjustment heard the matter and decided that the property owner's hands were not clean. They concluded that the property owner must have known about the ridgeline ordinances, and told him to tear down the house.

This case, like many land use cases, came down to the substantial evidence standard we discussed in Chapter 3. There was plenty of evidence the house was under construction, the expenses were significant, and a building permit had been issued. There was no evidence, according to the judge, the property owner was not innocent or the county officials who issued the permits knew they were proceeding in error.

Although difficult to establish, sometimes the legal doctrine of zoning estoppel can be of assistance to property owners who have innocently relied on specific, affirmative acts of government officials. Note that this doctrine is not of any help to those who openly and knowingly violate the rules only to claim later that they should not have to bear the burden of their decision to proceed at their own risk.⁹

3. Covenants, Conditions and Restrictions: Homeowner Associations

The private covenants that attach to the land when subdivision lots are sold would seem to be beyond the scope of land use regulation. In actual fact, however, they are a significant part of the land use process.

Local ordinances usually require covenants, conditions and restrictions (CC&Rs) whenever there is open space to be owned or maintained, and most new home buyers want some assurance

that the amenities of the community will be maintained and enforced. In a condominium development where all the area outside the actual dwelling is common area, the CC&Rs and the homeowners association (HOA) created by the CC&Rs are even more important.

Sometimes local government is accused of getting a little too involved in the developer's drafting of the CC&Rs for a subdivision. Unsubstantiated rumors abound that some rules that could not be legally placed into local ordinance, such as the prohibition of manufactured houses in a neighborhood, are imposed by the city by proxy. Sometimes, it is alleged, subdivisions will not be approved if certain minimum house sizes, aesthetic standards, and other limits on lower value housing are not imposed by the subdivider. No one has taken the issue to court and challenged whether local government sometimes gets a little too much involved in managing these private covenants.



Quiet, peaceful streets with grace and charm are everyone's ideal. Homeowners associations and Covenants, Conditions and Restrictions on suburban lots represent an attempt to reach this ideal.

Homeowners are often naïve about the role of the HOA in their daily lives. For some, HOAs appear to be a great solution to the need to maintain common spaces and regulate appearances. But they certainly have their detractors.

HOAs are not like local government. They do not have to hold open meetings, open records, or give notice of the time and place the board gathers. They can assess fees that are equivalent to taxes. When someone does not pay, they can place a lien on the offender's dwelling and sell it to recover back fees. Usually the HOA can collect attorneys' fees in successful actions against homeowners. The standards to be met can be revised and made harsher without unanimous consent. Homeowners must comply, if the HOA insists, even if disability or age makes it difficult.

As one who has long had some skepticism of whether local government needs to regulate or intrude everywhere it does, I can sometimes be critical of what a city or county does to regulate its citizens. But the worst abuses I have seen in local government pale when compared to the astounding grief that occurs when a small cadre of homeowners with too much time on their hands decides to go after some miscreant who does not conform to the community ideal envisioned by the majority of the board of directors of an HOA.

I am certain that, in most cases, the HOA concept operates well. In many neighborhoods the quality of life suffers because no one will step up to the plate and provide leadership to solve the immediate problems. To serve on a HOA board must be a thankless task in most cases.

If a property owner has a problem with an HOA, however, my recommendation is to move—sooner rather than later. If everyone digs in on a protracted fight, there is no way for an individual homeowner to ever win the battle that results. It is better to

seek out a place where the restrictions are less severe or the community more sympathetic to your frame of mind.

These issues do not involve government-related land use law. They are contract issues or they mimic the kind of relationship that a minority stockholder has in a private corporation. This is not the place you want to be when you need to assert individual rights against a strong-willed majority.

One thing is certain. You need to know what you are getting into. When you buy a home in a subdivision, planned unit development, or condominium that has an HOA, talk to people who are already there about the tone and history of enforcement. Read the CC&Rs. What kind of a majority is needed to change the rules? Are there any limits on what the HOA board can impose in terms of new rules and regulations? How does one participate? Whether you want to be sure the board actively enforces community manners or you wish they would all go away, it is better to know before you purchase a home.

If you are not sure what the CC&Rs for your HOA say, it is easy to find out. They were probably included in all that paperwork you got when you closed the purchase of your home. If you are not sure where all that went, you can easily stop by the county recorder's office and get a copy. A few minutes with your reading glasses—they are always in very fine print—will reveal what the rules are where you live. Once you understand what CC&Rs say, you can figure out what to do about it. If you need good legal advice, seek it early. The issues arising from an HOA can be very expensive and significant, both socially and financially.

¹Utah Code Ann. §10-9a-103(20) (municipalities); Utah Code Ann. §17-27a-103(23) (counties).

²Utah Code Ann. §10-9a-511(3) (municipalities); Utah Code Ann. §17-27a-510(3) (counties).

³*Rock Manor Trust v. State Road Comm'n*, 550 P.2d 205 (Utah 1976).

⁴Utah Code Ann. §10-9a-511(2)(b) (municipalities); Utah Code Ann. §17-27a-510(2)(b) (counties).

⁵Utah Code Ann. §10-9a-511(2)(a) (municipalities); Utah Code Ann. §17-27a-510(2)(a) (counties).

⁶*Xanthos v. Bd. of Adjustment*, 685 P.2d 1032 (Utah 1984).

⁷*Utah County v. Young*, 615 P.2d 1265 (Utah 1980).

⁸*Dayley v. Summit County*, Case No. 010500292, (2002) (Hilder, J.).

⁹See, for example, the case of *Culbertson v. Salt Lake County*, 2001 UT 108, where the Utah Supreme Court indicated to the trial court judge that if warranted he could order the developer involved to remove a building that was built on what was once a county street, since the remaining half of the street was left in violation of the county's own street standards.

Enforcing Local Land Use Ordinances

Zoning Enforcement—When You are in Violation

What if you are accused of violating a zoning ordinance? Enforcement by the municipality can take several forms.

Criminal statute: You are charged with an infraction or misdemeanor and the city or county takes you to court to prove that you are guilty of a crime. If found guilty, you will be fined or, in an extreme case, imprisoned.

Civil statute: You are charged with a civil violation. The remedy is not imprisonment, but a fine will be levied against you.

These approaches are very different. The most aggressive jurisdictions now use the civil statute method.

1. Criminal Procedure

If you are charged with a crime, you get a trial before the local court (usually the justice court). No fines will be assessed until you are found guilty or plead guilty to the infraction or misdemeanor.

You will have a chance to explain your situation to the judge, present witnesses, cross examine those who testify against you and otherwise fully participate in a criminal trial. The judge is

usually one who hears a lot of other types of cases, such as traffic citations and other types of criminal charges.

If a fine is assessed, you will pay the fine and that will end the matter. If you are charged with a zoning offense again, the process starts over.

In criminal matters you are innocent until proven guilty.

2. Civil Procedure

If you are charged civilly, you will usually get a warning notice indicating that you are in violation of the local ordinance. You will typically be given a time frame in which to bring your land into conformance and a warning of the amount of the fine that will be assessed against you.

If you comply, you will usually be left alone. The inspector will come to confirm that the violation was fixed. Sometimes your property will be monitored in order to be sure that it stays in compliance. If you don't challenge the notice, this warning may still constitute a "first offense" even if you were not technically in violation of the ordinance.

A second notice will often bring higher fines. Sometimes a different infraction on the same property will bring more fines even though the problem is not the same as the original violation. It is essential that you read the zoning or nuisance ordinance to understand the nature of the violation, but also that you read the enforcement section to find out how the fines are levied and collected. The procedures used to charge you with second and subsequent offenses is usually explained there as well.

There is always a method for appealing a determination that you are responsible for a civil violation of the zoning or nuisance ordinance. This should be explained in any written notice you receive about the alleged violation.

While there is always an appeal, it is not always convenient or flexible. If you wish to contest an allegation that you have violated an ordinance, you must comply with the appeals procedure, including the sometimes short appeal deadline.

If the notice says you must appeal within 10 days, even if it took three days for the mail to get to you, you must file the appeal before the deadline to be safe. Often some accommodation will be afforded you on an informal basis if your appeal is late for good cause, but do not risk missing the chance to appeal if you wish to contest the matter. File the appeal even if you are planning to work out some remedy for the situation. If you miss the appeal period, you may either have to do whatever the enforcement officer says you must do or pay fines. The local government entity can proceed as if you have admitted a violation if you miss the appeals deadline.

If you do appeal, you will likely be given a hearing before an administrative law judge or other hearing officer appointed by the county or city to hear such appeals. The judge is paid by the municipality, trained by the municipality, and the municipal officials appear before him regularly. They know each other and they don't know you, so you may feel that the deck is not exactly stacked evenly. Nevertheless, this is legal and has been upheld in recent decisions by the Utah Court of Appeals.¹

If you do not agree with the decision of the appeal authority, you may appeal to the district court, but the decision of the first hearing will be upheld if there is any substantial evidence to support it (see Chapter 3). To win at district court, you must prove that the zoning hearing officer at the city made a decision that was completely unsupported by credible evidence.²

Local ordinances can sometimes be extraordinarily harsh and arbitrary. For example, one Utah nuisance ordinance lists 34 actions that can be subject to fines and enforcement. These

include the predictable ones, such as prostitution and drug houses, but also they include leaving trash cans out, allowing standing water, outdated signs, and an extraordinary definition of a "dangerous condition": [Any use of property which] "shall or may endanger the health, safety, life, limb or property, or cause any hurt, harm, *inconvenience, discomfort, damage or injury* to any one or more individuals in the City" (emphasis added).

What is the penalty for maintaining property (or not maintaining it) so that someone in this particular Utah community is inconvenienced or discomforted? One hundred dollars per day for the first week; \$200 per day after the first week. Habitual offenders are charged \$500 per day. If the City cannot locate the responsible person who is to be charged with the offense, it can post a notice on the property. If no appeal is filed within 10 days of that posting, no appeal can ever be filed and the fines *cannot be waived*. Sounds pretty harsh to me.

If an appeal is filed, the matter comes before a hearing officer, which is the city manager or his designee. If the property owner wishes to appeal, he must demonstrate by a "*preponderance of the evidence*" that any citation given him is not valid before he even gets a hearing. If he loses the appeal and takes the matter to the district court, the court must uphold the city manager's decision if there is *any* substantial evidence to support it. Generally, the testimony of the zoning enforcement officer can be considered as substantial evidence.³

In addition to the fines, some communities assign other costs and fees such as administrative fees, inspection fees, abatement costs (including treble damages if the city determines that another abatement is necessary within a year), and collection costs. In some cities, if you wish to appeal the hearing decision to district court, you must pay to have the recording from the hearing transcribed and the documents involved copied and delivered to the court.

Bottom line: you can't win this game. In my eight years as the state ombudsman for property rights, I have not come up with any answer to the apparent futility of formally challenging a civil zoning complaint against you even when it seems frivolous. You may be correct and the procedure may violate due process, but the cost and hassle of a full-blown legal challenge is rarely worth it.

In one case where my office was involved, a woman was charged with having too many Mustang cars in her front yard. While those of my generation may find it hard to understand how there could ever be too many Mustangs (or Corvettes), the city considered them abandoned vehicles and started the fines when she did not move the cars 10 days after the first notice hit her front door.

She finally moved them, but during the inspection for compliance, the officer noticed that she had a kitchen dinette set on her back porch, some weeds along her fence line, and that a 25-year-old pine tree in the front yard might obscure the view of drivers attempting to make a turn in the street around her corner lot.

Even though the tree was several feet back from her fence line and the roads that met at her corner are both posted at 25 mph, she was cited for interfering with safe driving. They doubled the fines after the second visit to \$50 per day for each infraction. She took in the dinette set and got out her weedeater, but did not wish to remove the tree.

She was told she could avoid the fines by trimming all the branches from the tree up to nine or 10 feet, which she thought would look very strange. The tree was only about 30 feet tall.

She went to the hearings and lost twice. By this time the tree was about to cost her thousands, but she would not give in. Her home was not generally unkempt; a number of her neighbors had trees

that were just as objectionable and some had solid fences and hedges that were much more obstructive to traffic sight lines on corners much busier than hers.

Finally it occurred to her to suggest to the city that her tree was a non-conforming, grandfathered use since the sight line ordinance was germinated after the tree. My involvement may have helped a little, and it appeared that the city let the matter die. At least it appeared that a truce had been reached and the matter was over, though the issue of the fines was not resolved.



This tree was the subject of a zoning enforcement action in 1999. A city enforcement officer cited the owner because he claimed the tree interfered with traffic visibility from a stop sign located where this photo was taken. The property owner refused to remove it or trim all the branches nine feet from the ground, and appealed the citation. The city eventually let the matter drop, but a judgment was placed against the owner of the house in the civil enforcement process.

A few months later she went to refinance her house. The lender said a judgment against her had been recorded by the city. The lender would not give her a new loan until the city was paid. The city waved the fines but legally did not have to.

If you feel a complaint against you is unjust, appeal it, but comply with the instruction of the enforcement officer. Perhaps allow some part of the fine to accrue so you have something to appeal and then comply so that the fines do not continue. In the meantime, appeal the first fine and see what happens at the hearing. If you win, you were not in violation. Get a refund and continue your original practice. If you lose, at least you did not have to pay huge fines.

I realize that you may not have an easy fix to cure the zoning violation. Attempt to work with the enforcement staff. They will usually attempt to come to some accommodation, but they are not required to do so. Whatever happens, do not ignore the violation. The local ordinances sometimes give the enforcers the right to lien your property with the fines and foreclose on it.

You may wish to take a political approach rather than a legal one. Call your city council person or county commissioner and review the details with him. He may be able to help more than a lawyer or judge can.

The difficulty with civil zoning enforcement is that if you enforce all the fine print in the ordinances, more than half the properties in the municipality (maybe even some *owned* by the municipality) have civil land use violations. The law is meant to be very harsh so that the bad guys are reigned in efficiently. In order to do that the enforcement officers and administrative law judges are given very broad discretion in what they chose to pursue and what they do not. This is not much different than the power we give policemen and health officials, but the power is granted to them nonetheless. That's the reality.

Citizen Zoning Enforcement: When Your Neighbor (or the Municipality Itself) is in Violation

Usually the local municipality or county will have a method in place that you can use to make complaints about zoning violations. Sometimes the complainant is protected in an effort to keep his name secret, and the compliance officer is the one who actually makes the complaint. If that happens, you may be blessed by the city or county doing all the heavy lifting to get your neighbor to comply with the rules.

There may be some facts about a given situation that allows your neighbor to avoid compliance. Perhaps the use is “grandfathered” or, to use the legal phrase “non-conforming.” Perhaps a building or use was erected in violation of the ordinance, but innocently. If it would be grossly unfair to make the property owner remove the offending structure or use after making a large investment, the zoning violation cannot be enforced. This is called “zoning estoppel.” Both of these concepts are discussed in detail in Chapter 11.

But if the violation is clear and the municipality chooses to enforce its rules, you are probably going to see some changes in the neighborhood. Life will be better. But what if the city is a partner in the violation (as when a subdivision approval is given illegally) or simply does not wish to enforce the relevant ordinances?

In Utah, there is a special provision in the state statute that allows any property owner in the jurisdiction to enforce the zoning ordinance if they are uniquely and adversely affected by a violation.⁴

When Can Citizens Enforce the Ordinances?

Case Law — Citizens v. Springville City

Just a few years ago, a developer in Springville got approval from the planning commission and city council to construct a planned unit development. Some neighbors did not want the land to become a housing tract, so they took the matter to court.

The neighbors claimed the city had not followed its own ordinances in approving the development. Among other seemingly minor concerns, they noted the subdivision ordinance required that if the land involved had a canal running across it, the plat must include a signature from the canal company that the ditch is accurately drawn on the plat.

Although this would seem to be a minor issue (in fact, the city argued as much), the Utah Supreme Court reminded the city that it (the city) had written the ordinances and it (the city) chose the word “shall” in the reference to the canal company’s approval, so it (the city) was bound by the rules just like everyone else.

The court said:

Municipal zoning authorities are bound by the terms and standards of applicable zoning ordinances and are not at liberty to make land use decisions in derogation thereof.⁵ The irony of the City’s position on appeal is readily apparent: the City contends that it need only “substantially comply” with ordinances that it has legislatively deemed to be mandatory. Stated simply, the City cannot “change the rules halfway through the game.”⁶ The City was not entitled to disregard its mandatory ordinances.⁷

So if neighbors wish to challenge land use decisions that do not comply specifically with every mandatory provision of the local ordinances, they may? Yes, but—it depends on who is making the challenge. The Springville citizens’ case goes on to clarify who can actually succeed in a challenge to local land use decisions:

The City's failure to pass the legality requirement . . . however, does not automatically entitle plaintiffs (the neighbors) to the relief they requested (nullification of the subdivision approval). Rather, plaintiffs must establish that they were prejudiced by the City's noncompliance with its ordinances, or in other words, how, if at all, the City's decision would have been different and what relief, if any, they are entitled to as a result.⁸

If a property owner is going to challenge a local land use decision, he does not even get to first base unless he can show that some right he enjoys on his property has been significantly injured or otherwise "adversely affected." This provision is imposed by the courts and statutes because there could be so much frivolous litigation brought by those who just want to oppose change. Those who wish to enforce the ordinances are, therefore, required to show what specific harm the conduct of the governmental entity imposes on them that is over and above the general impact an illegal decision has on the community at large.

But generally speaking, citizen/property owners who have a legitimate concern and the wherewithal to mount a challenge have the tools necessary in Utah to succeed if they can point out errors that substantially affect the use and value of their property. If that describes you, then you may have a remedy to your concern even if the municipality is part of the problem.

¹While not precisely decided in response to a facial attack on the administrative code enforcement process, a recent decision of the Utah Court of Appeals includes an affirmation of the state law allowing administrative code enforcement. "The Utah Legislature has granted general welfare powers to cities which include the power to pass city ordinances. See Utah Code Ann. § 10-8-84 (1999). Also included in this grant of authority is a city's power to use administrative hearing procedures to enforce local ordinances. See, e.g., *Tolman v. Salt Lake County Attorney*, 818 P.2d 23, 28 & n.6 (stating "procedural rules may appear in statutes, ordinances, or even in an administrative body's own rules")." *West Valley City v. Roberts*, 1999 UT App 358 ¶9.

²Utah Code Ann. §10-9a-801(3) (c) (municipalities); Utah Code Ann. §17-27a-801(3) (c) (counties).

³Id.

⁴Utah Code Ann. §10-9a-802 (counties) §17-27a-802 (municipalities). Property owners can enforce the ordinance, sue to stop violations or possible future violations, have violating structures removed, or otherwise step into the shoes of the municipality or county and enforce its ordinances for it.

⁵Quoting *Thurston v. Cache County*, 626 P.2d 440, 444 (Utah 1981).

⁶Quoting *Brendle v. Draper*, 937 P.2d 1044, 1048 (Utah App. 1997).

⁷*Springville Citizens v. City of Springville*, 1999 UT 25, ¶30, 979 P.2d 322 (Utah 1999).

⁸Id. ¶31.

Appealing Land Use Decisions

There are two facets to the appeals issue: when *can* you appeal and when *must* you appeal.

When *can* you appeal?

As with just about every other aspect of American life, one does not have to settle for the first answer given in a land use issue. Dispute resolution is, more often than not, what the land use procedures are all about.

If you disagree with a decision, there is invariably a method to appeal it from the first decision-maker to some other entity. In order to make that appeal yourself, you need to do some research about the process and then follow the specific procedures.

Some land use decisions are not even meant to be final (such as when the planning commission decides whether to recommend approval of a subdivision application that comes before them). In such cases there is another review set up automatically and you will have an additional chance to influence the decision at the second level of review, usually before the local council or county commission.

Again, there is no substitute for reading the local ordinance.

There may be many variations on the theme when it comes to appeals, but there are a few general guidelines that are set by state statute or court precedent.

Standing. This is a legal term of art that means the person asking the question is entitled to the answer. If the law says you have no legal interest in the issue, then you have no right to demand the issue be heard at all, much less that it be resolved one way or the other.

The applicant typically has standing to challenge a denial of his application. The ordinance may allow neighbors or others the right to bring a challenge or make an appeal whether the application is approved or denied. If your constitutional rights are affected, you have standing to protect them. Check the local ordinance and ask the staff or local government attorney or your own lawyer to be sure you have standing before you initiate an appeal.

When *must* you appeal?

If you *can* make an appeal, there is always a deadline by which you must file an appeal or lose the right to keep the legal issues alive. You will probably be left out in the cold with nothing to argue about if you do not file a timely appeal.

It is essential that you check on local appeals procedures and deadlines.

Exhaustion. There is invariably a local procedure that could be used to resolve land use issues, and the person challenging local decisions must file an appeal using such procedures before the applicable deadline passes. According to statute, there is no cause of action in district court or in arbitration until after the "exhaustion of local administrative remedies." If you miss the deadline, you did not exhaust and the issue is closed even

though your appeal may have been successful if the appeals process had been used.¹

The word “exhaustion” may be well chosen, because if there is a means of appeal, even if it appears to be futile and a waste of time, you have to use it. According to the Utah Supreme Court, allegations of unfairness in the day-to-day relationship between property owners and city staff do not support a claim that the entire administrative appeals process is inoperative or unavailable.²

Exception: Violations of federal statute such as the Fair Housing Act or the statute that protects religious organizations from local regulation may allow a direct appeal to federal court without local appeals. Lawsuits involving local government based in administration of the community ordinances and state statutes must exhaust local remedies, but those pursuing federal statutory relief need not.

This is an opportunity that many citizens miss. Once a property owner complained to me that the local health department refused to allow him to build a home on his residential lot because his land was within the “source protection zone” of a city’s water supply and he would need a septic tank. I explained that a refusal to allow any building at all could be an unconstitutional act if he was denied all use of his property. He indicated that when he went to the counter of the health department, they refused to allow him to make application for building approval and told him if he did, he would be turned down. Discouraged, he left the matter there.

I asked him whether his neighbors were allowed to build and he said they were treated the same way. They all chose not to press the issue. At least one of them was a lawyer.

As ombudsman, I convened a mediation session—or more accurately described—an information sharing meeting. Three property owners came, as well as officials of the state water quality division, county attorney's office, health department, and county building department. The property owners told their stories and all listened. When they were finished, I turned to the health officials present and they agreed with the details of the story. They had refused to process any applications.

I then turned to the county attorney present. "Could the health officials do that?" I asked. "No," he said. "They legally had to at least take the application and deny it. According to the code, the property owner would then have an opportunity to appeal the denial to the County Board of Health."

"Has anyone done that?" I asked. "No" was the response. No property owner, in the face of a total loss of all use of his property, had ever chosen to force the matter with an appeal to the Board of Health. The county attorney wondered aloud if the board would even know what to do if such an appeal came to them.

"Did you know about that right to appeal?" I asked the health officials present. "No" they said. "We knew our division director would never allow building permits and that any effort to get past his policy would be futile."

"Well, then," I said, "obviously if the fellows at the counter have refused the process, then it would have been a waste of time. The property owner can now go to court or come to me as ombudsman since any local appeal is futile."

"Not so," said the attorney. "We will vigorously oppose any such effort to go to court or arbitration because the person has not exhausted the local administrative remedies."

“You mean to tell me then that the property owner, who has no knowledge of such matters, is supposed to read the fine print in the codes, figure out that an appeals procedure exists, teach the local officials about it, and then demand that appeal before the property owner can go to court or expect the ombudsman to arrange arbitration of the issue?” I asked.

“Exactly.”

What is even more astounding is that he is absolutely correct. As ombudsman, I could not take such an agency to arbitration until the property owners had exhausted their local appeals.

Levels of Appeal

Appeals are thus divided into two levels. First, internal appeals within the local government’s land use procedures, and second, beyond the county or municipality to the court or the property rights ombudsman.

For internal appeals, if a landowner or citizen wishes to have a land use issue heard in arbitration or at court, one of the following appeals procedures must be used first:

1. if the matter involves a challenge to the way the zoning ordinance is being applied or interpreted, appeal to a land use appeals authority asking whether the ordinance is being correctly applied (see page 174); or
2. if the matter involves the building, fire, health, landmarks, impact fees, or other special codes of ordinances, use the appeals procedures in those codes or ordinances (see page 181); or
3. if the local action may involve the violation of protected property rights, use the local takings appeals procedure, (see page 183); or

4. follow appeals procedures as provided in local ordinances (see page 185).

For appeals beyond the local government, once the local process has been “exhausted,” there are two choices to resolve the matter beyond the local jurisdiction:

1. request arbitration and mediation through the office of the Property Rights Ombudsman; and/or
2. file a Petition for Review to the local state district court. (There is no appeal to federal court unless a federal statute is involved.)

1. Appeals to a Local Land Use Appeals Authority Asking for an Interpretation of the Land Use Ordinance

Nature of the decision

Every time the land use ordinance is applied, someone has to decide what it means and how it should control the proposed application or use. It would be impossible for the local council or commission to anticipate every issue that may come up or to even attempt to regulate every change that people may wish to make on their properties. If there is a disagreement about what the language of the zoning ordinance means or how it should be applied, state statute mandates that a local government provide an appeals process to resolve that question.³

This statutory right to appeal any decision applying the ordinance to a land use appeal authority is a very powerful, but seldom used, tool for citizens and property owners.

When and where must the appeal be filed?

There may or may not be a deadline for an appeal in the local ordinances or rules—check and read the ordinances to be sure.

The process of filing the appeal is probably provided for in the procedures adopted by local ordinance. There is often a fee involved. Don't miss the deadline. It will be fatal to your cause if you do. A recent case involving some neighbors who protested the building of a house in the foothills of Draper makes the point vividly.⁴ The owners of a hillside lot sought a permit to build a home on a slope that exceeded 30 percent, a thing the ordinance supposedly did not allow. The neighbors protested. The planning commission and city council reviewed the matter twice.

The first time, the planning commission denied the right to build, but at a rehearing it reversed itself and allowed the home builder to go ahead. There was a requirement in the ordinances that any appeal from such a decision had to be filed within 14 days. No exceptions were allowed.

Fourteen days went by and the property owner poured his foundation. After the neighbors raised vociferous objections, the city council got involved. They held a hearing and suspended the permits, despite the fact that the appeals deadline had passed.

On appeal to the Utah Court of Appeals, the property owner prevailed. The court said that neither the neighbors nor the city's own legislative body could ignore the appeals deadline in the ordinance. Even the city council could not overturn the planning commission's approval if 14 days passed without a written appeal. If there is no time provided in local ordinance, you only have 10 days.

Don't miss the deadline to file an appeal. If there is no time provided in local ordinances, you have only 10 days.

Who makes the decision?

Local ordinances must state who is to hear appeals and interpret ordinances and rules. An appeal authority may be a board of

adjustment, an appeals board, or a single hearing officer. The following guidelines would apply to any appeal no matter which body is hearing the appeal.

What notice is required?

An appeals body must post a notice 24 hours in advance as required by the Open and Public Meetings Act.⁵ It also must comply with any notice requirements in the local ordinance. A single hearing officer is not subject to the act and need not hear an appeal in public unless local ordinance requires it.

What public input is required?

No public hearing is required by state statute. Local ordinance or practice usually provides for public comment on all land use issues before bodies making decisions in this arena. Check the local ordinance and board of adjustment procedures.

What are the issues?

Simply put, the issue is whether the interpretation of the ordinance that is being appealed was "correct," or the ordinance was otherwise appropriately applied. There may be some deference given to the staffer or local official that made the decision unless some other standard of deference is provided for in local ordinance. Otherwise, the appeals authority must simply review the plain language of the ordinance to determine what it means and how it should be applied and support that conclusion by substantial evidence on the record.⁶

This is important. The issue before the authority is not whether the official that previously interpreted the ordinance had a reasonable basis for coming to said conclusion, but the body hearing the appeal comes to the same conclusion based on its independent review of all the information available to it.⁷

In making the determination of what the ordinance means, the body hearing the appeal should follow the guidelines in recent Utah case law:

Because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner.⁸

Thus, where there is a question about the intent of the language, the issue should be resolved in favor of the use of property and against an interpretation that would impose more regulation on land.

This is important because normally if the application submitted meets the standards of the ordinance in place at the time, it should be approved. Unless there are compelling, countervailing public interests or if changes in the law are pending before the local leadership, then the community is bound by the laws that are in place and can only enforce the codes that apply.⁹

How is the decision appealed?

A decision by an appeal authority may be appealed directly to the district court or, in a case where an unconstitutional taking of property is alleged, to Utah's property rights ombudsman.¹⁰

Tips for participants

This opportunity to have an appeal authority review the interpretation of the ordinance and how it is applied is very powerful and seldom used by those who disagree with local regulation. There is often a knee-jerk reaction by property owners who hear that a regulation will limit the use they wish to make of their

property—they think they need a variance.

But the fact is that you do not need a variance if the ordinance does not actually restrict you in the first place. As discussed in Chapter 6, pages 94 to 106, applicants who want variances must prove they are entitled to them under strict standards. Those who want to appeal the meaning of the ordinance have no legal burden to meet—they just ask the question and expect the appeals authority to provide an answer. Of course, as a practical matter, if you want the decision to be in your favor, you need to provide strong arguments in support of your position. Sometimes that means a good speech and a few well-chosen definitions from *Webster's Dictionary* are all the evidence you need to show why your interpretation of the ordinance is correct, and why it was inappropriately applied in your situation.

How Do We Interpret a Zoning Ordinance ?

Case Law — Brown v. Sandy City Board of Adjustment

A case in point may be helpful. In 1998, the Utah Court of Appeals considered a case involving residential uses in Sandy. Steve Brown and others with the same idea decided to rent out single family homes to skiers and other visitors on a nightly basis as if they were guest cottages. After receiving objections from neighbors, the city attempted to stop the practice and Brown challenged them to show him wherein the zoning code prohibited overnight rentals.

The city cited provisions of the ordinance stated that the single family zones were designed to create "a residential environment . . . that is characterized by moderate densities . . . a minimum of vehicular traffic and quiet residential neighborhoods favorable for family life."¹¹



The black arrow indicates the location of a house owned by Steve Brown. The Utah Court of Appeals held that Brown's use of the house for overnight rentals did not violate the Sandy ordinances. Photograph courtesy of Sandy City.

(Please accept my apologies in advance for the legalized obscurity of this next quote, but you need to see it in all its glory to understand why the court dismissed it.)

The city also referred to a provision of the ordinance that said, "No building or part thereof or other structure shall be erected, altered, added to or enlarged, nor shall any land, building, structure, or premises be used, designated, or intended to be used for any purpose or in any manner other than is included among the uses hereinafter listed as permitted or conditional uses in the district in which such building, land, or premises are located."¹²

In other words, if we don't specifically allow it, you can't do it.

The court had no problem with this case. Citing the evidence that the code limited occupancy to "families" and Brown was, indeed, renting to "families," the court held in his favor. The Sandy ordinance did not limit the rental of properties to a certain minimum period of time and the city could not read in to the ordinance what the ordinance clearly did not say. Although the city could have passed such an ordinance, it had not. Lacking an ordinance, the zoning administrator could not invent language that did not exist. This is not to say that the court concluded that a community must list every use that is prohibited in each zone in order to avoid a glue factory in the R-1 zone, but the point was clearly made. Local leaders may impose a wide range of restrictions by regulation, but they can't enforce a law they have not adopted.



Above is the home that Steve Brown rented overnight to skiers, giving rise to a Utah appellate court decision that restated the rule that zoning ordinances are to be interpreted narrowly and in favor of the use of the property.

Does Every Word in an Ordinance Count ?

Case Law — Caster v. West Valley City

West Valley City was involved in another case that vividly illustrates how strictly the courts read the ordinances.¹³ A property owner named Caster had a junkyard he called “Back Yard Auto” near the Rocky Mountain Raceway on 2100 South. The junkyard could only exist as a grandfathered use since it could not be legally created under the current ordinance.

A grandfathered use must be continued without interruption by the property owner in order to be legal. The city claimed that Caster had abandoned the use because he had not sold or disassembled junk cars for more than a year. The city wanted all junkyard activity to stop and the old cars hauled away.

West Valley won at trial, but lost at the Court of Appeals. The record showed there had been continuous use of the property to store abandoned autos for many years. The city ordinance defined the junkyard use as “the use of any lot . . . for the sale, storage, keeping, or disassembly of junk or discarded or salvaged material.”



Back Yard Auto's non-conforming use of property was the subject of Caster v. West Valley City.

Since the word “or” was used instead of the word “and,” reasoned the appellate court, doing any of the listed activities preserved the right to all of them. Since Caster had “stored” and “kept” old cars, he could resume the “sale” or “disassembly” at any time. The ordinance was interpreted as it read—and the junkyard use was preserved since the ordinance provided that any one of the listed uses constituted a junkyard use.

Read the ordinance.

Bottom line—read the ordinance. If it is not being interpreted correctly and the result goes against your interests, an appeal can resolve the matter in your favor.

2. Building, Fire, Landmark, Impact Fee and Health Code Appeals

Nature of the decision

A specific application or interpretation of a local code or specialized ordinance can be appealed if the person objecting believes it is being applied inappropriately. Each code typically makes a provision for appeals from decisions interpreting or applying the code.

When and where must the appeal be filed?

See the applicable code provisions. Perhaps no one has even checked to find out what appeals may be possible. Be patient as the local officials figure out how to respond to your request for appeal. There is often no fee for an appeal.

Who makes the decision?

It depends on what the code says. The decision of a building inspec-

tor may be appealed to the chief building official. The chief building official's decision may be appealed to the local building inspection board of appeals or to the state building board, for example.

What notices are required?

Sometimes none is required. If the entity making the decision is a body defined as being subject to the Open and Public Meetings Act (most governmental bodies are), then the minimal 24-hour notice must be provided.

What public input is required?

There is none required unless the board or official making the decision invites or allows it.

What are the issues?

The main issue is whether the official whose decision is appealed made a correct application of the code or rule. As with zoning appeals, unless local ordinance provides otherwise, no deference need be allowed the local official. The question is whether or not the decision is "correct," not whether or not the decision was supported by some good reason. See the discussion on pages 190-191.

How is the decision appealed?

It depends on the code or ordinance involved. If no means of appeal is provided, then a final decision, made after exhausting local administrative remedies, can be appealed to the district court. Arbitration or mediation also can be requested through the property rights ombudsman.

Be certain the appeal is made in a timely manner. If you miss the deadline, your appeal cannot be heard.

Tips for participants

Don't be shy. If you do not agree with a local decision involving the codes and rules, find out how to appeal. Sometimes you will get blank looks over the counter because no one has asked how to appeal before.

Prepare your information and make the appeal. The decision you receive must be supported by substantial evidence and you are entitled to a straight answer.

3. Takings Appeals Procedures**Nature of the decision**

Every local government entity, including towns, cities, counties, special districts, and others, must have an ordinance that allows for a local appeal by a property owner who feels that a decision made by the city or county has violated his constitutional property rights.¹⁴

The appeal is guaranteed whether the issue involves a land use issue or not. Any "taking" question may be appealed.

Local procedures vary, so there is no substitute for reading the ordinance.

When and where must the appeal be filed?

See the local ordinance. There is often not a fee, although one could be imposed by the local ordinance.

Who makes the decision?

It depends on the takings appeals ordinance. Usually it is the council or county commission that hears the appeal. Sometimes

there is a separate body appointed, or the board of adjustment hears the matter.

What notices are required?

Only the minimal notice provided for in the Open and Public Meetings Act is required.

What public input is required?

None is required, unless the local ordinance provides for public input. No takings appeals ordinance I have seen provides for public notice or input. The body making the decision would usually allow public comment in the public meeting held to resolve the issue, if the public showed up to comment, however.

What are the issues?

Simply stated, the question is whether a court would find the local decision violates protected property rights. See the part of Chapter 14 that deals with pitfalls related to private property rights on pages 208-220.

How is the decision appealed?

A takings claim can be brought into district court or a request for arbitration or mediation can be filed with the private property ombudsman.

Tips for participants

I recommend takings appeal process if anyone asks me for my opinion. There are some local ordinances, however, that require a property owner to make extensive, intrusive disclosures of his property value, income from rentals, appraisals, purchase price, offers to sell or buy, etc., that the property owner may not wish to reveal. I believe these requirements to be inappropriate in many

cases, but some ordinances say they must be made in order to pursue an appeal. The process is optional, and the state statute says that you do not need to use the local takings appeals process before filing a complaint in district court or coming to the ombudsman for further action. If the procedures in local ordinance are unfairly intrusive, don't use them.¹⁵ Feel free to contact the property rights ombudsman for help with local takings appeals.

4. Alternative Dispute Resolution: Mediation, Arbitration, and the Ombudsman

Utah is unique because we have a provision in state law that provides that any property owner who wishes to mediate or arbitrate some land use disputes may ask the property rights ombudsman to arrange alternative dispute resolution. This avoids court action because the ombudsman can "toll" the deadline before which legal action must be filed.¹⁶ Your 30-day deadline is thus extended until the process of dispute resolution is complete or the ombudsman decides not to proceed.

An "ombudsman" or "ombuds" is someone whose salary is paid by government or business, but whose job it is to advocate for the citizens or constituents of the employer. Utah's property ombudsman is charged to:

1. advise property owners and government entities about property rights;
2. provide information through seminars and publications about property rights; and
3. help resolve disputes fairly, in accordance with existing law, and without expensive and time-consuming legal action.¹⁷

There are several options available to local government entities, citizens, and property owners to resolve disputes:

1. negotiation—when the parties attempt to work things out between themselves;
2. conciliation—when either party contacts an outside person such as the ombudsman for help. The ombudsman or other neutral may contact the other parties and attempt “shuttle diplomacy” to resolve matters. There is no face-to-face meeting;
3. mediation—All the parties meet together with a neutral third party and attempt to resolve matters with the third party acting as a facilitator and sounding board for ideas. The mediator may then meet separately with each party in a “caucus” and attempt to reach a compromise solution to which all can agree. If all do not agree, there is no mediated solution. The mediator does not impose a solution. She is just there to help grease the skids for resolution. If both parties do not agree to settle the matter, it remains unresolved;
4. ombuds—An ombuds is charged with investigating complaints and recommending solutions. An ombuds does express an opinion if appropriate. If his employer has made an error in a matter involving a citizen or consumer, he advises his employer of that error and recommends corrective action. An ombuds also can act as a gatekeeper in dispute resolution processes, attempting to solve problems at whatever level is the simplest, easiest, and least frustrating to those involved; and/or
5. arbitration—Unlike mediation, arbitration involves a neutral third party who does express an opinion on the matter before him. If the parties have chosen binding arbitration, the decision by the arbitrator resolves the issues.

Arbitration can be advisory, non-binding, or binding unless appealed. An arbitration hearing can be like a court almost, though it need not be so formal. It can be very flexible and adjust to meet the needs of the parties and the facts of a case. The property rights ombudsman can arrange arbitration at the request of a property owner in certain cases. If the property owner requests arbitration and the ombudsman deems it appropriate, then the government entity must participate. The result of an arbitration through the ombudsman can be appealed to the district court within 30 days. If it is not, the resulting arbitration award is binding on the parties. If it is appealed, all legal rights remain, including the right to trial by jury.

Tips for participants

As the first Utah Property Rights Ombudsman, I have assisted more than 4,000 property owners, professionals, and government officials in eight years. As a general rule, I have found that earlier is better in terms of when outside information is helpful and when attempts should be made to head off looming disputes. The more information that all involved have available to them and the earlier the parties can consider options, the less likely it is that someone will dig in to a hard position that makes the process of dispute resolution harder.

If you have questions that I can assist with as ombudsman, please feel free to call early. Most of the time, all I can do is give a perspective and outline some options, sometimes acting as a "coach" for the parties as they work through the local exhaustion of remedies process. I do not go to planning commission meetings and pretend to be some important guy from the state. But if anyone involved wants to bounce some ideas off me or ask about procedures in general, I am happy to help. Call the numbers found at the end of this book and I will assist as much as I can.

There is only one of me, and I cover the entire state. At this writing I do not have any full-time support staff and deal through voice mail and e-mail more than any other medium. I appreciate your patience with the limitations placed on me, my budget, and my time constraints.

The goal of the dispute resolution process through the property rights ombudsman is not to ignore the law and merits of the matter. First of all, the process is designed to arrive at a solution that both parties agree is better than the other options available. If that consensus is not possible, the process should result in the same conclusion that a court would reach, but without all the delay, cost, and hassle of litigation.

5. Legal Action—When It's Necessary

As a last resort, once the local appeals are exhausted and the ombudsman either has no jurisdiction over the matter or you have decided not to attempt to involve that office, you are at the courthouse doors.

Rule no. 1: Do not miss the deadline to appeal. You must file an appeal within 30 days of the date that a land use decision is made or you will probably lose your chance forever.¹⁸ The statute says that a land use decision is rendered on the date that a written decision is issued, or otherwise as provided in local ordinance.¹⁹

Rule no. 2: Get a lawyer who understands land use law in Utah. Not all do. While your family attorney may be helpful in general negotiations, working out the development agreement, or evaluating the options, there is no substitute for someone who understands the principles outlined in this book when it comes time to file lawsuits.

An attorney who is not acquainted with the process can make some simple errors in the papers she files that will make your case DOA at the courtroom. It is common for an attorney to miss the chance to lay the proper record before the local appeals processes only to find after a long legal battle that the Court of Appeals must dismiss it because essential elements of the complaint are missing.

The attorney must be sure that all local appeals have been attempted and that he is working on the right theory—whether for a legislative issue or an administrative matter.

When you do go to court, make sure you know what you want and what you can expect to gain through the process. The plaintiffs in the board of adjustment case we discussed in Chapter 6 must have been pleased with their victory after claiming that the proper procedures were not followed in granting the variance. They were no doubt nonplussed, however, when the board simply heard the matter again, this time following the right procedures, and granted the variance correctly. The same result remained after all that hassle and expense.

The remedy may be invalidation—where the decision made is struck down. Often this means the local government entity simply makes the decision again, but this time follows procedure correctly. Sometimes the result can change, but there is not always a guarantee that will happen.

The person bringing the lawsuit may seek an injunction where the effect of a decision is halted and everyone takes a time out while other issues are litigated. This can obviously be a very effective tool. One advantage is that it is a quick remedy and brings things to a head sooner. If implementation of a local decision is held up, then pressures build that would help promote a

resolution earlier rather than later. An injunction is not always available, and sometimes a lot of time and energy is spent with no results.

Rarely is the remedy “mandamus” or a court order directing someone to do something. It is not common, in light of the extraordinary deference that courts grant to local government entities, that a city or county is ordered to do anything. It does happen, however. The “builder’s remedy” of having a building permit revived and placed back into force, or the subdivision approved by court order, can sometimes be the fairest result. While this is often the prime hope of the plaintiff in a lawsuit, it is rarely the result, so don’t go into the courtroom with unrealistic expectations.

The result of legal action may be damages, but it rarely is. Usually damages are only paid as “just compensation” in a “takings” claim to assert private property rights. Sometimes the plaintiff in a lawsuit does not want compensation—they want the project stopped. Unfortunately for them, if an unconstitutional taking of private property is proven, the result sometimes is that compensation must be paid, not that the decision is rescinded.

As a practical matter, of course, most government entities do not like to pay damages. Most takings cases result in rescission of decisions and not the payment of damages.

One of the obvious goals of litigation is to get the other party into a position where they will settle a case. This certainly happens with government actions, but it is less likely. Remember that the defendant in a land use case is often a city or county with more resources than citizens and property owners have. It also is difficult to settle a case when that decision must be made by a disparate group like the council or commission rather than by an

individual. Sometimes legal battles are like real ones—such as the Civil War, which was expected to last a few weeks and went on for five years, leaving incalculable damage to the nation.

It is certainly wise to consider all options before litigation. And after a land use lawsuit is commenced by the filing of a Petition for Review with the district court, it is still a good idea to pursue every option to compromise and settle the matter, as long as settlement results in a fair resolution.

That said, however, there are certainly cases that must be heard and must go to the appellate courts if we are to clarify the law. Sometimes there are issues of such novelty and importance that the courts must take a position for the good of all. There is no question that there are times when no other options exist, and both government entities, property owners, citizens, and planners need answers that only the courts can give.

¹*Brendle v. Draper*, 937 P.2d 1044 (Utah App. 1997).

²*Patterson v. American Fork*, 2003 UT 7, ¶20, 67 P. 3d 466 (Utah 2003).

³Utah Code Ann. §10-9a-701(1)(b) (municipalities); Utah Code Ann. §17-27a-701(1)(b) (counties).

⁴*Brendle*, *Id.*

⁵Utah Code Ann. §52-4-2(3)(a) defines a public body.

⁶*Brown v. Sandy City Bd. of Adjustment*, 957 P. 2d 207 (Utah App. 1998); *Carrier v. Salt Lake County*, 2004 UT 98 at ¶25-28.

⁷*Id.*

⁸*Id.*

⁹Utah Code Ann. §10-9a-509 (municipalities); Utah Code Ann. §17-27a-508 (counties).

¹⁰Utah Code Ann. §10-9a-801(2)(b) (municipalities); Utah Code Ann. §17-27a-801(2)(b) (counties).

¹¹*Sandy City, UT, Development Code*, cited by the Utah Court of Appeals as §15-7-5(b)(2) and §15-7-3(b)(2), (1996).

¹²*Id.* §15-6-2.

¹³*Caster v. West Valley City*, 2001 UT App. 212, 29 P. 3d 22 (Utah App. 2001).

¹⁴Utah Code Ann. §63-90a-4.

¹⁵Utah Code Ann. §63-90a-4(2)(c).

¹⁶Utah Code Ann. §10-9a-801 (municipalities); Utah Code Ann. §17-27a-801 (counties).

¹⁷Utah Code Ann. §63-34-13(1).

¹⁸Utah Code Ann. §10-9a-801(2) (municipalities); Utah Code Ann. §17-27a-801(2) (counties).

¹⁹Utah Code Ann. §10-9a-708 (municipalities); Utah Code Ann. §17-27a-708 (counties).

Mounting a Legal Challenge

When Local Land Use Decisions are Illegal

We have covered a lot of ground about land use decisions and pointed out how local decisions are made.

There are a number of issues, however, that apply to almost all land use decisions and which provide grounds for someone who disagrees to make a legal challenge. They include constitutional claims and other legal precedents established by courts or statutes that nullify or frustrate local decision-making if the participants are ignorant of the limits of local authority and discretion.

A number of these issues are discussed here, but only as an overview. Lawyers and judges have considered cases in this arena for a hundred years. By now there is a lot more detail to the process than could be covered in a hundred books the size of this one.

As an introduction, it may be worth saying that there is little hope of gaining much by moving from the local, county, or municipal land use process to the courts. If the system seemed abrasive and aggravating before, mounting a lawsuit will make you look back on those hearings before the planning commission with nostalgia.

Since the normal, local approval process is affected by how cases are tried if they go to court, there may be some merit in reviewing the major ways that local land use decisions are challenged in court.

STATE AND FEDERAL CONSTITUTIONAL CHALLENGES

1. Loss of All Economically Viable Use

The first landmark U.S. Supreme Court opinion finding a regulation of property unconstitutional as a “taking” was handed down in 1922.¹ In the 80-plus years since then, we have had extended discussion of the matter by the courts, both state and federal. In some ways we know more and in some ways we know less about what is a taking and what is not a taking in the 21st century. What we know for sure is that taking occurs when regulation deprives a landowner of all economically viable use of their property. After that basic rule, it gets more complicated.

Must a Regulation Allow Some Economic Use of Property?

Case Law — Lucas v. South Carolina Coastal Council

David Lucas bought two lots on the coast of South Carolina to use for the construction of summer homes. After the purchase, the South Carolina Coastal Council passed a rule that restricted construction of any buildings within 300 feet of the shoreline. That was a problem because his beachfront lots were not 300 feet deep.

The U.S. Supreme Court heard Lucas' case in 1992.² They decided the state action was a taking and just compensation should be paid to Lucas for the loss of his property.



David Lucas bought a lot on each side of the square house shown above. The U.S. Supreme Court declared it was unconstitutional to prohibit him from using these lots to build vacation homes in 1992. Photograph courtesy Prof. Daniel Mandelker at law.wustl.edu/landuselaw.

The state argued the restriction was necessary to protect the general welfare because homes would be blown apart in the next major hurricane. Lucas pointed out his lots were the only two vacant lots along that section of the coast. The burden imposed on him was severe. The Court ruled that a regulation that deprives the property owner of all economically viable use creates a “taking.”

The Court said the state could eliminate all use of property if any use would constitute a nuisance. Under the old common law developed by the courts over the centuries, one neighbor could not cause a nuisance to his neighbor that unreasonably interfered with the quiet enjoyment of the neighbor’s property. If he did so, the neighbor could sue and recover damages for the loss of use and value. Since the right to create a nuisance was not a legal aspect of property ownership, no taking occurs when the government prevents a use that would be a nuisance.



After losing its case before the U.S. Supreme Court, the South Carolina Coastal Council could not afford to leave the Lucas lots idle so it sold the lots for development. Another home has already been built on the lot in the photograph above. Photograph courtesy Prof. Daniel Mandelker.

The Court also reasoned that a nuclear plant could be prohibited—even if that were the only use the property might support—if there were a fault line on the property and the nuclear plant might fail in a major catastrophe.

Lucas' proposal was not a nuisance, however, unless the danger was great enough to require his neighbors to tear down their houses. A nuisance is not created just because the world would be better if the activity were not going on. A nuisance exists when the interference with the neighbor is severe, permanent, and very disruptive.

Land use regulations that destroy all use of property are takings. Examples may include a rule that property owners cannot build anything at all on land that is near the city well or in the watershed. Or suppose that a legally created, vested lot was vacant at the time an ordinance change was enacted that would make the same lot illegal to create today. If the local officials seek to apply the ordinance retroactively to make the “non-conforming” lot unbuildable, that would be a taking. No economically viable use would remain.³

It would not be a “taking,” however, to prohibit the use of land for residences in an area where any building on the land would be hazardous to the health and safety of the residents because of contaminated soils, imminent landslides, or repeated avalanches. The ordinance may recognize that factors exist, inherent in the property, that make it unsuitable for any use.

I remember being called to Iron County years ago to address concerns that rules might be implemented to prohibit the building of new residences on lots as small as 5,000 square feet in the rural expanses of the county. There were no sewer, water or other municipal services in the vicinity. I was asked if the denial of permits was a taking.

“No,” I said. Until it could be shown that someone could fit a safe well, an effective septic system, and a house on 5,000 square



In the case of Harper v. Summit County, the Utah Supreme Court ruled that property rights include the right of neighbors to be free from nuisances such as excessive dust and noise. The case involved this loading facility on a nearby railroad line.

feet, then the county could take notice that any use of the property for a residence would be hazardous to human health. There is no taking if any potential use of the property would constitute a nuisance.

2. Severe Economic Impacts

It is not as easy to win such a case, but the U.S. Supreme Court also has held that a property owner can recover just compensation when a local regulation imposes a severe burden even though some economically viable use remains.⁴ The test requires a balancing of burdens and benefits.

For example, if a property owner loses almost all value so that the public can enjoy a very marginal benefit, the constitutional alarm bells may ring. On the other hand, if the public interest is compelling and the burden on the property owner relatively light, then no taking would ever be found.⁵

Part of the equation related to the property owner's burden is based on the owner's expectations of a profit and the investment he has made toward that end. If a property owner claimed that a new regulation cost him significant property value, his claim would likely be more successful if he paid a large sum for the property the year before and was in the process of getting permits for his planned project when the new regulation went into effect.

The same landowner would not have nearly as strong a case if he inherited the property from his father who bought it 50 years ago for what would now be considered a pittance.⁶

When is a Land Use Regulation a “Taking”?

Case Law — Smith Investment v. Sandy City

A recent Utah case involved property on 700 East in Sandy. The city down-zoned the land (made its use less intensive and lowered densities) from commercial to residential. The property owner brought suit, claiming a “taking.”

According to the evidence presented at trial, the value of the property involved in the lawsuit fell from \$1355 million to \$775,000, a loss of 43 percent of the value. Despite this major hit, there was no “taking.” According to the court:

Substantially diminished as a result of zoning, that fact alone will not be deemed a sufficient ground for finding the regulation arbitrary and capricious. Such losses generally are deemed to be simply the uncompensated burdens one must accept to live in an ordered society.”



The land behind the Sandy Hills Shopping Center was “downzoned,” which resulted in a protracted lawsuit. The Utah Court of Appeals held that no “taking” had occurred and did not award any damages, even though the property lost \$580,000 in value.

Although most of us would think a \$580,000 loss is real money, the court said it was simply not unexpected that such losses would occur in a zoning context. As the Utah Courts have said:

Indeed, zoning and rezoning present perplexing problems of economic and environmental gain and loss. While some gain, others lose. It is the legislature which must strike the proper balance.⁸

Mere diminution in value is insufficient to meet the burden of demonstrating a taking by regulation.⁹

As the U.S. Supreme Court has explained it:

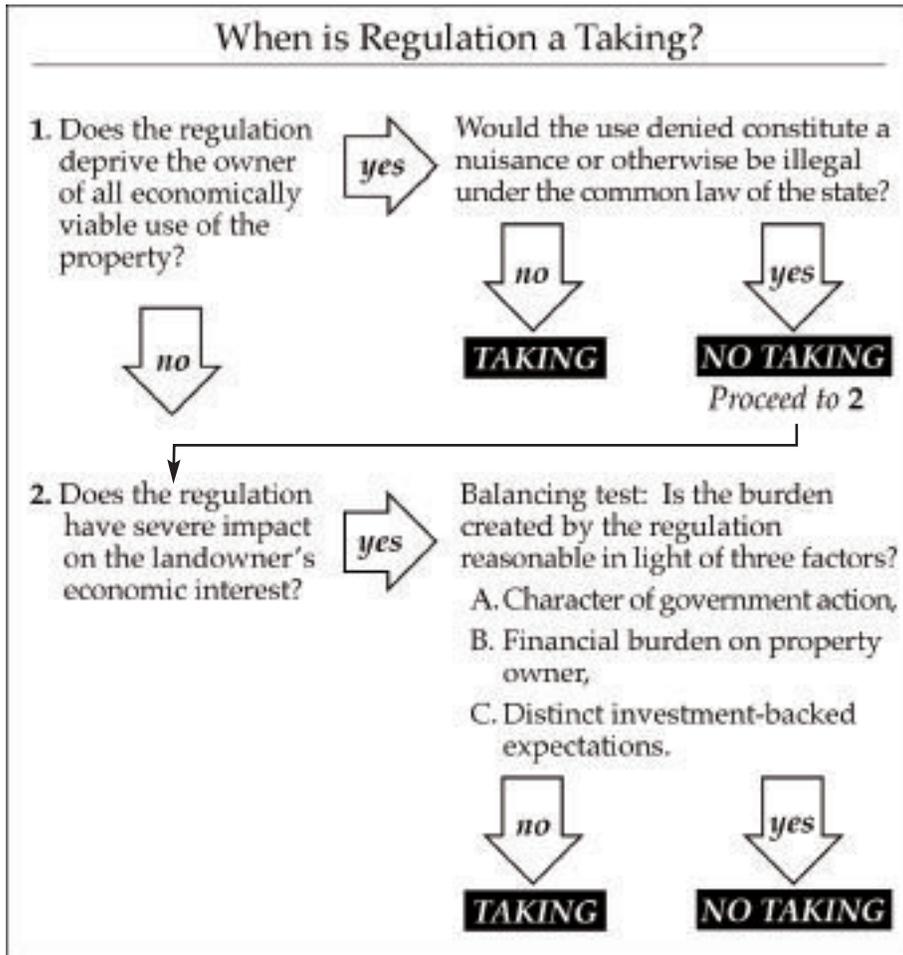
Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in general law.¹⁰

This Court has generally been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Rather it has examined the "taking" question by engaging in essentially ad hoc (case by case) factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance.¹¹

Although the courts have left the door open to finding an illegal regulation when some economically viable use remains under this test, it is very rare that a property owner succeeds in challenging local land use decisions under a claim of severe economic impact.

Note that this balancing test for a "taking," where the benefits and burdens of regulations are weighed, is different from the "loss of all economically viable use" test. If all use is denied and no nuisance could be created by some economically viable use, then the regulation categorically creates a "taking," no matter how compelling a public use exists to justify the regulation.

The following diagram may be helpful.



3. Trespass—Excluding Others

Another sacred property right is the one to exclude others from your property. It is a taking if the government imposes a duty on you to allow the permanent occupation of any part of your property by the government, the public, or anyone acting for the government.

Can Government Occupy Private Property?

Case Law — Loretto v. Teleprompter Manhattan

For example, a Ms. Loretto owned an apartment building in New York City. City officials directed her to allow the local cable company to put a connection box on the back of the building. She refused and won the case in the U. S. Supreme Court.¹²

In an opinion authored by Justice Thurgood Marshall, the great champion of civil rights, the city was told that the right to exclude others is significant. No property owner has to volunteer property for physical occupation for public purposes without just compensation.

Ms. Loretto's apartment building in New York City. Photograph courtesy Prof. Daniel Mandelker.



Other examples may include:

1. when inevitably recurring floodwaters repeatedly occupy private property;
2. when open space that is required under local ordinance must be given to the public for public use instead of being kept for use by homeowners within the project; and
3. when landowners must accept trails across their property although they have done nothing to create the need for the trails.

In summary, the courts will find a “taking” if a local action results in the permanent occupation of property or unlimited public access to the property without the payment of just compensation.

4. Lack of a Public Purpose—Due Process Issues

A decision or action also can be invalidated if the regulation restricts the use of private property but accomplishes no legitimate public purpose. This is almost the same thing as saying that a decision violates due process because it does not promote the general welfare as we discussed in Chapter 3.

In Utah, as elsewhere, the courts have determined that they will first look to local ordinances and state statutes to review local land use decisions rather than to the Constitution of the United States or the Utah State Constitution. If a land use decision is overturned because it violates a statute or ordinance, then the court will not review the constitutional cause of action. As we discussed in Chapter 3, the Utah statutes have been interpreted to allow the setting aside of local decisions that are arbitrary, capricious, or illegal. This language roughly parallels the constitutional claim the lawyers call “substantive due process”. Since this constitutional language has been grafted into statute, the

Utah courts have reviewed local land use decisions without considering constitutional issues.

In one recent case, *Patterson v. American Fork City*¹³, the Utah Supreme Court was asked to void local decisions by declaring that the local government had acted in a manner that was arbitrary, capricious and unreasonable. The Court declined to do so, stating that:

Reading all of the facts in the light most favorable to Pattersons' claims, we conclude that this case involves disputes about specific local development issues, not about the deprivation of constitutional rights. Pattersons have liberally peppered their brief with strong language indicting the City for dozens of its decisions, but they have failed to cite a single case where developers have succeeded when pursuing [constitutional] claims on similar facts. Although Pattersons are entitled to "all inferences which are fairly supported by the evidence, [they] are not permitted to build their case on mere 'opprobrious epithets' of malice, or 'the gossamer threads of whimsey, speculation, and conjecture.'" (citations omitted). Whatever unfairness Pattersons may have experienced, nothing in the facts presented sounds constitutional alarm bells.¹⁴

For about 25 years the United States Supreme Court has stated that a regulation that imposed burdens on the use of land but failed to substantially advance a legitimate public purpose could result in a successful claim for compensation under a "taking" theory. The Court abandoned this "taking" theory in 2005¹⁵, holding that regulations which do not accomplish what they are intended to do or which do not advance the general welfare must now be challenged as violations of substantive due process. Under *Patterson* and other relevant Utah precedent, this means that for us these issues are to be resolved under the Utah land use management statutes, not the Constitution.¹⁶

5. Equal Protection

Land use laws, like others, must not treat people differently if they are in the same situation. A recent U.S. Supreme Court case involved a widow who, with her late husband, had successfully sued the local village in an unrelated dispute. She claimed the only reason the municipality required her to provide a much larger utility easement than that required of others was to get back at her for suing the town.

The U.S. Supreme Court decided that she had a viable case if what she alleged was found to be true.¹⁷

In Utah, as in other places, this is a hard case to make. The Utah Supreme Court has stated that:

Zoning decisions will almost always treat one landowner differently than another. It is the presence of evidence of vindictive action, illegitimate animus, or ill will that will distinguish run-of-the-mill zoning cases from cases of constitutional right.¹⁸

[T]he plaintiff must present evidence that the [municipality] deliberately sought to deprive him of equal protection of the laws for reasons of a personal nature unrelated to the duties of the [municipality's] decision.¹⁹

A showing of uneven enforcement of the law is not sufficient: what is required is a showing of a totally illegitimate animus toward the plaintiff by the [local government entity].²⁰

Those claiming a violation of equal protection must provide evidence believable to the decision-maker that the only explanation for the allegedly arbitrary and capricious conduct is unlawful discrimination against a protected class. This is a major uphill battle and very unlikely to be successful in the courts.

6. Free Speech Protections

Mainly used in sign regulations and sexually-oriented business cases, these are discussed more thoroughly in Chapter 8.

The courts have been very generous in using the free speech protections of the first amendment, just as they have in avoiding government actions that establish religion or interfere with the right of assembly.

7. Federal Statute Challenges

See the related parts of Chapter 8 about religious uses, signs, fair housing, cellular towers, and other special uses with which federal statutes have dealt. Using the commerce clause of the U.S. Constitution, Congress has pre-empted the field in some areas of land use law. Where federal law trumps, the state laws are not much help. Local zoning ordinances and decisions that operate contrary to federal statutes will be struck down.

STATE STATUTE CHALLENGES

8. Arbitrary, Capricious, and Illegal Acts

This concept is so fundamental to land use legalities that we spent a lot of time reviewing it in Chapters 5 and 6. Rather than review it again, I merely wish to remind you that it is a paramount issue and that land use decisions will not be upheld unless they survive this test.

Legislative decisions must advance the general welfare.²¹

Administrative decisions must be supported by substantial evidence on the record.²²

9. Following Required State Procedure

The state zoning statutes do not say much when it comes to the day-to-day business of local land use management, but what they do say is significant and not to be ignored.

Ben Toone is a resident of Ogden Valley where Huntsville and Eden are located. Some years ago the Weber County Commission decided to sell some surplus property located in a relatively remote area of the valley to a local hunter/outfitter. Toone and others thought the sale was not at market value and should have been advertised more broadly. They brought suit in state court.

In a decision invalidating the sale, the Utah Supreme Court held that a remote part of the statutes governed the matter.²³ According to the state code in force at the time, no city or county could sell property without asking the planning commission to comment first. Of course no one ever noticed that rule, much less followed it, and municipalities have been selling property for years without even knowing such a requirement existed.

Too bad, said the court, and struck down the sale. Although this requirement was removed by the 2003 legislature, it applied at the time of the sale and the sale was void. This was a pretty harsh remedy, but the court made the point that the statutes are not to be ignored.

Another case involved the little town of Boulder in southern Utah. Its zoning ordinance was struck down because officials could not prove that they had a zoning map at the time they adopted the ordinance. The code says a town must have a map if it has a land use ordinance, stated the Court of Appeals: no map, no ordinance.²⁴

If you do not agree with a local decision, check the related state statutes. If they have not been followed, a challenge may succeed.

10. State Policy Mandates

A related issue involves the policy mandates imposed by the legislature. These are imposed on local government because they are creatures of the state and they have no power to zone without state approval and delegation. Since the power comes from the state, the state can impose some restrictions that go along with the power. As you would expect, the state on occasion waded in with regulations covering a short list of special land uses.

Some of the “strings” attached have to do with issues that the legislature addresses because some have political influence on Capitol Hill. Billboards have special protections in land use,²⁵ as do school districts.²⁶

Other limitations are a result of legislative preferences and policy such as a requirement that manufactured housing be allowed in all residential zones²⁷ and that moderate income housing be promoted statewide.²⁸

These policy mandates can be the fodder for litigation in imposing certain land uses or fighting local decisions.

What is the Effect of State-mandated Policy?

Case Law — Anderson v. Bluffdale City

A local developer acquired the right to develop a large area of property in Bluffdale, generally located east and south of the intersection of the Bangerter Highway and Redwood Road in Salt Lake County. The City of Bluffdale refused to allow the densities that were desired by the landowner and several lawsuits resulted.

One series of opinions dealt with the state-mandated moderate income housing plan. The city claimed it had adopted one, but the developer claimed it was insufficient and had no potential to actually encourage those of modest means to live in Bluffdale. The trial court judge, who has since been elevated to the Supreme Court, wrote that Bluffdale was required to do more than just make a token effort at a moderate income housing plan. After several opinions, the developer and community finally reached a settlement that resulted in a mix of housing types and uses with both rentals and owner-occupied residences in a planned community.



Extended wrangling between the City of Bluffdale and a developer involved the issue of exclusionary zoning and a state mandate to locate moderate income housing in the community. This development, "The Bluffs," was built after settlement was reached.

11. Following Local Ordinances

Another area of legal challenge that sometimes results in reversal of local land use decisions is a claim the city or county is not following its own ordinances. We discussed this briefly in Chapter 12 when talking about citizen enforcement of zoning ordinances, but it bears some more discussion here. We have recently had some interesting cases related to this issue.

Must Local Government Follow Their Own Ordinances?

Case Law — Culbertson v. Salt Lake County

In 1991, the then owners of the Family Shopping Center (located at 900 East and Union Park Avenue in Midvale) wanted to expand it and include more shopping attractions for local residents. They were unable to acquire property from some of the landowners in the area, however, but they did obtain a conditional use permit from Salt Lake County that allowed them to build the rear wall of several stores in an area that was formerly part of a county street.

The homeowners facing the street sued, claiming the county could not allow a developer to reduce the street width from 33 feet to 25 feet because to do so violated the county's own street standards. They also sued to enforce the developer's conditional use permit, which required that curbs, gutters, and sidewalks be installed everywhere the project fronted on a public street and that landscaped setbacks be provided.

The county and the developers asserted that 1070 East and North Union Avenue are not streets at all, but "closed" roads, available only for private use by the residents. The Utah Supreme Court noted, however, that there is only one way to make a county street a private roadway and that is the official "abandonment" of the street as provided in state statute. An ordinance of abandonment was never adopted so the streets remained "public streets."

The court then went on to hold that the county has only two definitions for streets in its ordinance—they are either private or public. Since the streets in this case were not privately owned, they must be public streets. Thus, the county could not allow them to be divided in violation of county street standards. The streets could not be changed to a cul-de-sac without a 50-foot turnaround as the county ordinance required. Nor could it be limited to a width where a fire truck or garbage truck could not negotiate the roadway.²⁹



Before and after aerial views of the Fort Union Shopping Center vicinity showing the homes involved in the case of Culbertson v. Salt Lake County. Several county streets were obliterated in the expansion of the retail complex. The owners of the homes shown in the center of these photographs won a lawsuit against the county and developers because the project illegally narrowed the streets in front of their residences.

As a remedy, the court declared:

Where the encroachment is deliberate and constitutes a willful and intentional taking of another's land, equity may require its restoration, without regard to the relative inconveniences or hardships which may result from its removal.

In other words, tear down the buildings! This result, and the harsh remedy of complete invalidation of the zoning ordinance in the Boulder case cited in this chapter, point out the risk that local officials run when they do not carefully analyze local decisions and the relevant local ordinances.

This is not to say that just anyone can amble into the courtroom and bring down the local municipal power structure. The precedent established in the *Springville citizens* case, mentioned before in Chapter 12, is that the plaintiff in such a lawsuit must show that their interests were prejudiced by the local decision. Surely the Culbertsons were—they lost their street. But the result would have been much different if they had missed the deadline to file an appeal or if the landowners had not been so vocal in the first place, pointing out

the violation of their rights long and loudly in public places, and thus putting the county and the developers on notice that there were legal issues involved that remained to be resolved.

Summary—Legal Issues

We have looked at a variety of ways that local land uses can be challenged. There is a “laundry list” at the back of this volume in Appendix 3.

The legal answer is not always the best answer, however. Although I am all for a property owner or citizen standing up for their rights and not putting up with illegal and discriminatory treatment, I have found in my legal career that lawsuits and legal threats are more counter-productive than helpful on most occasions.

On the street and in the neighborhood, zoning is about compatibility and appropriate community behavior. When there are conflicts, the best answer is often for both sides (or all three or four sides) to sit down with mutual respect for the rights and concerns of each other and work out solutions.

This is often not likely to happen in the heat of a land use hearing before a body of citizen planners. Someone needs to take some leadership, call out a time out, assemble the “stakeholders,” and work out solutions that you do not find in a courtroom.

It is important to learn the law and know the rules. But the law is not a very efficient or satisfying tool to use in an area as subjective and emotional as land use decisions. Give the other options a try before dropping the legal bombshell.

¹*Penn Coal v. Mahan*, 260 U.S. 33 (1922).

²*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

³The *Lucas* case was recently cited by Utah Courts in *Diamond BY Ranches v. Tooele County*, 2004 UT App. 135, and *Arnell v. Salt Lake County*, 2005 UT App. 165.

⁴*Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

⁵See discussion of *Penn Central* in *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Authority*, 535 U.S. 302 (2002).

⁶The U.S. Supreme Court considered such a case in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Palazzolo had acquired the subject property in the 1950s. The court recognized that even though state regulations dramatically lowered the value of his property, it was still worth more than he had paid for it decades earlier, and dismissed his “*Lucas*” style claim for the loss of all economically viable use.

⁷*Smith Investment Co. v. Sandy City*, 958 P.2d 245 (Ut App. 1998).

⁸*Id.*

⁹*Id.*

¹⁰*Penn. Coal*, *supra*, note 1.

¹¹*Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 494 (1987).

¹²*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

¹³2003 UT 7, 67 P. 3d 466 (Utah 2003).

¹⁴*Id.* ¶ 28.

¹⁵*Lingle v. Chevron*,

¹⁶See, in addition to *Patterson, Bradley v. Payson City Corp.*, 2003 UT 16, 70 P. 3d 47 (Utah 2003); 2001 UT App 9, 17 P. 3d 1160 (Utah App. 2001) vacated. *Harmon City, Inc. v. Draper City*, 2000 UT App 31, 997 P. 3d 321.

¹⁷*Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

¹⁸*Patterson v. American Fork*, 2003 UT 7, ¶28, 67 P. 3d 466 (Utah 2003).

¹⁹*Id.* ¶33.

²⁰*Id.* ¶33.

²¹Utah Code Ann. §10-9a-801(3)(b) (municipalities); Utah Code Ann. §17-27a-801(3)(b) (counties).

²²Utah Code Ann. §10-9a-801(3)(c) (municipalities); Utah Code Ann. §17-27a-801(3)(c) (counties).

²³*Toone v. Weber County*, 2002 UT 103, 57 P.3d 1079 (Utah 2002).

²⁴*Hatch v. Boulder Town*, 2001 UT App. 55, 21 P. 3d 245.

²⁵Utah Code Ann. §10-9a-512, 513 (municipalities); Utah Code Ann. §17-27a-511, 512 (counties), Utah Code Ann. §72-7-501.

²⁶Utah Code Ann. §§10-9-106 (2) (municipalities); §17-27-105 (counties).

²⁷Utah Code Ann. §10-9a-514 (municipalities); Utah Code Ann. §17-27a-513 (counties).

²⁸Utah Code Ann. §10-9a-401(2)(f), §10-9a-403(2)(a)(iii) and (b), §10-9a-404(5)(c), and §10-9a-408 (municipalities); Utah Code Ann. §17-27a-401(2)(f), §17-27a-403(2)(a)(iii), §17-27a-404(6)(c), and §17-27a-408 (counties).

²⁹*Culbertson v. Salt Lake County*, 2001 UT 108, ¶ 56, 44 P. 3d 642 (Utah 2001), citing *Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assoc.*, 535 P.2d 1256, 1259 (Utah 1975).

Access to Public Records

In the entire landscape that is planning and zoning, one of the areas where our community philosophy all too often conflicts with how we actually manage our business is in the area of government records and open meetings. The Utah legislature has made the policy clear:

It is the intent of the legislature to:

- (a) promote the public's right of easy and reasonable access to unrestricted public records;
- (b) specify those conditions under which the public interest in allowing restrictions on access to records may outweigh the public's interest in access;
- (c) prevent abuse of confidentiality by governmental entities by permitting confidential treatment of records only as provided in this chapter;
- (d) provide guidelines for both disclosure and restrictions on access to government records, which are based on the equitable weighing of the pertinent interests and which are consistent with nationwide standards of information practices;
- (e) favor public access when, in the application of this act, countervailing interests are of equal weight; and
- (f) establish fair and reasonable records management practices.¹

The Government Records Access and Management Act (GRAMA) attempts to balance two weighty considerations: 1) the public's right of access to information and 2) the right of privacy that surrounds certain personal data that government entities gather.²

In the land use arena, however, there is not much in the way of personal, private data that can be protected from public view by GRAMA. On the other hand, anytime there are public emotions running high and anyone feels threatened or intimidated by public clamor, there is bound to be a lot of maneuvering behind the scenes and some effort to keep information close to the vest. This is inappropriate and often illegal.

What is a public record? Basically, GRAMA provides that all documents that are received by, created by, or in the possession of local agencies are public records unless specifically exempted by the GRAMA statute.³

As a practical matter, the way the process should work is that everyone who is interested in any land use application or pending decision should be able to review the file in its completeness so as to be able to fully participate in the public process. If a citizen does not have all the details, how is she supposed to be a full participant?

In the real world, however, there are two opposing factors. The first is simply the press of business. Staff reports and packets prepared for decision-makers are often not ready until a deadline just a few days before a hearing is held or a decision is made. In light of this, staff should share all the information in that packet with the public as soon as it is available to the public body involved so that all can participate fully. Certainly if the packet is completed three business days before the meeting, GRAMA is thwarted by a demand that everyone wanting to see it must file

a GRAMA request and then wait five or ten business days as allowed by law. Local officials should respect the spirit of full participation and share with all concerned the documents and records that influence their decisions well before those decisions are made.

The second opposing factor is pure and simple politics and the reluctance we all have to being embarrassed. Citizen planners are not professional, sophisticated experts and often are not sure themselves about what the public should know. They are sometimes very protective of business entities who are attempting to get permits for projects that the municipality wants to encourage. Occasionally local officials will attempt to limit access to documents and claim that they represent business trade secrets or real estate deals that are not ready to become public. Sometimes the planning commission or city council just does not want the press or the public rummaging around in their business at will. The problem, of course, is that it is not only the officials' business, but the public business, and GRAMA makes it pretty clear where the bias lies when there is a request to make public documents public. Absent compelling reasons to keep records secret, they should be disclosed.

The right to know: There is an even deeper issue on the level of an applicant who is entitled to due process under the Constitution. Inherent in the right to due process is the right to know about and confront witnesses, to cross examine those offering testimony against one's interest, and to be heard on all the relevant matters that affect the decision to be made. This cannot be done if there are documents made available to decision-makers that the applicant cannot see. It is a breach of due process when decision-makers such as a board of adjustment, planning commission, site plan review committee, or city council have access to information and documents that affect their decisions and do not share that information with the applicant whose rights are

affected by their decisions.⁴

On another level, it is also unwise for municipal officials to avoid disclosure of documents and evidence that affect their decisions. Administrative decisions by local boards can only be challenged based on the record made of the decision. If all the information is not in the record, then the decision may not be upheld by the court or an arbitrator. The decision will only survive scrutiny if there is substantial evidence on the record, and information not disclosed cannot be considered as part of the record.

It is in everyone's interest in a democracy to make sure that all participating know the facts and the factors that will support good, positive decisions, made in the light of day with information all can analyze and discuss.

Fees: GRAMA provides that every person has the right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours, subject to the normal requirements of asking in advance and paying a fee for any copies that are desired.⁵

There is no charge for inspecting a record.⁶ Usually a place will be provided where a person can sit and review the file or other documents in a convenient manner. If you would like to copy the records, a charge may be imposed that has been predetermined by the municipal council or county commission. The law requires that fees be set in ordinance and not just imposed by the staff.⁷

No charge can be assessed for the time the staff takes to review a record to determine if it is public or for inspecting the record.⁸

A government entity may fulfill a record request without charge and is encouraged to do so if the record directly relates to a person's legal rights, and that person can not afford to pay the fee.⁹

Charge for compiling a record: The Utah courts have held that no charge for compilation of a record is to be made without previous notice of the charge. An agency may assess fees if the request involves extracting materials from a larger document of source and compiling them in a different form. If feasible and reasonable to do so, the agency should offer to allow the person requesting the record to compile it. If the agency compiles the record as a preferred way to provide it, rather than from necessity, no charge is to be made.¹⁰

Time limits: As far as the timing of a request goes, most of the time a record will be provided when it is asked for. Local officials may stick to the strict time frames that GRAMA provides, however, and require advance notice of no more than ten business days before the government responds to a GRAMA request.¹¹ For requests by a citizen that are made for the benefit of the public and not just for her own personal benefit, up to five business days may pass before the record is produced or an explanation made as to why it was not produced.¹²

There are exceptions to the time limits, which may be pointed out by the municipality once the request is received. Remember that the bias of the law is meant to be in favor of access, so there should be a good reason for denial if the request for records is denied.

Public documents: Every document is public unless private, controlled, or protected.¹³

Private documents: Generally relate to individuals and their private interests, such as eligibility for benefits, medical history, employment, library circulation, etc.¹⁴

Controlled documents: Mainly medical records of individuals shared with a limited audience.¹⁵

Protected documents: Generally trade secrets, financial and commercial information for companies, test questions, appraisals for future property transactions, investigations, litigation documents not available through discovery, privileged communications from the agency's attorney, drafts, minutes, and notes of closed meetings, and other documents that may compromise a legitimate state interest.¹⁶

Business confidentiality: If a record provided by a business to an agency is desired to be protected, the business must provide a claim of confidentiality and state the reasons for the restricted access. The agency can still classify the record as public if it notifies the business. Remember it is the business, not the local government, that originates the idea that the documents provided to the government entity ought to be confidential.¹⁷

Not a public record: (and thus not required to be disclosed to the public) temporary drafts, privately owned documents; calendars and notes; records of closed meetings by local bodies and attorney-client documents, for example. There are more, but the long list is beyond the scope of this short discussion. Check the statute on-line for details.¹⁸

Denial: If access is denied, the agency shall provide a notice of denial, including a description of the record or portion of record to which access is denied, citation to the statute allowing the denial, and a description of the process to appeal the denial. Failure to respond is deemed a denial.¹⁹

Destruction: If access to a record is denied, that record is not to be destroyed or given to another agency before the appeal period has passed.²⁰

Other agencies: Even if a record is not available to the public, that same record can be provided to another governmental

agency if that agency enforces, litigates, or investigates civil, criminal or administrative law and in other instances.²¹

Appeals: Any appeal must be filed within thirty days of a denial of access or other determination. File a notice of appeal to the chief administrative officer of the agency if such an appeal is allowed under the local ordinances.²² The local appeal decision may then be reviewed by the State Records Committee or the district court.²³ The State Records Committee is a panel of seven individuals, including one citizen and one representative from the news media, which hears appeals and make decisions in implementing GRAMA.

Penalties: It is a class B misdemeanor to knowingly disclose records that should not be disclosed, or to gain access to records that should not be disclosed by false pretenses, bribery, or theft, or to intentionally refuse to release a record which is legally required to be released.²⁴

Attorney's fees: can be ordered against the agency if a person who appeals a denial of access substantially prevails in legal action.²⁵

Form: A form that can be used to make a GRAMA request is often available from the local governmental entity involved. If one is not available, a sample is included with this publication that can be used under most circumstances. Just copy it, fill in the blanks, and submit it to the governmental entity involved. You may also wish to copy the summary of GRAMA rules on the back of the document provided so the governmental entity to which you submit it has a copy of the statute handy for reference.

Questions: GRAMA issues and disputes are most commonly routed to State Archives in the Department of Administrative Services, which provides staff support to the State Records Com-

mittee. The current contact number for State Archives as of the date of these materials is (801) 538-3012. You may also get information on the internet at <http://archives.utah.gov>. Another source is the Attorney General's Office, where one of the assistant attorneys general specializes in open meetings and public records. Call the State Agency Counsel Division. The current number as of this printing is (801)366-0353.

¹Utah Code Ann. §63-2-102(3).

²Utah Code Ann. §63-2-102(1).

³Utah Code Ann. §63-2-201(2).

⁴1 Delaney, Abrans and Schinidman, Land Use Practice & Forms: Handling the Land Use Case, § 5:11 (2nd Ed., 2003 Update). See also Zizka, Hollister, Larsen and Curtin, State and Local Land Use Liability, § 5:13 (1997, 2003 Update).

⁵Utah Code Ann. §63-2-201(1).

⁶Utah Code Ann. §63-2-201.

⁷Utah Code Ann. §63-2-203(3)(b).

⁸Utah Code Ann. §63-2-203(5).

⁹Utah Code Ann. §63-2-203(4).

¹⁰*Graham v. Davis County Solid Waste Dist.*, 1999 UT App. 136, 979 P. 2d 363

¹¹Utah Code Ann. §63-2-204.

¹²Utah Code Ann. §63-2-204(3).

¹³Utah Code Ann. §63-2-201(2).

¹⁴Utah Code Ann. §63-2-203.

¹⁵Utah Code Ann. §63-2-203.

¹⁶Utah Code Ann. §63-2-304.

¹⁷Utah Code Ann. §63-2-308.

¹⁸Utah Code Ann. §63-2-103(18). All state statutes are available on-line at www.utah.gov/government/utahlaws.html at the current time; the exact address for specifics on the law can be found at <http://archives.utah.gov/recmanag/govlaw.htm>.

¹⁹Utah Code Ann. §63-2-205(2).

²⁰Utah Code Ann. §63-2-205(3).

²¹Utah Code Ann. §63-2-206(1).

²²Utah Code Ann. §63-2-401.

²³Utah Code Ann. §63-2-402.

²⁴Utah Code Ann. §63-2-801.

²⁵Utah Code Ann. §63-2-802.

Open and Public Meetings

To quote the statute, “In enacting this chapter, the Legislature finds and declares that the state, its agencies and political subdivisions, [sic] exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.”¹

Generally speaking, when public bodies meet to discuss and take action on public business, their deliberations are to be open and public. This does not mean that the public can participate; it only means that the meeting is to be observable by the public.

Fair enough, but what is a “public body” and when do we call their interaction a “meeting”? As you would expect, the devil is in the details.

What is a public body?

It is any administrative, advisory, executive, or legislative body of the state or a municipality, county, special district, school board, or other entity created by government action, if that body:

1. has two or more members AND
2. uses or spends tax dollars AND
3. makes decisions about the public’s business

UNLESS the body is a political party or one of a few committees at the state legislature.

City councils, county commissions, planning commissions, boards of adjustment, site plan review committees, historic district commissions, and similar land use bodies are all public bodies. Groups of staff who meet together and ad hoc committees of self-appointed individuals who meet to propose changes in policy are not public bodies.

What is a meeting?

A meeting is the convening of a quorum of a public body to discuss or act on business that the body does, unless the meeting is:

1. by chance OR
2. to discuss administrative matters that are the normal business of a body like a three-person county commission and no formal action is required for that business, or for the body has no official role in the business they discuss³

Study sessions, field trips, and formal sessions held for the purpose of discussing or acting upon a matter over which the public body has jurisdiction or advisory power are all "meetings."

How is public notice to be given of meetings?

It is done in several ways. Any body like the planning commission or city council must give notice once a year of their normal meeting schedule. The notice must note the specific time, date, and place of each meeting planned for the year.⁴

Any body must also give a 24-hour advance notice of the agenda, date, time, and place of each of its meetings.⁵ If this requirement is not met, the body is not to meet.

Public notice can be satisfied by:

1. written notice posted at the principal office of the body or

at the meeting place, AND

2. notice to at least one newspaper of general circulation in the area or to a local correspondent ⁶

Emergency meetings can be held to handle urgent matters if the best notice practicable is given and an attempt is made to notify all members of the body and a majority votes to go ahead with the meeting.⁷

Public bodies are encouraged to use electronic means such as special cable TV channels, e-mail, or the internet to broaden the notice of public meetings.⁸

Remember that there are some other notice requirements related to certain items on an agenda; for example, some ordinances require advance notice to neighbors before certain applications can be heard. Check the local ordinance and state statutes to be sure of the notice requirements for specific issues. Just because the meeting was noticed twenty-four hours in advance does not mean that the notice requirements for a zoning change were met.

What if items are discussed that are not on the agenda?

In a recent case involving Summit County, the Utah Supreme Court held that no violation of the Open and Public Meetings Act occurred when the planning commission discussed in its meeting items that were not on its agenda because the matters were not within the jurisdiction of the planning commission to make decisions about. This opinion by the court offers some comfort to those who worry about falling into the trap of discussing incidental issues not related to their offices without putting such non-issues onto the agenda.¹⁰

On the other hand, the courts have given some indication that when a significant issue is to be discussed, it should be listed plainly on the agenda. Sometimes local officials get a little too

“cute” by placing an item at the bottom of the agenda such as “other business” or “possible executive session” or the like and assume that that creates a blanket opportunity to discuss anything at all. This is clearly an abuse. In a recent case, the Utah Supreme Court said “it would clearly violate the public policy behind the Act to strategically hide sensitive public issues behind the rubric of ‘other business.’” In that case, the city only escaped having its actions invalidated because the item discussed was re-advertised and heard again in a subsequent meeting that had been properly noticed.

What is the difference between a public “meeting” and a public “hearing”?

Quite a bit. *Anyone can observe a public meeting, but there is no right to speak or be heard there.* Although it is common (and wise) for local bodies to freely allow public comment when that comment is constructive and not disruptive, they have no legal duty to do so.

Local ordinances and state statutes may provide for the obligation to hold public hearings, and those rules must be followed. Beyond that, the public participates in presenting opinions and evidence at the pleasure of the body that is conducting the meeting. Many would be surprised, for example, to know that there is no state requirement that the planning commission conduct public hearings on rezoning requests or other similar business.¹² Most do, and perhaps are required to do so by local ordinance, but they are not obligated by some state law to do so. Check the local ordinance or relevant state statute to see if a public hearing is required.

It is not uncommon for legislative bodies to have time on their agenda for “comments” or “questions” from the public. This is normally limited in time to avoid taking time on items that are

not on the agenda at the expense of the items that are. In fact, though the public may raise any issue, it would violate the notice requirements explained above if the body extensively discussed a matter that is not on the agenda just because a citizen brought it up.¹³ It would certainly be out of order to make a decision without the agenda showing that the issue was to be brought up.

Although there is nothing wrong with taking advantage of an open mike if it is provided, the better practice would be to call the clerk or chair of the body and ask to be on the agenda so they could discuss your matter completely and legally, and perhaps make a final decision on the matter.

If the meeting is not a public hearing, you have no right to participate. You are entitled, as mentioned, to record it, to observe it, to tell your friends about it, and to communicate your thoughts to the members of the body outside of the meeting, but you don't have any right to speak up unless the body invites you to do so. Check with someone ahead of time to find out if public input is commonly accepted and how you can express your desire to speak if you are so moved while the meeting is proceeding.

If the meeting is a public hearing, there are usually some restrictions on participation such as time limits. If unduly narrow and strict, these limits may actually violate due process, but normally they must be followed. If you do not have time to say all you wish, submit written material for the record so that everything you wish to be considered can be taken into account as the decision is made. If your rights to property are at issue, there are minimal standards of due process that must be afforded to you. The right to adequately present your evidence and argument cannot be unreasonably restricted.

If you are not allowed to submit written materials, ask a member of the body to submit them for you. The record must include any

information that a member submits.¹⁴

What records of public meetings must be kept?

Written minutes or a tape recording must be kept of all open meetings. The records must indicate:

1. when and where the meeting was held, AND
2. which members of the body were present, AND
3. the substance of all matters discussed, AND
4. a record by individual members of all votes taken, AND
5. the names of all citizens who appeared and the substance, in brief, of their testimony, AND
6. any other information that a member of the body requests be entered in the minutes¹⁵

If a tape is used to record a meeting, written minutes must be produced within a reasonable time and be made available to the public.¹⁶ The tape is a public document. It may not be erased or destroyed except under a schedule of destruction for public documents.¹⁷ Only written minutes, however, are considered evidence of the official action taken at the meeting.¹⁸

Anyone present may also record all or part of a meeting, as long as the recording does not interfere with the conduct of the meeting.¹⁹

Are there some meetings that do not have to be open to the public?

Yes, if they fit into one of the following narrow exceptions for closed meetings or "executive sessions":

1. to discuss the character, professional competence, or physical or mental health of an individual; OR

2. strategy sessions to discuss collective bargaining; OR
3. strategy sessions to discuss pending or reasonably imminent litigation; OR
4. strategy sessions to discuss real estate transactions where such a private discussion would help the public body get the best deal; OR
5. to discuss the deployment of security systems; OR
6. deliberative proceedings by bodies which act like a jury in determining the facts of a given situation and applying those facts to a matter properly at issue before them in a “quasi-judicial” proceeding.²²

Note that exception 6 is not found in a state statute, but has been created as an exception by the opinion of the Utah Appellate Courts. To quote from a recent case involving the deliberations by the Wellsville City Council over the revocation of a business license:²³

It is clear that the legislature intended that any official meeting of the [public body], wherein it performs the “information obtaining” phase of its activities, should not be held in private or in secret, but should be open to the public. However, once the “information obtaining” procedure has been completed, it is essential that during the “decision making” or judicial phase, those charged with that duty have the opportunity of discussing and thinking about the matter in private, free from any clamor or pressure, so they can calmly analyze and deliberate upon questions of fact, upon the applicable law, and upon considerations of policy, which bear upon the problems with which they are confronted.²⁴ Therefore, as long as the “information obtaining” procedures are conducted in the open and any final or formal action is announced or issued in the open, the “decision making” or deliberation of a public body during a judicial

process may be held in private and is exempt from the requirements of the Act.²⁵

This exception may not apply to meetings of the Board of Adjustment since those meetings are governed by a state statute that reads specifically:

All meetings of the board of adjustment shall comply with the requirements of Title 52, Chapter 4, Open and Public Meetings.²⁶

The Utah Supreme Court has not applied the deliberation exception to the Board of Adjustment specifically, so it is unclear whether they can meet in private to deliberate. It would probably be wise not to raise the issue. The Board of Adjustment should conduct its deliberations in public.

And, most prominently, this exception only applies to quasi-judicial proceedings. Private deliberations may be held if a judicial-like hearing is held to revoke a license or permit, to determine if a nonconforming use has been abandoned, or to consider a variance.

It would generally not be appropriate to discuss proposed legislative decisions such as the general plan, zoning ordinance, rezoning requests, annexations, or similar policy questions in private. In the rare event that a closed meeting to discuss legislation is appropriate under the law, it would probably be in the context of the exception allowed to discuss pending or reasonably imminent litigation.

What are the limits on a closed meetings?

Before going into a closed meeting, the body must meet in open session and take a motion to go into a closed meeting. The motion must pass by a two-thirds majority vote of the quorum

that is present to conduct the meeting. The reason(s) for holding the closed meeting must be announced and made part of the record of the open meeting and the vote must be recorded individually.²⁷

The public body, in a closed meeting, may not make any decisions, and cannot approve an ordinance, resolution, rule, contract, or appointment. It must come out of a closed meeting to make a decision.²⁸

The public body must tape record closed meetings or keep detailed written minutes that disclose the content of the closed portion of the meeting. These minutes or tapes are protected records, however, and the public can only have access to them now or in the future under the limitations imposed on such records by GRAMA. The minutes must include the date, time, and place of the meeting; the names of those present and absent; and the names of all others present except where noting someone's presence may violate a confidence and defeat the purpose of keeping the meeting closed.²⁹

If a closed meeting is challenged in court, the judge will review the tape recording or minutes in privacy and decide if the meeting was legally held. If the rules were followed, she will seal the record and not reveal any of its contents. If she determines that the meeting was not conducted properly in private, she will reveal all or any part of the record of the meeting which relates to business that should have been conducted in public.³⁰

The ability to weigh facts in private does not lessen the duty a public body has in supporting its decisions by substantial evidence on the record. No decision can be made behind closed doors. The public body must come out of a closed meeting, state the facts as they find them to be, and then announce a decision that is supported by those facts if their decisions are to be valid.³¹

Can meetings be held by telephone or on the internet?

Yes, as long as the public can also participate. One location for participation must be in the city where the body normally meets. Notice of the meeting and the means to participate must be provided twenty-four hours in advance.³²

How are open meeting requirements enforced?

First of all, the duty to enforce the statute is imposed on the Attorney General and county attorneys.³³ There is a specialist at the office of the Attorney General who handles these matters and will respond to local concerns and questions.

Anyone denied any right to participate in open and public meetings can also bring suit to compel compliance with the rules. In the right case, the court can award attorneys' fees and court costs to a successful plaintiff. Decisions made in violation of the open meetings act (either by improperly closing a meeting or by failure to provide the required notice) can be voided by a court if the decision is challenged by filing legal action within 90 days.³⁴

¹Utah Code Ann. §52-4-1.

²Utah Code Ann. §52-4-2(3)(a).

³Utah Code Ann. §52-4-2(2)(a).

⁴Utah Code Ann. §52-4-6(1).

⁵Utah Code Ann. §52-4-6(2).

⁶Utah Code Ann. §52-4-6(3).

⁷Utah Code Ann. §52-4-6(5).

⁸Utah Code Ann. §52-4-6(4).

⁹Utah Code Ann. §10-9-402(2)(b) provides, for example, that fourteen days' notice must be given for a zone amendment.

¹⁰*Harper v. Summit County*, 2001 UT 10, 26 P. 3d 193.

¹¹*Ward v. Richfield*, 798 P.2d 757 (Utah 1990).

¹²See Utah Code Ann. §10-9-402(2)(b) where the duty to hold the hearing is imposed on the legislative body, but not on the planning commission. They must only meet in an open meeting and make a recommendation to the legislative body. Of course, every planning commission I am aware of holds a hearing, which is entirely appropriate. The law sets minimums for public participation, not maximums.

¹³Utah Code Ann. §52-4-6(2).

¹⁴Utah Code Ann. §52-4-7(1)(e).

¹⁵Utah Code Ann. §52-4-7(1).

¹⁶Utah Code Ann. §52-4-7(3).

¹⁷Utah Code Ann. §52-4-7(6). The duty to preserve records by municipalities and counties is referred to in Utah Code Ann. §63-2-905. Each government entity is to adopt a schedule for the retention of records, including tape recordings of meetings.

¹⁸Utah Code Ann. §52-4-7(6).

¹⁹Utah Code Ann. §52-4-7(4).

²⁰For a case discussing this exception see, *Kearns Tribune v. Salt Lake County Commission*, 2001 UT 55 28 P. 3d 686. The court did not read the exception narrowly, but allowed Salt Lake County to discuss strategy for a pending hostile annexation issue even though litigation had not been filed against the county in the matter.

²¹Utah Code Ann. §52-4-5 lists the first six exceptions shown in these materials.

²²*Dairy Prod. Servs., Inc. v. Wellsville*, 2000 UT 81, 24, 13 P.3d 581.

²³*Id.*

²⁴*Common Cause of Utah v. Public Serv. Comm'n*, 598 P.2d 1312, 1315 (Utah 1979); see also *Andrews v. Board of Pardons*, 836 P.2d 790, 792-93 (Utah 1992) (per curiam) (finding judicial nature of board deliberations to be exempt from requirements of Utah Open and Public Meetings Act).

²⁵See *Common Cause of Utah*, *supra*, note 24, at 1,315.

²⁶Utah Code Ann. §10-9-702(4)(a).

²⁷Utah Code Ann. §52-4-4.

²⁸*Ibid.*

²⁹Utah Code Ann. §52-4-7.5.

³⁰Utah Code Ann. §52-4-10.

³¹*Dairy Prod., supra*, note 22.

³²Utah Code Ann. §52-4-7.8.

³³Utah Code Ann. §52-4-9.

³⁴*Ibid.*

Will a Local Land Use Decision be Overturned?

Checklist:

YES NO

- | | | |
|-------|-------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| _____ | ----- | 1. Legal Ordinance. Was the decision supported by an ordinance that was legally adopted and complied with in every respect according to the mandates of the state enabling statutes? |
| _____ | _____ | 2. Public Meeting. Was the decision made in a meeting by a public body? If no, skip to question 6. |
| _____ | ----- | 3. Due Process. If the answer to 2 is yes, was notice of the meeting where the decision was made provided as required by law? If a hearing was required, were the parties and public given the right to present relevant evidence? |
| _____ | ----- | 4. Procedure in Compliance. If the answer to 2 is yes, was the meeting conducted in complete compliance with all mandatory provisions of local and state law? |

YES NO

_____ - - - - 5. **Open and Public Meeting.** If the answer to 2 is yes, was the meeting duly noticed with an agenda published twenty-four hours beforehand and posted as required by state statute? Was the decision made in public if quasi-judicial deliberations were conducted in private?

_____ - - - - 6. **Application in Compliance.** If no dashed line is checked above, was the application for the land use approval completed as required?

_____ - - - - 7a. **Sufficient Evidence—Administrative Actions.** If the decision is one administering local land use laws, do the minutes of the meeting or other record show that the person or entity making the decision provided substantial evidence to support the decision?

OR

_____ - - - - 7b. **Public Good—Legislative Actions.** If the decision was made by an elected body in its legislative capacity, is it reasonably debatable that the decision advances the general welfare?

_____ - - - - 8a. **Interpretation of Ordinance.** Is the decision in harmony with the clear provisions of applicable ordinances and regulations? Were any ambiguities limiting the

YES	NO	
		uses of property construed strictly and those permitting property uses construed liberally in favor of the property owner? If yes, skip to 9.
_____	_____	8b. Local Appeal. If the answer to 8a is no, are the provisions in question part of the land use ordinances?
_____	- - - - -	8c. Land Use Appeal Authority. If the answer to 8b is yes, did a local land use appeal authority hear the issue and uphold the meaning of the ordinance, interpreting it as described in 8a?
- - - - -	_____	9. Fundamental Property Right. Does the decision illegally interfere with some other fundamental property right (such as reasonable access; air, light, and view; right to freely sell property; right to exclude others; etc.)?
- - - - -	_____	10. Vested Rights. Does the decision interfere with a vested property right as identified and protected by state law (such as a legally vested building permit, preliminary site plan or subdivision approval, nonconforming use, right to be considered under rules in place when a complete application was submitted, business license, etc.)?
_____	- - - - -	11. Denial of All Use. Does the decision leave some economic value in the property?

- | YES | NO | |
|-----------|-------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| - - - - - | _____ | 12. Undue Burdens. When balancing the nature of the public interest, the property owner's reasonable investment-backed expectations, and the burdens on the property owner, is the effect of the ordinance grossly unfair? |
| - - - - - | _____ | 13. Illegal Exactions. Does the decision impose an illegal condition or exaction on development or permitting? (See separate exactions checklist.) |
| - - - - - | _____ | 14. Other Constitutional Rights. Does the decision illegally interfere with some other Constitutional right (such as freedom of speech [sexually-oriented businesses or some signs], freedom of religion, freedom of assembly, etc.)? |
| - - - - - | _____ | 15. Equal Protection. Does the decision treat one property owner differently from other property owners that are similarly situated without any debatable justification for treating them differently and for a reason that is obviously discriminatory such as racial animus? |

If no dashed line is checked above, the land use decision is probably legal. If a dashed line is checked above, proceed with the rest of this checklist.

CHECKLIST: CONDITIONS AND EXACTIONS IMPOSED ON DEVELOPMENT

YES

NO

- | | | |
|-------|---------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| _____ | _____ | 1. Requirement. Is the property owner being required to dedicate property or provide public improvements in order to get an approval or permit to use or develop property? |
| _____ | - - - - | 2. Legitimate State Interest. If the answer to 1 is yes, has the agency shown by substantial evidence that the exaction or improvement is reasonably related to and substantially advances a legitimate public interest that is within the mission of that agency to regulate or advance? |
| _____ | - - - - | 3. Essential Connection. If the answer to 2 is yes, has the agency shown by substantial evidence that the exaction will offset an adverse impact on an identified public interest and thus further the goal of the agency to protect that public interest? |
| _____ | - - - - | 4. Proportionate Burden. If the answer to 3 is yes, has the agency shown by substantial evidence and an individualized determination that the proposed requirement places a burden on the property owner that is roughly proportionate to the burden his proposed use or development places on that public interest after accounting for any impact fees paid? |

YES NO

_____ - - - - -

5. Minimal Intrusion. If the answer to 4 is yes and if the exaction involves the dedication of real property, has the agency shown by substantial evidence that the identified public interest cannot be reasonably achieved by some regulation short of dedication?

If there is a check on any dashed line, the exaction or condition may be illegal. Verify with your legal counsel for specifics. You may also call the property rights ombudsman for more information.

NOTE: These guidelines are general and are provided by the Utah Property Rights Ombudsman in an effort to provide better understanding of the land use process. They are not meant to constitute legal advice. They simplify and broadly generalize complex issues of law. Specific questions should always be directed to your attorney for specific advice. Questions and comments and suggested improvements to these materials are always welcome. Please contact: Property Rights Ombudsman, 1594 West North Temple Street, Suite 3710, P.O. Box 145610, Salt Lake City, UT 84114-5610.
PHONE: 801-537-3455/ FAX: (801) 538-7315
online: www.utahpropertyrights.com.

A

- access 109
- accommodation, required by Fair Housing Act 127-132
- administrative acts 29, 36-42, 77-107
- administrative code enforcement 171-177
- adopting land use ordinances 47-49, 56-60
- adult businesses 134-136
- aesthetic regulation 133-134, 136-139, 151-154
- agenda 52, 239
- agenda, controlling access to 23
- air quality 45
- alcohol addiction 128
- Alexandria, Virginia 151
- alternative dispute resolution 200-203
- American Fork, City of 218
- American Planning Association 73
- amortization of nonconforming uses 163
- Anderson v. Bluffdale City* 147, 222
- annexation 60-63
- appeal authority 27-28
- appeals – to challenge decisions involving:
 - annexation to municipality 63
 - conditional use permits 84
 - enacting land use ordinances 59
 - general plan 53
 - government records 235
 - impact fees 120
 - interpreting ordinances 188-196
 - litigation – filing lawsuits 203-227
 - misc code appeals 196-198
 - moratoria 74
 - routine approvals 80-82

- subdivision approvals 92
- takings 198-200
- temporary zoning ordinances 74
- variances 96
- zone changes 67
- Apple Computer 157
- applicants 20, 23-25, 79, 84, 92-94, 110
- approval, right to 79, 91
- arbitrary and capricious standard 47, 85-87, 220
- arbitration 200-203, 253
- archeology 104
- architectural controls 151-154
- Associated Foods 68-69
- Attorney General's Office 236
- attorneys 24-25, 203-206
- attorneys' fees 127, 235, 246

B

- Back Yard Auto 195-196
- Belmont, Massachusetts 125
- bike path 112-113
- Bill of Rights 5, 134
- billboards 136-139
- Bluffdale, City of 147, 222-223
- board of adjustment 19, 27, 41, 97-106, 244
- Board of Health 80, 186
- Boulder, Town of 221
- boundary commission 63
- Bradley v. Payson City* 68-69
- Brendle v. Draper* 80-82, 189
- Brown v. Sandy City Board of Adjustment* 192-194
- building code appeals 196-198
- building permits 41, 78, 165-166
- business confidentiality 234

C

CC&Rs 166-169
California Coastal Commission 111-112
Caster v. West Valley City 195-196
cellular towers 133-134
Charleston, South Carolina 16, 138
Checklist –Development Exactions 254-255
Checklist–Land Use Decisions 249-253
chief building official 197
Church of Jesus Christ of Latter-day Saints 125-126
churches, regulation of 123-127
citations 7
citizen enforcement of zoning ordinances 223-226
citizen planners 19-23, 27-28
citizen zoning enforcement 178-181
city council 19-23, 27-28
Civil Rights Act 135
clamor 3, 31-40, 53, 59, 66, 85, 87, 129
civil zoning enforcement 171-181
Clearfield, City of 85-86
closed meetings 242-246
Colonel Potter 5
communications facilities 133-134
compatibility 66
compelling public interest 72, 124, 191
conciliation 200-203
condemnation 144
conditional use permit 36-40, 64, 82-87, 109, 158, 224
conditions and exactions on development 109-121, 156-157, 254
condominiums 166-169
congestion 45
conservation easement 155
consistency 47

constitutional rights 12, 16-17, 208-220, 252
consultant 22
Corps of Engineers 93
corridor preservation 143-146
Covenants, Conditions and Restrictions 166-169
criminal procedure 171-172
critical lands 155
cross examine 231
Culbertson v. Salt Lake County 224-226

D

Dannon Yogurt 36-40
Davis County v. Clearfield City 85-87
day care 158
Dayley v. Summit County 165-166
deadlines for appeals 80-82, 189
deference to local decisions by the courts 31, 34, 39, 49, 59, 62, 68-69
Department of Administrative Services 235
development applications 78
development exactions 109-121
development standards 35
discretion 30-32, 45, 62, 70, 72, 85, 96
Dolan v. Tigard, Oregon 111-115
Draper, City of 31-35, 54, 80-82, 189
drug addiction 128
due process 217-218, 231, 249

E

easements 104
economic impacts 212
Eden, Ogden Valley 221
eminent domain 139

energy conservation 45
enforcing local land use ordinances 171-181
Episcopal Church v. West Valley City 130-132
equal protection 219, 252
estoppel 163-166
Euclid v. Ambler Realty 16
evidence 87 (also see substantial evidence)
exactions 62, 84, 109-121, 155-156, 217, 252, 254
exclusionary zoning 147, 154, 167
executive sessions 242-246
exhaustion 92, 145, 184-187

F

Fair Housing Act 127-132, 185
fairly debatable standard 35
Family Shopping Center 224-226
Federal Telecommunications Act of 1996 133
federally mandated rules 123-141, 220
fire code appeals 196-198
flood plain 114
floodwaters 217
foothills 80-82
Fort Union Shopping Center 224-226
free speech 26, 49, 134-139, 220
French Quarter 16, 151
frivolous litigation 180

G

Gastronomy, Inc 97-103
general plan 35, 43-47, 51-56
government records 229-236
Government Records Access and Management Act 230

GRAMA 14, 47, 229-236 (Appendix A)
grandfathered uses 41, 137, 161-163, 178, 195-196
group homes 85-87, 127-132
growth 60

H

handicapped 128
hardship 94-106
Harmon's v. Draper 31-35, 54
Harper v. Summit County 211
Hatch, Orrin 123
Haven, The 130-132
health code appeals 196-198
health department 185-186
Hewlett Packard 157-158
historic preservation 46, 97-103, 151-154
highways, acquiring land for 113, 143-146
Home Builders of Utah 119
home occupations 157-159
homeowner associations 155, 167-169
Huntsville, City of 221

I

impact fees 118-121, 155, 187, 196-198
internet meetings 246
internet sites 9
interpretation of ordinance 105, 188-196, 250
Iron County 211

J

Jobs, Steve 157
junkyard 195-196
just compensation 205

L

Lake Tahoe 73
Land Use Development and Management Act (LUDMA) 27
land use ordinances 47-49
land use planning 11-18
landmark code appeals 196-198
landmarks 151-154
law library 9
lawyers 24, 203
legal action 203-206
legal research 7-9
legalization of nonconforming uses 162
legislative acts 29-35, 51-74
local appeals 253
Logan, City of 162
Loretto v. Teleprompter Manhattan 216
lot division 89
low income housing 146-147
Lucas v. South Carolina Coastal Council 208-210
LUDMA 27
LULU 2

M

M*A*S*H 5
manufactured homes 147-149, 167
Market Street Broiler 97-103
Markham, Edward 5
Marshal, Thurgood 216
Martin v. The Church of Jesus Christ of Latter-day Saints 125-126
Massachusetts 125-126
Master Plan – see general plan
mediation 186, 200-203
mental health facility 85

Midvale, City of 224
minutes 242, 245
mistake 163-166
moderate income housing 146-147, 154, 222-223
moratoria 48, 71-74
municipal authority 45

N

Native Americans 104
neighbors 20, 25-26, 31, 35, 79, 85-87, 130, 179-180, 209-210
New Orleans, Louisiana 16, 151
New York City, New York 152
NIMBY (Not In My Back Yard) 25, 133
Nollan v. California Coastal Commission 111-112
nonconforming uses 137-139, 161-163, 178, 195-196, 210
notice – minimum required for meetings and hearings
 annexation to municipality 61
 conditional use permits 83
 enacting land use ordinances 56-58
 general plan 52
 impact fees 120
 interpreting ordinances 190
 misc code appeals 197
 moratoria 71
 open meetings 238-239
 routine approvals 79
 subdivision approvals 89
 takings 199
 temporary zoning ordinances 71
 variances 95
 zone changes 64
nuisance 36-40, 163, 172-177, 208-212
nuisance ordinances 172-177

O

official maps 144
Ogden Valley 221
Ombudsman 200-203
open and public meetings 13-14, 52-53, 197, 237-248, 250
open space 115, 154, 155, 217
ordinances 29, 47-49, 56-60, 77-78
outdoor advertising 138-139
outdoor storage 36-40
overnight rentals 192-194

P

Packard, David 158
Park City, City of 151, 153, 155
parks 154-157
pathways 156-157
Patterson v. American Fork City 218
Payson, City of 68-69
Plain City, City of 44, 55
planners 20-23
Planning Commission 19-23, 27-28, 43, 46, 48, 51, 53, 56-57, 64, 78,
163, 189
permitted uses 82
prescriptive easement 156
private covenants 166
procedure 249
procedures, required 221
professional planners 20-24
property owners 20, 23-25
property rights 67, 74, 101, 116, 143, 144, 156, 187, 208-218, 251
Property Rights Ombudsman 59, 67, 74, 92, 188, 200-203
Provo, City of 1
public body 237

public clamor 3, 31-40, 53, 59, 66, 85, 87, 129
public documents (see GRAMA)
public hearing 13, 14, 240
public input – minimum required
 generally 240-242
 annexation to municipality 61
 conditional use permits 83-84
 enacting land use ordinances 58
 general plan 53
 interpreting ordinances 190
 misc code appeals 197
 moratoria 72
 open meetings act 240-242
 routine approvals 79
 subdivision approvals 90
 takings 199
 temporary zoning ordinances 72
 variances 95
 zone changes 66
public meetings 13-14, 52-53, 237-247, 250
public records (see GRAMA)

Q

quality growth 154
quasi-judicial acts 29-31, 36-42

R

racial discrimination 49, 219
reasonably debatable standard 29-35, 66, 250
record 31
Religious Land Use and Institutionalized Persons Act of 2000 123
religious land uses 123-127
rental property 192-194

research 7
rezoning 35, 64-71, 88, 92
ridgeline 165
right to exclude others (see trespass)
RLUIPA 123
Rocky Mountain Raceway 195-196
rough proportionality 113
routine matters 78-82

S

sales taxes 32
Salt Lake City 55, 97-103
Salt Lake County 61-62, 224-225
San Jose, California 157
Sandy, City of 67, 192-194, 213-214
Sandy Hills Shopping Center 67, 213-214
Santa Barbara, California 111
school district 63
Scottsdale, Arizona 138
Secretary of the Interior's Standards for the Treatment of Historic
Properties 151
septic tanks 185-187
service district 63
setback 94, 104
sexually-oriented businesses 134-136, 220
sight lines 175-177
sign regulations 136-139, 220
site plan review 64
slope ordinance 80-82, 104
Smith Investment v. Sandy City 67, 213-214
source protection zone 185
South Carolina Coastal Council 208-210
speech 134-139
sprawl 60-63, 154

Springville Citizens v. City of Springville 179, 225
Springville, City of 179, 225
St. Stephen's Church 127-132
stake holders 2
standing 184
State Archives 236
state building board 197
state mandated rules 143-150, 222-223
State Records Committee 235
steep slopes 80-82
storage 40
street standards 224
streets and highways 111-115, 143-146
subdivisions 35, 41, 64, 78, 87-94, 109, 167
substance addictions 128
substantial burden 123
substantial evidence 36-42, 84-87, 91, 96-103, 154, 159, 166,
232, 250
substantive due process 217-218
Supreme Court Web site 9
Summit County 155, 165-166, 211
Sutherland, George 17, 35

T

takings 144, 198-200, 205, 208-218, 251
takings appeals procedure 198-200
tape recording 242
telecommunications facilities 133-134
telephone meetings 246
Teleprompter Manhattan 216
temporary ordinances 48, 71-74
third parties 20, 25-26, 31, 85, 130, 179
Tigard, Oregon 112-115
Toone, Ben 221

township 63
trailers 148
trails 115, 156-157, 217
transportation corridors 143-146
trash enclosures 97-103
trespass 114-115, 155-156, 215-217
Truman Elementary 128, 130-132

U

UDOT 138-139, 143-146
upsizing the water lines 116
urban sprawl 154
U.S. Supreme Court 9
Utah Code annotated 9
Utah Corridor Preservation Act of 2001 143-146
Utah Department of Community and Culture 146
Utah Department of Transportation 138-139, 143-146
Utah League of Cities and Towns 15, 143
utilities, duty to provide 109-121

V

vagueness in ordinances 48
variances 94-109, 253
vesting 93, 251
Village of Euclid v. Ambler Realty Co. 16

W

Wadsworth v. West Jordan 36-42
water 45
Web sites 9
Weber County 48, 221
weeds 175
Wells v. Salt Lake City Board of Adjustment 97-103

West Jordan, City of 36-42
West Valley City, City of 128-132, 195-196
wireless 133-134
witnesses 231

Z

zoning enforcement 41, 171-181
zoning estoppel 163-166, 178
zoning map 48, 54
zoning ordinances 35, 43, 47-49
zoning, changing 64-71, 88