OVERVIEW AND HISTORY OF

UTAH ZONING LAW

by

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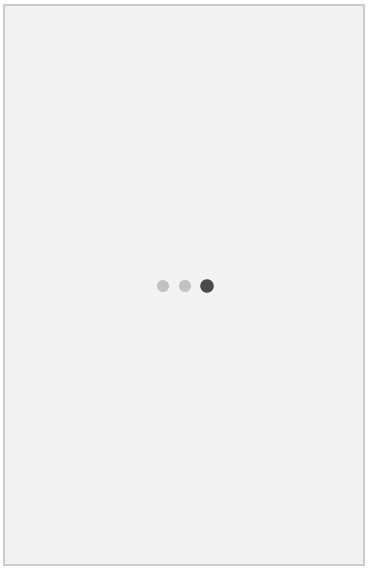
I.i. A BRIEF HISTORY OF ZONING IN THE UNITED STATES

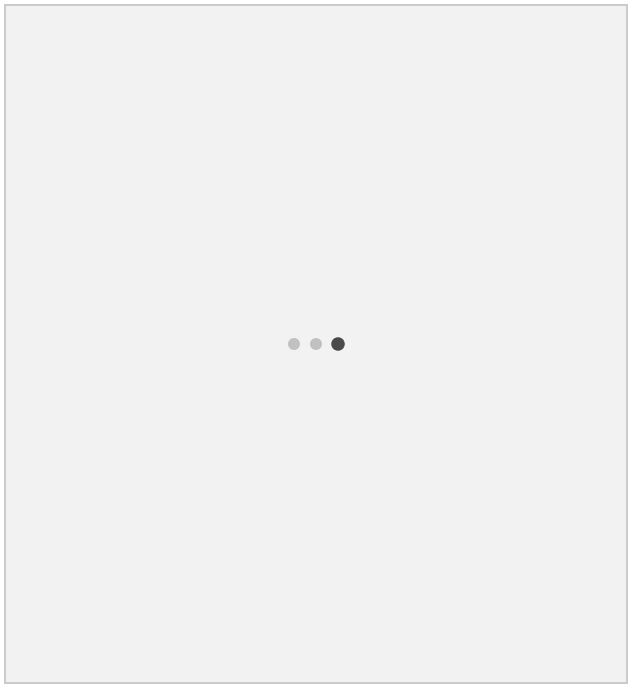
Although limited land-use regulation existed in the United States before the mid-1920's, it had not, historically, been a particularly popular endeavor. In fact, throughout the colonial period, land-use regulation had been practically non-existent. Land was typically owned by the sovereign, and was only released for purchase and development after streets and commons had already been laid out, and municipal and church sites already determined. This trend continued throughout the 19th Century, with developable land passing increasingly into private ownership, while, at the same time, government regulation of private conduct fell into disfavor. Public supervision of land development thus became quite rare as a result. But this was entirely consistent with the prevailing economic policy of *laissez faire*: the quality of land division and development was considered a private matter, of concern only to the owners and their successors

and best left to the "invisible hand of the market." (*See* R.L. Settle, *Washington Land Use and Environmental Law and Practice*, 1983.)

As a result, by the turn of the 20th Century, public land administration had become a more or less technical regimen, regulating the surveying and mapping of subdivisions, and the laying of utility lines. Rapid growth and increasing urban density, however, very quickly brought this hands-off policy into question. It was, for example, very difficult to maintain residences in a neighborhood suddenly home to a new meat-packing plant. Nor was it either wise or safe (although it was evidently temporarily quite profitable) to pile tenements atop one another for blocks without any provision for emergencies or epidemics.

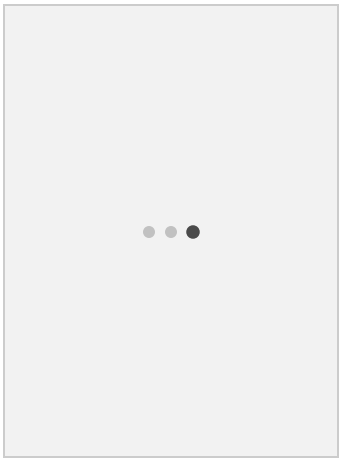


Oddly enough, however, it was neither disease nor disaster, but darkness, which prompted the first modern zoning ordinance. In 1912, the Equitable Building on Broadway—a wondrous, seven-story, elevator-equipped "sky-scraper" when it had been erected in 1870—burned down. The new Equitable Building, however, towered 500 feet into the air and cast a seven-acre shadow over Manhattan.



Those who found themselves in the unwelcome shade of this unheard-of monolith when it was completed in 1915 reacted with outrage. As a result, New York City adopted the first zoning code in 1916.**[1]**

It was a fairly simple document by today's standards, focusing for the most part on height and setback rules and establishing residential districts within which incompatible uses were forbidden.**[2]** Many people feared the concept, however, as government usurpation of private property rights. Others, however, strongly supported zoning, perceiving it as a mechanism for protecting property interests as well as health and safety.**[3]**

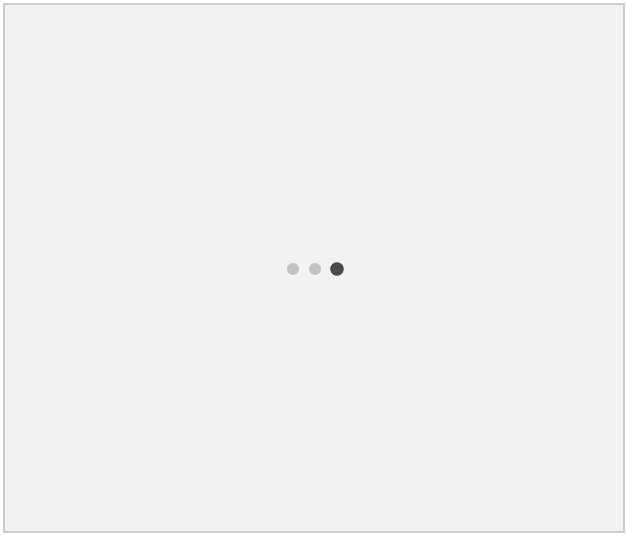


President Warren G. Harding's Secretary of Commerce, Herbert Hoover, was a zoning advocate. Hoover tapped the principal drafter of the New York zoning ordinance, Edward M. Bassett, to head the team preparing the Standard State Zoning Enabling Act ("SZEA"). Published in 1924, the several states welcomed and responded with unexpected enthusiasm to the new standard. During the following year, 1925, 19 states—including Utah—adopted zoning enabling legislation based upon the SZEA.**[4]** The 1926 revision was even more popular; in fact, by 1930, the act had been adopted in whole or in part by 35 state legislatures.

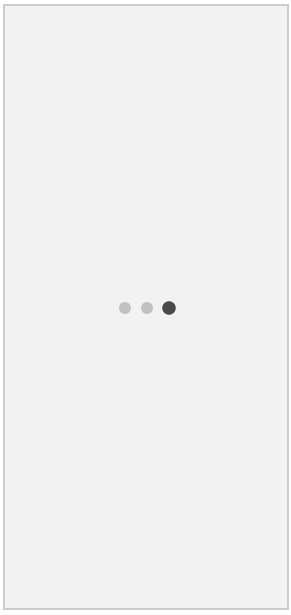
Throughout the country, however, those opposed to zoning began challenging what they saw as an infringement of their property rights. Their cause enjoyed what appeared to be a victory in the famous case of *Pennsylvania Coal Co. v. Mahon*,**[5]** in which Justice Oliver Wendell Holmes affirmed that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."**[6]** And it was in this legal atmosphere that the City of Euclid, Ohio, found itself thrust into the national spotlight in the seemingly insurmountable uphill battle of *Village of Euclid v. Ambler Realty Co*:**[7]**

> Euclid was a tiny farming community on the outskirts of Cleveland when the village board approved the village's first-ever zoning code in [November of] 1922. The accompanying map

divided the village into six use districts: single family, two family, apartment house, retail-wholesale stores, commercial, and industrial. Included in the residential districts were parts of a 68-acre tract along Euclid Avenue owned by Cleveland's Ambler Realty Company—land that the company had planned to sell to industrial users.



The realty company, joined by 14 other landowners, responded to the code with a lawsuit, the first zoning suit to be filed in a federal court. They won that round, with the help of a more-than-competent lawyer, Newton D. Baker, a former Cleveland mayor and Woodrow Wilson's secretary of war. Federal district court Judge David Westenhaver [, citing, among other cases, *Pennsylvania Coal*,] declared in January 1924 that the Euclid ordinance was an improper use of the village's police power[, constituted a taking of the Ambler property without just compensation,**[8]**] and thus was unconstitutional.



> Euclid attorney James Metzenbaum didn't give up. He appealed the decision directly to the U.S. Supreme Court, arguing that zoning was needed to protect the character of the community. Baker responded with a general attack on zoning. "To subdivide a municipality, to classify it and crystallize restrictions into laws, is to embed a fly in amber," he said.
>
> Just when Euclid seemed to be losing, Cincinnati lawyer and planning pioneer Alfred Bettman**[9]** saved with the day with a friend-of-the court brief in which he contended that zoning was a valid form of nuisance control and thus a reasonable exercise of the police power. The argument won over [six of the nine justices], who [on November 22, 1926,] issued the landmark opinion [(authored by Justice George Sutherland) holding Euclid's zoning ordinance constitutional].**[10]**

The *Euclid* decision settled the question of whether zoning violated constitutionally protected private property rights. In fact, no one has ever filed another facial challenge to the constitutionality of the zoning mechanism.**[11]** This has had little effect upon the continuous battle between landowners and city officials over the scope of land-use regulations in general

(and zoning in particular), and the courts have many times addressed, examined, and established the reach of the many facets of land-use legislation.**[12]**

I.ii. THE HISTORY OF ZONING AND THE POLICE POWER IN UTAH.

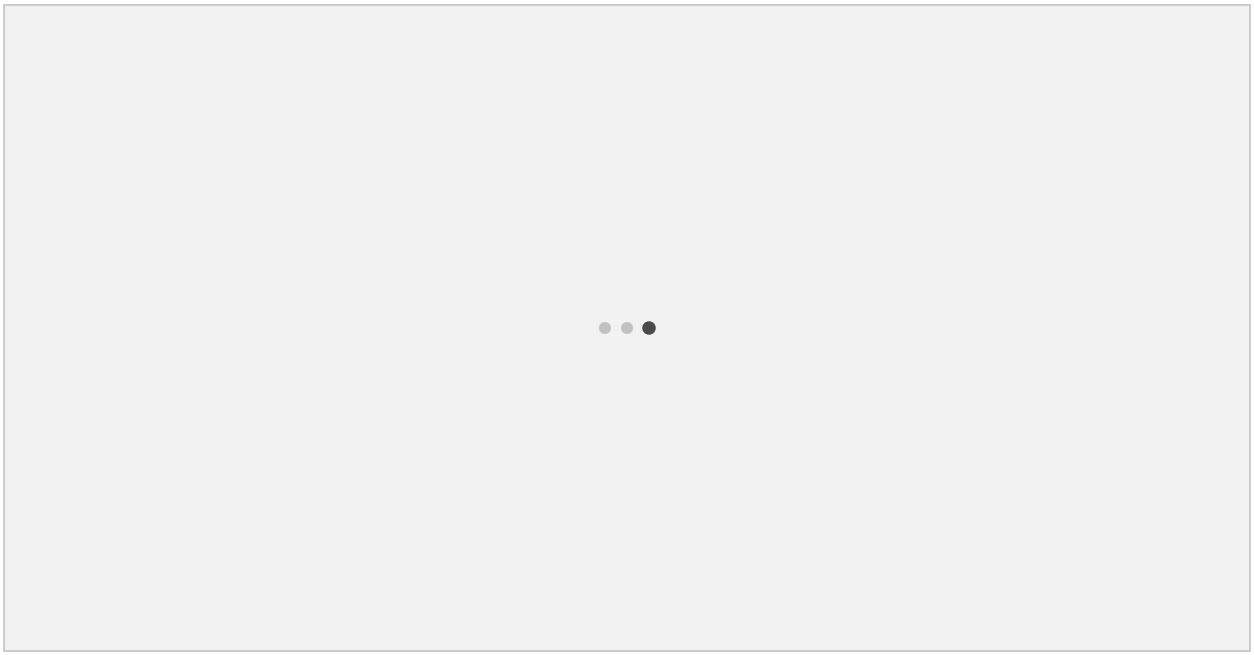
Utah, as noted above, was among the first states to adopt a zoning enabling act along SZEA lines. Its first enabling act, adopted in 1925, provided only for zoning within municipalities and followed the SZEA almost verbatim. Utah did not adopt legislation providing for zoning in unincorporated counties until 1941. This county act differed significantly from the original municipal act, reflecting not only 16-years' worth of amendment and "tuning," but also the different emphases which drive county land use as opposed to those underlying municipal land-use regulation.

The Utah Supreme Court, in *Marshall v. Salt Lake City*,[13] citing *Euclid* among numerous other cases, held that it a municipal legislative body's authority to divide a city into zoning districts and regulate uses therein is a function of the police power:

> City zoning is authorized only as an exercise of the police power of the state. It must therefore have for its purposes and objectives matters which come within the province of the police power....: It must be comprehensive; it must be designed to protect the health, safety, and morals of the inhabitants; to promote the general transportation and other public service; and meet the ordinary or common requirements of happy[,] convenient and comfortable living by the inhabitants of the districts, and the city as a whole. A zoning plan should not be jettisoned merely because it may be vulnerable to attack from one of these "pill boxes" [*i.e.*, small spot

> zones within larger districts]. It must be considered as a whole to see if it is designed to accomplish such purpose; if it could promote the general welfare; or even if it is reasonably debatable that it is in the interest of the general welfare, that act should be upheld. The wisdom of the plan, the necessity for zoning, the number and nature of the districts to be created, the boundaries thereof and the uses therein permitted, are matters which lie in the discretion of the governing body of the city. Unless the action of such body is arbitrary, discriminatory or unreasonable, or clearly offends some provision of the constitution or statute, the court must uphold it, if within the grant of power to the municipality.[14]

The *Marshall* Court's affirmation of the traditional standards of the public health, safety, and general welfare established the scope of local governments' police power to divide their territories into districts and regulate land uses therein.[15] Of course, this standard renders unenforceable, conceptually at least, any zoning ordinance lacking such a police-power purpose—in modern parlance, without a sufficient nexus between it and the health, safety, and general welfare of community residents.[16] As can be seen from a review of the reasoning behind the *Marshall* decision, the Utah Supreme Court (to date, at least) has been explicitly reluctant to invalidate a zoning regulation for lack of such a nexus, signaling on the contrary the lengths to which the Court would go to defend local zoning regulations from claims that no nexus exists.[17] Thus, an appeal claim of lack of nexus is difficult at best.



The zoning ordinance at issue in *Marshall* permitted "utility" business uses on intersection corners in residential districts. Acknowledging that the enabling statute required that territory should be divided into districts and not regulated by single lots or groups of lots (commonly termed "spot zoning," but by the *Marshall* Court, "pill boxes" (see above)),[18] the Utah Supreme Court nevertheless upheld the corner uses.[19] The basis for the holding, as noted above, was that the classification was part of a comprehensive plan designed to promote the general welfare, and the court would not second guess the city "[u]nless the action of [the governing body of the city] is arbitrary, discriminatory or unreasonable, or clearly offends some provision of the constitution or statute."[20]

Six years later, in *Phi Kappa Iota Fraternity v. Salt Lake City*,[21] the Utah Supreme Court reaffirmed this position. At issue was a Salt Lake City ordinance limiting the placement of fraternity and sorority houses around the University of Utah to the area within 600 feet of the school's boundary line.

> Plaintiffs profess to see nothing pertaining to the health, morals, safety or general welfare in distinguishing between residences of District A within the 600 foot area, and those outside thereof.
>
> As indicated in ... *Marshall v. Salt Lake City* ..., the expressions 'health', 'morals', 'safety', and 'general welfare' of the public contemplate something more than merely the literal translation of each of those terms. The statutes ... recognize the right to zone; and pursuant to them, cities have zoned certain areas upon the theory of it being to the public interest to do so—such as the various Zones of A, B, etc., in Salt Lake City. Circumstances may be such that there is just as much reason for 'spot zoning' within a certain zone, as there is for having that zone declared as an area of limitation within the city. The relationship to the public interest of each form of zoning is considered as falling within the terms of health, morals, safety and general welfare of the public, when such zoning is permissible. We are of the opinion that the present limitation of the 600 foot area is of that class of legislation....
>
> .... "This is essentially a legislative problem, and the determination may be attacked only if there is no reasonable basis therefore. Often there may be little difference in the character of the property on either side of the line, but such a showing will not justify a judicial alteration or extension of the boundaries."[22]

This language—"each form of zoning is considered as falling within the terms of health, morals, safety and general welfare of the public"—reemphasized the Court's reluctance to interfere with legislative decree and plainly reified the judicial presumption of the validity of local-government land-use decisions.

In *Hargraves v. Young*,[23] six years after ΦKI, the Salt Lake City building inspector had cited a carport for violation of the applicable zone's sideyard requirements. Defendants had challenged the citation on the grounds "that there is no reasonable relationship between prohibiting such structure in sideyards and the public health, safety, morals or general welfare."[24] The Utah Supreme Court disagreed:

> As to [whether] there is no reasonable relationship between prohibiting such structures in prescribed sideyards and the public health, safety, morals or general welfare, we cannot agree, since set-back requirements generally have been held valid under similar ordinances, and there appears to be no essential difference between elimination of structures in sideyards and the elimination of structures in frontal areas reserved in set-back ordinances.[25]

Of course, the absence of any explanation as to *how* set-back provisions are based upon "health, safety, morals or general welfare" leaves us no wiser, but this very absence points up the Courts' disinclination to review any such connection (or lack). *Hargraves* also established the right of local governments to regulate sideyards and setbacks.[26]

The Utah Supreme Court further expanded this presumption of validity 20 years later in *Buhler v. Stone*,[27] which held that regulations in a zoning ordinance may include "reasonable measures to minimize discordant, unsightly and offensive surroundings; and to preserve the beauty as well as the usefulness of the environment."[28] Moreover, ordinance language

requiring the elimination of "unsightly or deleterious objects" or "junk [and] scrap metal"[29] is not unconstitutionally vague:

> Concerning the charge of vagueness, it should be realized that legislation must necessarily be in somewhat general terms because it is obviously impossible to describe in detail every act and circumstance a statute or ordinance is intended to deal with. It is but sensible and practical that courts should take into consideration the difficulties involved in describing such conditions with the last degree of precision of language. The pertinent parts of the ordinance should not be viewed in isolation for the purpose of finding fault with them and declaring it unconstitutional; they should be viewed in light of the total context and purpose; and an enactment should not be declared void for vagueness unless it is so deficient that it is susceptible of no reasonable construction which would make it operable.[30]

Five years after issuing the *Buhler* decision, and 37 years after *Marshall* established the validity of zoning in Utah, the Utah Supreme Court brought matters full circle, handing down the landmark *Western Land Equities, Inc. v. City of Logan*,[31] in which, citing *Euclid*, the Court noted at the outset that "an owner of property holds it subject to zoning ordinances enacted pursuant to a state's police power."[32] From being almost a tolerated exception critically held up to traditional land-use law, zoning had become the established premise against which land uses must be themselves critically measured.

I.iii. The 2005 LUDMA.

For the last century, then, the police power vis-à-vis zoning has allowed cities and counties to "divide the territory over which [the city or county] has jurisdiction into zoning districts" within which "the legislative body may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings and structures, and the use of land,"[33] within each of which "the regulations . . . [must be] uniform for each class or kind of buildings . . . [,] but the regulations in one zone may differ from those in other zones."[34] These principles have been codified in various statutes over the years—separated, merged, amended, renumbered, and revised time and again. These various statutes have formed the basis for zoning ordinances and land-use regulations throughout the state; ordinances which have, themselves, been subjected to repeated revision and amendment. Both statutes and ordinances have been judicially scrutinized, affirmed, criticized, and discussed—consuming oceans of ink and acres of paper.

Then, exactly 80 years after Utah's adoption of its first zoning enabling act, the Utah Legislature enacted the 2005 UTAH LAND USE, DEVELOPMENT, AND MANAGEMENT ACT ("LUDMA"), codified in Chapter 9a of Title 10 of the Utah Code (the "UCA") for municipalities and in Chapter 27a of Title 17 for counties. The fruits of efforts by then Senator, now Lt. Governor Greg Bell, LUDMA attempt to embrace all of the various judicial interpretations, practical policies, and good ideas of the last hundred years into a single, comprehensive act. The task force drafting the bill comprised more than 50 people—elected and appointed officials, lawyers, realtors and developers, lawyers, surveyors and engineers, and, of course, lawyers—whose job it was to turn the many topics "land use" comprehends, balancing sometimes esoteric judicial interpretation against the legislature's desire to reinforce the role of the ordinary person, to present a clear vision of land-use regulation for the *next* 100 years.

The purposes of LUDMA echo the police power objectives which have driven zoning ordinances since their inception, suitably updated to address the concerns of the early 21st Century:

> The purposes of this chapter are to provide for the health, safety, and welfare, and promote the prosperity, improve the morals, peace and good order, comfort, convenience, and aesthetics of each municipality/county and its present and future inhabitants and businesses, to protect the tax base, to secure economy in governmental expenditures, to foster the state's agricultural and other industries, to protect both urban and non-urban development, to protect and ensure access to sunlight for solar energy devices, to provide fundamental fairness in land use regulation, and to protect property values.[35]

The language emphasizing "access to sunlight for solar energy devices" ironically hearkens back to Gotham's 1916 outrage over the Equitable Building's seven-acre shadow, although the modern policy behind it is quite a bit more complex.

An enabling provision follows immediately on the footsteps of the declaration of purpose, and includes a list of 13 points as to which local governments may enact, enter into, or undertake the various powers granted by the Act:

> To accomplish the purposes of this chapter, municipalities/counties may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that they consider necessary or appropriate for the use and development of land within the municipality, including ordinances, resolutions, rules, restrictive covenants, easements, and development agreements governing [1] uses, [2] density, [3] open spaces, [4] structures, [5] buildings, [6] energy efficiency,

[7] light and air, [8] air quality, [9] transportation and public or alternative transportation, [10] infrastructure, [11] street and building orientation and width requirements, [12] public facilities, and [13] height and location of vegetation, trees, and landscaping, unless expressly prohibited by law.[36]

II. UTAH PLANNING AND ZONING UNDER LUDMA.

II.i. PLANNING COMMISSIONS.

Under LUDMA, the starting point of zoning and land-use law is the municipality's or county's **(a)** "comprehensive, long-range general plan," UCA § 10-9a-401(1) & 17-27a-401(1), **(b)** its land use ordinance, and **(c)** its zoning map, UCA §§ 10-9a-501 & 17-27a-501 ("The legislative body may enact land use ordinances and a zoning map consistent with the purposes set forth in this chapter."[37]). The *first* step in the preparation of each of these, however, lies with the local planning commission, which is required to "make and recommend to the legislative body a proposed general plan," UCA §§ 10-9a-403(1)(b) & 17-27a-403(1)(b), as well as "prepar[ing] and recommend[ing] to the legislative body a proposed land use ordinance ... and zoning map." UCA §§ 10-9a-502(1)(c) & 17-27a-502(1)(c).

II.i.1 *Planning Commission Formation & Organization.*

The formation of a planning commission was once discretionary with the local legislative body—although, in practice, few if any local governments opted to do without one— LUDMA mandates their creation, although it leaves most of the details as to their composition and procedure to the local legislative body:

> **(1) (a)** Each [municipality/county] shall enact an ordinance establishing a planning commission.
>
> **(b)** The ordinance shall define:
>
> **(i)** the number and terms of the members and, if the municipality chooses, alternate members;
>
> **(ii)** the mode of appointment;
>
> **(iii)** the procedures for filling vacancies and removal from office;
>
> **(iv)** the authority of the planning commission; and
>
> **(v)** other details relating to the organization and procedures of the planning commission.
>
> **(2)** The legislative body may fix per diem compensation for the members of the planning commission, based on necessary and reasonable expenses and on meetings actually attended.

UCA § 10-9a-301 (municipal). The county provision, in keeping with the size and relative complexity of LUDMA's county regimen, is rather more convoluted:

(1) **(a)** Except as provided in Subsection (1)(b), each county shall enact an ordinance establishing a countywide planning commission for the unincorporated areas of the county not within a township.

(b) Subsection (1)(a) does not apply if all of the county is included within any combination of:

(i) municipalities; and

(ii) townships with their own planning commissions.

(2) (a) The ordinance shall define:

i. the number and terms of the members and, if the county chooses, alternate members;

ii. the mode of appointment;

iii. the procedures for filling vacancies and removal from office;

iv. the authority of the planning commission;

v. subject to Subsection (2)(b), the rules of order and procedure for use by the planning commission in a public meeting; and

vi. other details relating to the organization and procedures of the planning commission.

. . . .

(8) The legislative body may fix per diem compensation for the members of the planning commission, based on necessary and reasonable expenses and on meetings actually attended.

UCA § 17-27a-301(1), (2), & (8) (county). The reason for the convolution of the county requirements is the existence of townships:

> contiguous, geographically defined portion[s] of the unincorporated area of a county ... with planning and zoning functions as exercised through [a] township planning commission, as provided in this chapter, but with no legal or political identity separate from the county and no taxing authority ....

UCA § 17-27a-103(58).[38] Townships are thus planning and zoning entities by definition, their sole officers being a local planning commission.

In opposition to the almost complete freedom LUDMA grants cities and counties in regard to the number, composition, and tenure of their planning commissions, the statute exerts almost entire control of township planning commissions. An establishing county may define by ordinance appointment and removal procedures, as well as procedures for a township planning commission, UCA § 17-27a-301(3)(a); the statute requires, however, that such a commission "consist of seven members" to be appointed by the county authority exercising executive powers,

UCA § 17-27a-301(3)(b). All members are to serve four-year terms, one or two members' terms to expire each year. UCA § 17-27a-301(c).

II.i.2 *Planning Commission Powers & Duties under LUDMA.*

As noted above, one of the main duties of a planning commission—whether municipal, township, or county—is to "make and recommend to the legislative body a proposed general plan," as well as "to prepare and recommend to the legislative body a proposed land use ordinance ... and zoning map." UCA §§ 10-9a-403(1)(b) & 10-9a-502(1)(c), and 17-27a-403(1)(b) & 17-27a-502(1)(c). LUDMA's rearrangement of local land use authorities, however, places a set of additional tasks on the planning commission plate. In addition to its traditional tasks, a planning commission must prepare and/or recommend to the local legislative body:

- *an appropriate delegation of power to at least one designated **LAND USE AUTHORITY** to hear and act on a land use application;*
- *an appropriate delegation of power to at least **ONE APPEAL AUTHORITY** to hear and act on an appeal from a decision of the land use authority;*
- *an application processes which may include **A DESIGNATION OF ROUTINE LAND USE MATTERS** for informal, streamlined review and action (if uncontested); and*
- *a proposed **SUBDIVISION ORDINANCE**.*

UCA §§ 10-9a-302(3), (4), (5)(a) & -602(1) and 17-27a-302(1)(c), (d), (e)(i) & -602(1).[39];[40]

Under previous law, planning commissions were also empowered to enter upon any land at reasonable times to make examinations and surveys. *See* UCA §§ 10-9-205, 17-27-205 (2004). This power is now applicable to both a "municipality" and a "county," UCA §§ 10-9a-303 & 17-27a-303, not just the planning commission; this power, however, is specifically limited to examinations and surveys "pertinent to the ... (1) preparation of its general plan; or (2) preparation or enforcement of its land use ordinances, *id.*

In any event, in making recommendations, the planning commission acts as a quasi-judicial body providing recommendations to the legislative body, which alone has the power to implement them.

II.ii. THE GENERAL PLAN.

The general plan, required of "each municipality" and "each county," sets forth the general guidelines for proposed future development of the land within the territorial limits of the county or municipality, including a general plan for the present and future needs of the community and the growth and development of land within the community. *See* UCA §§ 17-27-401(1) & 10-9-401(1). A general plan may include provisions for any or all of the following:

a. *health, general welfare, safety, energy conservation, transportation, prosperity, civic activities, aesthetics, and recreational, educational, and cultural opportunities;*

b. *the reduction of the waste of physical, financial, or human resources that result from either excessive congestion or excessive scattering of population;*

c. *the efficient and economical use, conservation, and production of the supply of food and water as well as drainage, sanitary, and other facilities and resources;*

d. *the use of energy conservation and solar and renewable energy resources;*

e. *the protection of urban development;*

f. *the protection or promotion of moderate income housing;*

g. *the protection and promotion of air quality;*

h. *historic preservation, identifying future uses of land that are likely to require an expansion or significant modification of services or facilities provided by each affected entity, and an official map.*

UCA §§ 17-27a-401(2) & 10-9a-401(2).

The adoption of a general plan is a legislative act. *Gayland v. Salt Lake County*, 11 Utah 2d 307, 310, 358 P.2d 633, 635 (1961). As such, the courts must "presume" the adoption valid and cannot overturn it (or any other "decision, ordinance, or regulation made under the authority" of the LUDMA provisions, what's more) unless the adoption is "arbitrary, capricious or illegal." UCA §§ 10-9a-801(3)(a) & 17-27a-801(3)(a). LUDMA provides that actions "involving the exercise of legislative discretion" are valid if "reasonably debatable and not

otherwise illegal." UCA §§ 10-9-801(3)(b) & 17-27a-801(3)(b). To be "illegal," the adoption of a general plan (or any other legislative action) would have to "violate[] a law, statute, or ordinance in effect at the time" of the adoption. UCA §§ 10-9-801(3)(d) & 17-27a-801(3)(d). *See also Dowse v. Salt Lake City Corp.*, 123 Utah 107, 255 P.2d 723, 724 (1953); *Walton V. Tracy Loan & Trust Co.*, 97 Utah 249, 253, 92 P.2d 724, 726 (1939) ("the exercise of the zoning power is definitely a legislative function and activity"). The adoption of a comprehensive general plan ***does not*** itself constitute the regulation of property and has withstood constitutional challenge. UCA §§ 10-9a-103(14) & 17-27a-103(16); s*ee also*, *e.g.*, *Marshall v. Salt Lake City*, 105 Utah 111, 141 P.2d 704, 708–709 (1943). If the general plan is not a **comprehensive** plan, however, it does not meet the requirements of the statute and will be invalidated. *Id*. at 708. Because the adoption of a general plan is a legislative act, it is subject to referendum.[41] *See* UCA § 20a-7-601(2) (master plans and comprehensive zoning ordinances are subject to referendum); *Wilson v. Manning*, 657 P.2d 251, 253 (Utah 1982) ("the enactment of zoning laws and ordinances is the exercise of legislative function . . . subject to referendum").[42]

The adoption of the General Plan is also controlled by statute. The Planning Commission, in preparing the proposed plan, must include, along with "accompanying maps, charts, and descriptive and explanatory matter," recommendations for

(i) a land use element that:

(A) designates the long-term goals and the proposed extent, general distribution, and location of land for housing, business, industry, agriculture, recreation, education, public buildings and grounds, open space, and other categories of public and private uses of land as appropriate; and

(B) may include a statement of the projections for and standards of population density and building intensity recommended for the various land use categories covered by the plan;

(ii) a transportation and traffic circulation element consisting of the general location and extent of existing and proposed freeways, arterial and collector streets, mass transit, and any other modes of transportation that the planning commission considers appropriate, all correlated with the population projections and the proposed land use element of the general plan; and

(iii) ... an estimate of the need for the development of additional moderate income housing within [the city/unincorporated area of the county], and a plan to provide a realistic opportunity to meet estimated needs for additional moderate income housing if long-term projections for land use and development occur.

UCA §§ 10-9a-403(2)(a) & 17-27a-403(2)(a). Once the proposed plan is prepared, the planning commission must hold a public hearing, UCA §§ 10-9a-404(1) & 17-27a-404(1),[43] after which the legislative body may adopt the plan, or amend it, or reject it, with or without recommendations to the planning commission for changes. *Id.* at -404(4)(municipal) & -404(5)(county).

After the adoption by the legislative body, the general plan becomes an advisory guide for land use decisions, *see id.* §§ 17-27a-405(1) & 10-9a-405, "the impact of which shall be determined by ordinance," *id.* In any event, unless local ordinance makes compliance mandatory,[44] the fact that a development proposal does not comply with the general plan is not fatal to approval of the project, although it could be used as evidence of an arbitrary or capricious

action. *See generally* Robert M. Anderson, *American Law of Zoning 3d*, § 5.07 (1986). If so designated by the legislative body, however, the general plan becomes a mandatory condition that must be satisfied in any land use or zoning decision, and the failure to meet general plan requirements would thereafter be sufficient grounds for denial. *See also* §§ 17-27a-405, 10-9-303(6)(b). Even in the absence of such a designation, however, unless the legislative body approves an amendment to the general plan, "[a]fter the legislative body has adopted a general plan, no street, park, or other public way, ground, place, or space, no publicly owned building or structure, and no public utility, whether publicly or privately owned, may be constructed or authorized until and unless it conforms to the current general plan." UCA §§ 17-27a-406 & 10-9a-406.

II.iii. CITY COUNCIL, COUNTY COMMISSION, COUNTY COUNCIL

City Councils and County Commissions or Councils, as the legislative bodies in their respective jurisdictions, may adopt ordinances under the enabling acts. *See* UCA, §§ 10-9a-501 & 17-27a-501. They are also the only bodies that can adopt and amend zoning maps, UCA §§ 10-9a-502(2), 17-27a-502(2), and adopt general plans, UCA §§ 10-9a-404(4), 17-27a-404(5)(a). They also appoint or provide for the appointment of Planning Commission members, UCA §§ 10-9a-301(1)(b)(ii) & 17-27a-301(2)(b), the newly required "Land Use Authority" ("LUA"), UCA §§ 10-9a-103(23) & 17-27a-103(27), and the mandated "Appeal Authority" or "Authorities" under UCA §§ 10-9a-701(1) & 17-27a-701(1). The principal role of the legislative

body, however, insofar as planning and zoning are concerned, is the establishment of local zoning ordinances.

II.iii.1 ***Zoning Ordinances***

The Legislative body has the power to adopt and amend zoning ordinances. *See* UCA §§ 10-9a-501, -503 & 17-27a-501, -503. To adopt or amend zoning ordinances, the planning commission must, after a duly noticed public hearing (see §§ 10-9a-205 & 17-27a-205),[45] make a recommendation as to the proposed adoption or amendment. UCA §§ 10-9a-502(1)(a) & 17-27a-502(1)(a). The recommendation need not be favorable. Upon recommendation, the legislative body holds a duly noticed public meeting (note: not a hearing; again, see §§ 10-9a-205(1)(b) & 17-27a-205(1)(b)), and thereafter may adopt, amend, or reject the proposed ordinance and/or map.

Temporary regulations, including moratoria, may be adopted without such procedures, but may not exceed six months in duration, UCA §§ 10-9a-504 and 17-27a-504:

> **(1) (a)** A municipal legislative body may, without prior consideration of or recommendation from the planning commission, enact an ordinance establishing a temporary land use regulation for any part or all of the area within the municipality if:
>
> **(i)** the legislative body makes a finding of compelling, countervailing public interest; or
>
> **(ii)** the area is unregulated.

(b) A temporary land use regulation under Subsection (1)(a) may prohibit or regulate the erection, construction, reconstruction, or alteration of any building or structure or any subdivision approval.

(c) A temporary land use regulation under Subsection (1)(a) may not impose an impact fee or other financial requirement on building or development.

(2) The municipal legislative body shall establish a period of limited effect for the ordinance not to exceed six months.

II.iii.2 *Application & Enforcement of Zoning Ordinances*

Perhaps the most significant innovation of the 2005 LUDMA was the introduction of "Land Use" and "Appeal" Authorities. UCA §§ 10-9a-103(2), (23) & 17-27a-103(2), (27).

II.iii.2/a. The Land Use Authority

The "Land Use Authority" ("LUA") is the "person, board, commission, agency, or body, including the local legislative body, designated by the legislative body[46] to act upon a land use application." *Id.* at -103(23)(municipal), -103(27)(county). A "[*l*]and use application" is any "application required by a [city's or county's] land use ordinance," *id.* at -103(22)(municipal), -103(26)(county)[47]; and "[*l*]and use ordinance" means any "planning, zoning, development, or subdivision ordinance" (except the general plan), *id.* at -103(24)(municipal), -103(28)(county).

II.iii.2/b. Appeal Authorities[48]

While the natural inclination when an adverse zoning decision is made is to "take 'em to court" there is almost always at least one level of admissible appeal. Such appeals are almost

always a mandatory precedent to a judicial appeal. As most recently enunciated in *Holladay Towne Ctr. v. Holladay City*, 2008 Ut App. 301, exhaustion of administrative appeal requirements will be strictly enforced by the courts. Thus, internal appeals to the appeal authority with appeal periods as short as ten days are mandatory. *See Brown v. Sandy City*, 957 P2d 207 (Ut App 1998.) Appeal authorities are governed by Part 7 of the Act. Cities and counties are required, "by ordinance, [to] establish ***one or more appeal authorities*** to hear and decide" (a) requests for variances and (b) appeals from "decisions applying the land use ordinances." UCA §§ 10-9a-701(1), (4) & 17-27a-701(1), (4) (emphasis added). This relatively open mandate allows, theoretically, a separate appeal authority ("AA") for every sort of land use decision a LUA might ever have occasion to render: one for variances, one for subdivision approvals, one for conditional uses, one for nonconforming uses, etc. etc. In practice, of course, such a plethora of boards and hearings would never work.[49] There are, however, a number of rules more or less barring any sort of overlapping, thus requiring at least a great deal of care if one is inclined toward parsimony.[50]

First, an AA "may not entertain any appeal of a matter in which the [AA], or any participating member, had first acted as the [LUA]." UCA §§ 10-9a-701(3)(b) & 17-27a-701(3)(b). Thus, for example, if the planning commission is the LUA, it cannot sit as the AA; if one particular member of the planning commission is or is part of the LUA, such member cannot participate in the deliberations of the planning commission when it is sitting as the AA on the matter. **Second**, and perhaps more importantly (in light of the sometimes Byzantine situations created by prior law), an appellant from a LUA decision may not be required "to pursue duplicate or successive appeals before the same or separate [AAs] as a condition ... to

exhaust administrative remedies." UCA §§ 10-9a-701(4)(d) & 17-27a-701(4)(d). **Third** (oddly), a city or county may opt to make some LUA decisions immediately appealable to district court without the necessity of going before any AA at all. UCA §§ 10-9a-701(4)(e) & 17-27a-701(4)(e). Under this rule, theoretically, a city, county, or town would not have to establish any AAs. This, however, would appear to contradict §-701's mandate that such authorities be designated and established. Wisdom would dictate that a local government establish the required AAs and then, as necessary or desirable, select specific matters it believes would be best before a court rather than a local body for exception—as opposed to attempting to toss all LUA decisions onto the courts and risk a challenge to the whole regimen.

The standard of review before an AA is set by ordinance, UCA §§ 10-9a-707(1) & 17-27a-707(1), or, by default, their review must be de novo, *id.* at §§ -707(2).

Sections -701(5) (both city and county versions) specifies a number of procedural details for any AA to follow, and which we suggest the reader assume to be jurisdictional requirements:

> [A]t a minimum the [AA] shall:
>
> **(a)** *notify each of its members* of any meeting or hearing of the [AA];
>
> **(b)** *provide each of its members* with the same information and access to municipal resources as any other member;
>
> **(c)** *convene only if a quorum* of its members is present; and
>
> **(d)** *act only upon the vote of a majority of its convened members*.

(Emphasis added.) Take note especially of requirement (c), which permits an AA to convene only when a quorum of its members is present. How many constitute a "quorum," of course, will

have to be set out in the creating ordinance or the AA's own organizing documents. This becomes critical when we come to requirement (d), which permits action only upon the vote of a majority of ***convened*** members.

Let us say that a quorum consists of four out of seven members (a, b, c, d, e, f, & g). Let's assume additionally that a majority of the seven (say a, b, c, & d) are against a particular land use, while the minority (e, f, & g) favor it. Now suppose an appeal concerning this very sort of land use come up from an LUA decision before the AA, but only four of the members show up at the meeting: d, e, f, & g. A quorum is present, so a vote may be taken. In this case, however, the *minority* (e, f, & g) have the majority (three out of four), and the land use is probably going to be permitted. (This is also the reason behind requirements (a), notice, and (b), information access.)

Two more interesting rules applicable to AA appeals: ***First***, a municipal or county ordinance may "require an adversely affected party [*i.e.*, adversely affected by the LUA decision] to present to an [AA] every theory of relief that it can raise in district court." UCA §§ 10-9a-701(4)(c) & 17-27a-701(4)(c). What this means practically is that whatever a petitioner fails to bring up before the AA he or she will generally be unable to present in district court. ***Second***, an appeal from an LUA decision to an AA must be taken within at least ten days of the LUA's written decision, UCA §§ 10-9a-704 & 17-27a-704, although the city or county may, by ordinance, establish some longer time, *id.*

II.iii.2/c. Variance Appeals & Other Administrative Avenues

LUDMA provides a fairly structured approach to variances. Variances may only be granted if they meet specific statutory criteria:[51]

(1) literal enforcement of the ordinance would cause an ***unreasonable hardship*** for the applicant that is not necessary to carry out the general purpose of the land use ordinances;

To be "unreasonable," the alleged hardship must

(a) *be located on or associated with the property for which the variance is sought,*

(b) *come from circumstances peculiar to the property, not from conditions that are general to the neighborhood, and*

(c) *not be self-imposed.*

(2) there are ***special circumstances*** attached to the property that do not generally apply to other properties in the same zone;

"Special circumstances" ***only*** *exist if*

(a) *they relate to the hardship complained of, and*

(b) *deprive the property of privileges granted to other properties in the same zone.*

(3) granting the variance is ***essential to the enjoyment*** of a substantial property right possessed by other property in the same zone;

(4) the variance will ***not substantially affect*** the general plan and will not be contrary to the public interest; and

(5) the ***spirit of the land use ordinance*** is observed and ***substantial justice*** done.

UCA §§ 10-9a-702(2) & 17-27a-702(2).

Anyone seeking a variance bears the burden of proving that the conditions for a variance have been met. §§ -702(3). The AA can "not grant a use variance," §§ -702(5),[52] but the granting AA "may impose additional requirements" to "mitigate any harmful affects of the variance" or to "serve the purpose of the standard or requirement ... waived or modified," §§ -702(6). Once established, a variance "run[s] with the land." §§ -702(4).

In *Chambers v. Smithfield City*, 714 P.2d 1133 (Utah 1986), a variance had been granted to build a house on a lot less than the minimum size in the zone. The action granting the variance was challenged in court. The Utah Supreme Court held that the granting of the variance violated state law. The court found the spirit of the zoning law violated. The court also found no special conditions attached to the property. Also, the court found that no hardship was demonstrated and noted that economic loss alone is not a hardship. Finally, the court found that the owner had brought the hardship on himself. He had bought the lot knowing that it did not comply with the zoning requirement for lot size. In sum, any variance granted must comply with the limitations on the granting of variance in state law. In *Wells v. Salt Lake City Bd. Of Adjust.*, 936 P.2d 1102 (Utah App. 1997), the Utah Supreme Court held that approval of a variance without making the statutorily required findings was illegal.

If an AA variance decision is appealed to the district court, the appeal must be filed within 30 days. UCA §§ 10-9a-801(2)(a) & 17-27a-801(2)(a). The court's review will be based only upon the record made before the AA, unless (1) evidence was improperly excluded by the AA or (2) there is no record. *Id.* at §§ -801(8)(a)(ii). In the latter case, the court may call witness and

take evidence. Id. at §§ -801(8)(b). If the Appeal Authority's decision is supported by substantial evidence, it must be affirmed.[53] UCA §§ 10-9a-801(3) & 17-27a-801(3).

II.iii.2/d. Conditional Uses

Conditional uses are governed by UCA §§ 10-9a-507 & 17-27a-506:

> **(1)** A land use ordinance may include conditional uses and provisions for conditional uses that require compliance with standards set forth in an applicable ordinance.
>
> **(2) (a)** A conditional use shall be approved if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards.
>
> **(b)** If 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, the conditional use may be denied.

For example, in *Stucker v. Summit County*, 870 P.2d 283 (Utah App. 1994), the local ordinance required a proposed use to be **compatible** with neighboring uses. Where compatibility was at issue, the ordinance then authorized the planning commission to hold hearings and make a decision resolving the issue:

> When a developer and affected property owners cannot reach a consensus of opinion regarding compatibility of the proposed land use, **the Planning Commission holds a public hearing prior to making a decision and listens to the concerns of all**

> **affected property owners** and interested parties regarding the proposed project's compatibility,

Id. at 285 (emphasis added).

Concerning the decision to grant or deny conditional use permits, the Utah Supreme Court has held that although it is appropriate to solicit information from neighboring landowners, it is inappropriate to base a zoning decision on their consent. Thus, in *Thurston v. Cache County*, 626 P.2d 440 (Utah 1981), it was alleged that the county "placed undue reliance on objections filed by landowners in the vicinity." *Id.* at 445. The Utah Supreme Court held the landowner's objections were properly treated by the county as advisory only. Moreover, the court maintained:

> [w]hile it is true that the consent of neighboring landowners may not be made a criterion for the issuance or denial or [sic] a conditional use permit, there is no impropriety in the solicitation of, or reliance upon, information which may be furnished by other landowners in the vicinity of the subject property at a public hearing.

Id. However, in *Davis County v. Clearfield City*, 756 P.2d 704 (Utah App. 1988), the Utah Court of Appeals affirmed a district court holding that a "City Council's decision [refusing to grant a conditional use permit] was based on 'public clamor' which was not a legally sufficient basis for denying [a] permit." In a footnote, the court of appeals explained the nature of the public clamor it found objectionable: "The clamor is typified by the curious action taken at the Planning

Commission hearing, where citizens in attendance were asked to vote on the application. Only one person voted for the facility and all others in the audience voted against it." *Id*. at 711.

The issue of neighborhood involvement in permit approval arose again in *Stucker v. Summit County*, 870 P.2d 283 (Utah App. 1994). The local zoning ordinance allowed neighbors affected by a proposed permit to express their opposition or support. Focusing on a distinction between "neighborhood veto power and neighborhood participation," the court of appeals observed:

> At no time during the proceedings did the Planning Commission delegate veto power to the neighbors. Rather, it simply listened to the objections of the affected landowners and interested parties, and then rendered a decision. Therefore, because the Planning Commission ultimately made the decision to deny the permit, and because *Thurston* allows the Planning Commission to use information gathered from neighbors in making a decision, we hold that the 1985 Code's absolute policy on compatibility does not impermissibly grant veto power to the Stickers' neighbors.

Id. at 290.

A case of interest is *Salt Lake County v. Sandy City*, 879 P.2d 1379 (Utah App. 1994), where the appeal of a Conditional Use Permit to the Sandy City Council was challenged. The Court of Appeals held that in a council-mayor optional form of government the constitutional doctrine of separation of powers prevents the City Council, a legislative body, from hearing an administrative appeal from the Planning Commission. The Court reasoned that the Board of Adjustment, an administrative appellate board, was the proper body for the appeal.

III. CONSTITUTIONAL LIMITS TO THE ZONING POWER

While zoning power is broad and amorphous, arising from the inherent police power of the state, it does have limitations, including Constitutional limitations.[54]

III.i. DUE PROCESS

Due process rights arise from the Fifth and Fourteenth Amendments, the Civil Rights Act, 42 U. S.C. §1983 and Article 1 § 7 of the Utah Constitution.

III.i.1 *Substantive Due Process*

Land use action of the local government cannot be arbitrary and capricious. This standard is also found in the statutory standards of appeal. A number of Utah cases address this standard. For example, in *Patterson v. Utah County Board of Adjustment*, 893 P.2d 602 (Utah Ct. App. 1995), the Utah Court of Appeals declared that "all...ordinances enacted through the exercise of police power are considered valid unless they 'do not rationally promote the public health, safety, morals and welfare."' 893 P.2d 606 (*quoting State v. Hutchison*, 624 P.2d 1116, 1127 (Utah 1980)). Similarly, in *Marshall v. Salt Lake City*, 141 P.2d 704, 709 (1943), the Utah Supreme Court had observed that if an ordinance "could promote the general welfare, or even if it is reasonably debatable that it is in the interest of the general welfare" the courts will uphold it. More recently, in *Springville Citizens v. City of Springville*, 1999 UT 25, 979 P.2d 332, the Court noted that

> a municipality's land use decisions are entitled to a great deal of deference . . . . Therefore, the courts generally will not interfere with the actions of a city council unless its action is outside of its authority or so wholly discordant to reason and

> justice that its action must be deemed capricious and arbitrary and thus in violation of the complainants' rights... However, this discretion is not completely unfettered, and the presumption is not absolute. If a municipality's land use decision is arbitrary, capricious or illegal, it will not be upheld.

1999 UT 25, ¶23. And finally, in *Brown v. Sandy City Board of Adjustment*, 957 P.2d 207 (Utah Ct. App. 1998), the Court explained that "whether or not [a] decision is illegal depends on a property interpretation and application of the law. These are matters for [the court's] determination, and we accord no deference to the district court[, the appeal authority, or the land use authority]." 957 P.2d 210, n.5. The correctness of administrative zoning interpretation of the law is reviewed by the courts on a correctness basis. No deference is given to that decision.

The principles set forth in these various cases appear in LUDMA at UCA §§ 10-9a-801(3):

> **(a)** The courts shall:
>
> **(i)** presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and
>
> **(ii)** determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.
>
> **(b)** A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if the decision, ordinance, or regulation is reasonably debatable and not illegal.
>
> **(c)** A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.

(d) A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.

III.i.2 *Procedural Due Process*

Notice and hearing rights are mandatory before legislative changes can be made affecting land use. Hearings should not degenerate into a head count of those in favor and opposed. There are several cases that address this standard. For example, *Thurston v. Cache County*, 626 P.2d 440, 445 (Utah 1981), makes it abundantly clear that "the consent of neighboring landowners may not be made a criterion for the issuance or denial [of] a conditional use permit". Also, *State v. Gibbs*, 500 P.2d 209, 215 (1972) declares that "to satisfy an essential requisite of procedural due process, a 'hearing' must be prefaced by timely notice which adequately informs the parties of the specific issues it must be prepared to meet."

Apropos the topic of timely notice, it will be extremely difficult, under LUDMA, for a challenger to prove a case of inadequate notice if the cities and counties involved carefully follow the requirements of the Act's painstakingly detailed notice provisions, virtually all of which appear in Part 2 of both statutes: UCA §§ 10-9a-201 *et seq.*, & 17-27a-201 *et seq.*

III.i.3 *A Caveat:* **Spencer v. Pleasant View**

In November of 2003, the Utah Court of Appeals handed down its decision in *Spencer v. Pleasant View City*, 2003 UT App 379, 80 P.3d 546. Pleasant View had granted the Spencers and the Parkers variances (in 1986 and 1983, respectively) for the property upon which they

desired to build. These owners, however, took no action for nearly 10 years, and the city denied their respective applications for building permits and (in the case of the Spencers) subdivision approval. The Spencers sued, but the trial court granted the city's motion for summary judgment.

The Utah Court of Appeals affirmed, observing that the Spencers had no claim, under either federal or state law, as the Court explained at length:

> To state a valid substantive or procedural due process claim under § 1983, the Spencers "'must first allege sufficient facts to show a property ... interest warranting due process protection.'" *Patterson v. American Fork City*, 2003 UT 7,¶ 23, 67 P.3d 466 (*quoting Crider v. Board of County Comm'rs,* 246 F.3d 1285, 1289 (10th Cir.2001)). To have "a valid property interest in a state-created right, a plaintiff 'must have more than a unilateral expectation of it;' instead, the plaintiff must have a 'legitimate claim of entitlement to it.'" *Id.* (*quoting Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972)).
>
> > "Many courts have held that adverse municipal land-use decisions are not actionable under § 1983 because a developer does not typically have a claim of entitlement to a favorable decision." [*Patterson v. American Fork City*, 2003 UT 7, ¶ 24, 67 P.3d 466.] . . . :
> >
> > > [A] municipality's rejection of a developer's proposal does not always amount to a violation of section 1983 because every planning dispute "necessarily involves some claim that the [municipality] exceeded, abused or 'distorted' its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough

> simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983."

Id. at ¶ 25 (*quoting Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir.1982)). Additionally, "absent invidious discrimination, such as proof of racial animus, the 'conventional planning dispute ... is a matter primarily of concern to the state and does not implicate the Constitution.' " *Id.* (*quoting Creative Environments, Inc.*, 680 F.2d at 833).

The Spencers have not alleged invidious discrimination by the City. Rather, the Spencers argue their original variances warrant federal protection in that "[v]ariances run with the land," Utah Code Ann. § 10-9- 707(4) (1998), and are not subject to revocation. This argument is merely a "'conventional planning dispute.'" *Patterson*, 2003 UT 7 at ¶ 25 (*quoting Creative Environments, Inc.*, 680 F.2d at 833). Further, the Spencers have not identified a protected property interest to which they are entitled. While the Spencers and the Parkers obtained variances to build on their properties, neither sought to build until nearly ten years after the variances were granted. We have "uncovered no authority that suggests a property owner has a vested property right in a contemplated development or subdivision." *Marshall v. Board of County Comm'rs*, 912 F.Supp. 1456, 1464 (D.Wyo.1996). Moreover, the Spencers' argument, taken to its logical conclusion, would allow property owners who fail to act for many years on a granted variance to frustrate a city's ability to update its land use regulations.

The Spencers' case "involves disputes about specific local development issues, not about the deprivation of constitutional rights." *Patterson*, 2003 UT 7 at ¶ 28.

> "Whatever unfairness [the Spencers] may have experienced, nothing in the facts presented sounds constitutional alarm bells." *Id.* at ¶ 28. Thus, we conclude the Spencers failed to establish a property interest protected under 42 U.S.C. § 1983, and therefore the trial court properly granted summary judgment in favor of the City.

Spencer, 2003 UT App 379, ¶¶ 17–19 (footnotes omitted).

III.i.4 *Another Caveat: Equal Protection and Uniform Operation of Laws*

These rights arise from the Fifth and Fourteenth Amendments, the Civil Rights Act, 42 U. S.C. §1983 and Article 1 §24 of the Utah Constitution. Zoning and land use laws cannot be enacted or applied in a way that violates equal protection rights of any class of persons.

Fourteenth Amendment "rational basis" analysis is utilized to determine whether the equal protection clause has been violated. The United States Supreme Court, applying rational basis scrutiny to a state law, has said, "'[W]e will not overturn such a [law] unless the **varying treatment** of different groups or persons is so **unrelated** to the achievement of any combination of legitimate purposes that we can only conclude that the [state's] actions were **irrational**.'" *Id.* (*quoting Vance v. Bradley*, 440 U.S. 93, 97 (1979)) (Emphasis added.)

Traditionally, in order to have any success in an equal protection claim you needed to show that you were a member of a suspect class, i.e. a class determined by race, national origin, color, etc. However, in the Supreme Court case *Village of Willowbrook, et al. v. Olech*, 528 U.S. 562, 564 (2000), the Court stated that the "'purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper

execution through duly constituted agents.'" (*quoting Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923)). In *Willowbrook*, Petitioners required a 33-foot easement from Respondents when they only required a 15 foot easement from other similarly situated property owners. *Id*. at 565. The Supreme Court found that these allegations were sufficient to raise an Equal Protection claim. *Id*.

III.i.5 ***Takings*.**

The Taking Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." The Utah Constitution similarly provides: "No property shall be taken or damaged for public use without just compensation." Article 1 § 22.

One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Dolan v. City of Tigard,* 512 U.S. 374, 383-84 (1994) (*quoting* Armstrong v. Untied States, 364 U.S. 40, 49 (1960)). In order to establish a "takings" claims, a plaintiff, must show (1) it has property, (2) the property was taken, and (3) the amount owing for just compensation. In Utah, to bring a successful takings claim under Utah Constitution article 1, section 22, a party must prove the following elements "(1) property, (2) a taking or damages, and (3) a public use." *Farmers New World Life Ins. Co. v. Bountiful City,* 803 P.2d 1241, 1244 (Utah 1990). In Utah "a taking' is 'any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed."' *Colman v. Utah State Land Board*, 795 P.2d 622, 626

(*quoting State ex rel. State Road Comm'n v. District Court, Fourth Judicial District,* 94 Utah 384, 394, 78 P.2d 502, 506 (1937).

There are two categories of takings, physical and regulatory takings.

III.i.5/a. Physical Takings.

A physical taking exists when either of the following occurs: (a) Physical occupation of property by condemner or (b) actual physical injury to real property intentionally caused by a public improvement as deliberately designed and constructed, including access, expropriation, or physical invasion.

In addition to the *Colman* and *Farmers New World Life Insurance* decisions described above, two recent cases discuss physical taking. In *Pigs Club, Inc.v. Sanpete County,* 2002 UT 17, the Pigs Club owned land in Sanpete County next to the Sevier River. A public road, Fayette River Lane, crosses the river over a culvert bridge downstream from the Pigs Club property. Before 1983, the road was low enough that when the Sevier rose too high to pass beneath the culvert, they could wash over the road and proceed down river. Parts of the road were washed out in 1983, however, and the County constructed a new bridge, higher than before, which was progressively built up even higher through maintenance and repair from 1983 through 1995. Flood waters could no longer wash over the road, and the water backed up onto Pigs Club land. Pigs Club sued, alleging among other things, that the County, in allowing the water to back up onto Pigs Club property, the County had committed a partial or complete taking of their land.

The district court granted summary judgment in favor of the County, but the Utah Supreme Court reversed, noting, on the inverse condemnation issue, that the record was unclear (that is, that the inverse-condemnation plaintiff must establish) that (1) the property had been taken or

damaged for a public use (*i.e.*, flood management), and (2) the damage to the property had "'necessarily result[ed]' from the public use." 2002 UT 17 at ¶29 (*quoting Farmers New World Life v. Bountiful City*, 803 P.2d 1241, 1244 (Utah 1990)).

In *Carrier v. Lindquist*, 2001 UT 105, 37 P.3d 1112, The Carriers owned property on the south side of an alley 15 feet wide. The Lindquists owned property on the north side of the alley. The Lindquists claimed the north half of the alley and extended their landscaping to the middle of the alley, obstructing the north half and inhibiting the Carriers' only access to the rear of their property. The ordinance vacating the alley explicitly subjected the vacature to existing rights of way and easements. The Carriers sued, claiming a private easement over the entire alley, and the district court granted summary judgment in their favor.

On appeal, the Utah Supreme Court held that private rights of way and easements over a public way are not impaired by vacature of the public way: "A subsequent abandonment of a public right-of-way over [a public] road has no effect on a private easement owned by an abutting landowner." 2001 UT 105 at ¶23 (*quoting Gillmore v. Wright*, 850 P.2d 431, 437–38 (Utah 1993) (interpolation in original)).

III.i.5/b. Regulatory Takings.

Regulatory takings may occur when regulations that fail to advance a legitimate purpose or regulations that deprive a property owner of the property's economically viable use. Also a regulatory taking occurs when regulations constitute confiscatory exactions on development, or regulations substantially and materially diminish the value of property despite reasonable investment backed expectations.

Regulatory takings are much less well defined in Utah jurisprudence. Facial challenges have thus far been unsuccessful. In *Smith Inv. Co. v. Sandy City,* 958 P.2d 245, 259 (Utah App. 1998) the Utah Court of Appeals held that diminution in value from $1,355,000 to $755,000 by downzoning was not a taking. The Court further observed: certainly, with a total decrease of $580,000, at the time of the appraisal, the property as zoned R-2-10 lost about 43% of the value it had when zoned C-2. Even so, "mere diminution in value is insufficient to meet the burden of demonstrating a taking by regulation." *Cornish Town v. Koller*, 817 P.2d 305, 312 (Utah 1991). As the Supreme Court has declared, "'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the federal law...'" *Penn Central Transp. Co.*, 438 U.S. at 124, 98 S. Ct. 2659 (*quoting Pennsylvania Coal Co. V. Mahon*, 260 U.S. 393, 413, 43 S. Ct. 158, 159, 67 L. Ed. 322 (1922)). Indeed, regulations causing much greater diminution in value than that found here have been upheld against takings challenges.[55]

IV. SUBDIVISION REGULATION

In Utah, land use and development—including the submission and approval of subdivisions—are governed by Utah's Land Use, Development, and Management Act ("LUDMA," or the "Act," Utah Code Annotated "UCA" §§ 10-9a-101 *et seq.* (municipalities) and 17-27a-101 *et seq.* (counties)) together with local subdivision ordinances.

IV.i. THE SUBDIVISION ORDINANCE

The Act provides that a city or county legislative body "may enact ordinances requiring that a subdivision plat comply with the provisions of the ordinance and this part before ... it may

be filed or recorded ... [or any] lots may be sold." UCA §§ 10-9a-601(1) & 17-27a-601(1). Where a "legislative body fails to enact a subdivision ordinance," subdivisions may be regulated only to the extent provided in the Act. *Id.* at -601(2).

It is the planning commission's duty to prepare and recommend a proposed ordinance to the legislative body, UCA §§ 10-9a-602(1)(a) & 17-27a-602(1)(a). Before it may recommend the proposed ordinance to the legislative body, however, the planning commission must hold a properly noticed public hearing thereon, UCA §§ 10-9a-602(1)(d) & 17-27a-602(1)(d).**[56]** The same process must be followed to amend a subdivision ordinance, UCA §§ 10-9a-602(1)(b) & 17-27a-602(1)(b).

After a planning commission has prepared the ordinance (or an amendment), and has recommended it to the legislative body, the legislative body "may adopt or reject the ordinance either as proposed by the planning commission or after making any revision the legislative body considers appropriate," UCA §§ 10-9a-602(2) & 17-27a-602(2). This provision is intended to clarify a troubling question which arose under the language of the old provisions, namely whether or not any amendments made by the legislative body had to be resubmitted to the planning commission before passage. The current language appears to reject this idea, allowing a legislative body to make and adopt amendments to the proposed ordinance after submission without returning it for review.

IV.ii. WHAT IS A SUBDIVISION

A subdivision is "any land that is divided, resubdivided or proposed to be divided into two or more lots, parcels, sites, units, plots, or other division of land for the purpose, whether immediate or future, for offer, sale, lease, or development," UCA §§ 10-9a-103(52)(a) &

17-27a-103(56)(a), and includes "the division or development of land whether by deed, metes and bounds description, devise and testacy, map, plat, or other recorded instrument [which pretty much covers every sort of conveyance]; and ... divisions of land for residential and nonresidential uses, including land used or to be used for commercial, agricultural, and industrial purposes [which also covers just about every use]"**[57]** Any such division, or proposed division, of land must meet all the requirements set forth in the LUDMA, including the plat approval process, before it may be legally recognized as a valid subdivision. See UCA §§ 10-9a-604 & 17-27a-604.

The term *subdivision* does ***not*** include any of the following:

(i) a bona fide division or partition of agricultural land for the purpose of joining one of the resulting separate parcels to a contiguous parcel of unsubdivided agricultural land, if neither the resulting combined parcel nor the parcel remaining from the division or partition violates an applicable land use ordinance;

(ii) a recorded agreement between owners of adjoining unsubdivided properties adjusting their mutual boundary if: (A) no new lot is created; and (B) the adjustment does not violate applicable land use ordinances;

(iii) a recorded document, executed by the owner of record: (A) revising the legal description of more than one contiguous unsubdivided parcel of property into one legal description encompassing all such parcels of property; or (B) joining a

subdivided parcel of property to another parcel of property that has not been subdivided, if the joinder does not violate applicable land use ordinances; or

(iv) a recorded agreement between owners of adjoining subdivided properties adjusting their mutual boundary if: (A) no new dwelling lot or housing unit will result from the adjustment; and (B) the adjustment will not violate any applicable land use ordinance; or

(v) a bonafide division or petition of land by deed or other instrument whose the land use authority expressly approves in writing the division in anticipation of further land use approvals on the parcel or parcels.

UCA §§ 10-9a-103(36)(c) & 17-27a-103(39)(c).

Moreover, the following, though technically subdivisions, are exempted from the LUDMA subdivision requirements, UCA §§ 10-9a-605 & 17-27a-605:

(1) ***a subdivision of ten lots or less***, if the land use authority certifies in writing that notice has been provided, that the proposed subdivision is not traversed by the mapped lines of a proposed street and doesn't require any dedication of land for streets or other public purposes, that the subdivision has been approved by the water and sewer authorities, that the subdivision is located in a zoned area, and that the subdivision otherwise conforms to all applicable ordinances; and

(2) ***a lot or parcel resulting from a division of agricultural land***, if it is put to agricultural use (per UCA § 59-2-502), and only to agricultural use, and it meets the minimum size requirement of any applicable land use ordinances.**[58]**

IV.iii. PLAT APPROVAL PROCEDURES

IV.III.1 *Familiarize Yourself with Procedures and Standards*.

Given the Legislature's empowerment of municipalities and counties with the prerogative to enact their own subdivision ordinances, the obvious first step to proper understanding of land division law is to obtain and read the local subdivision ordinances. Do not assume that City A follows the same procedures as City B. The general parameters provided by State enabling law have resulted in sophisticated local governments' having very detailed ordinances requiring six months or more to process a subdivision application. Intimate knowledge of all of the land use ordinances of the local government is critical.

The local planning staff and the city's or county's legal counsel are also an important resource. They are available to answer questions regarding process and procedure, interpretation of ordinances, and handling of subdivision applications. Most local governments have copies of their land use or zoning codes for sale at nominal cost. Some have additional explanatory materials available—developers' guides, for example. In many cases, such materials—as well as the local ordinances—are available over the internet.**[59]** All of these sources should be consulted where available.

IV.III.2 ***The Plat***.

The Act mandates that, unless exempt under UCA §§ 10-9a-605 or 17-27a-605 or excluded under the definition of "subdivision" under UCA §§ 10-9a-103(52) or 17-27a-103(56), "whenever any land is laid out and platted, the owner of the land shall provide an accurate plat" describing or specifying the following information:

(a) a subdivision **name** that is distinct from any subdivision name on a plat already recorded in the county recorder's office;

(b) the ***boundaries***, course, and dimensions of all of the parcels of ground divided, by their boundaries, course, and extent, whether the owner proposes that any parcel of ground is intended to be used as a street or for any other public use, and whether any such area is reserved or proposed for dedication for a public purpose;

(c) the lot or unit ***reference***, block or building reference, street or site address, street name or coordinate address, acreage or square footage for all parcels, units, or lots, and length and width of the blocks and lots intended for sale; and

(d) ***every*** existing ***right-of-way and easement*** grant of record for underground facilities, as defined in Section **54-8a-2**, and for other utility facilities.

UCA §§ 10-9a-603(1) & 17-27a-603(1).

The owner must acknowledge the plat before a notary (or other officer authorized to take such acknowledgements) and must obtain the signatures of various officials before the plat may be considered for approval, UCA §§ 10-9a-603(4)(a) & 17-27a-603(4)(a). The Act specifies that the owner "shall obtain the signature of each individual designated" by city or county regulation, *id.* The surveyor making the plat is required to certify that he or she holds a valid license, has completed a proper survey of the property the plat depicts, and has placed monuments as represented on the plat. UCA §§ 10-9a-603(4)(b) & 17-27a-603(4)(b). In addition, the owner or operator of any underground utility facilities "shall approve" the boundaries, dimensions, and intended uses of any servitudes of record; the location of existing underground facilities; and the conditions or restrictions governing the location of such facilities within the existing servitudes. UCA §§ 10-9a-603(4)(c) & 17-27a-603(4)(c).

The Act requires a city or county to approve a plat which "conforms to the [city or county] ordinances and [part 6 of the Act]" if such plat has been approved by the culinary water and sanitary sewer authorities, UCA §§ 10-9a-603(2) & 17-27a-603(2); however, the city or county may withhold such approval, even for a valid, conforming plat, until the owner provides the city or county "with a tax clearance indicating that all taxes, interest, and penalties owing on the land have been paid," UCA §§ 10-9a-603(3) & 17-27a-603(3). **[60]**

IV.III.3 *Approval.*

The process of plat approval has been greatly simplified by the LUDMA. UCA §§ 10-9a-604(1) & 17-27a-604(1) provide that a subdivision plat may not be recorded without a

recommendation from the planning commission and the approval of the land use authority. (Obviously, of course, planning commission recommendation is not required if the planning commission is the land use authority required to give the plat final approval. *Id.* at -604(1)(b).) The plat must also be signed by all of the officers designated by local ordinance. *Id.* at -604(1)(b)(ii) & (c). A plat recorded without all the required signatures is entirely void, and any transfer of property based upon such a void plat is voidable. *Id.* at -604(2) & (3).

Although LUDMA simplifies the approval process in theory, bear in mind that plat preparation is only one step in a multi-step process of subdivision approval. Generally, the approval process will include at least the following steps:

1. Informal meeting with planning staff;

2. Plat Submission;

3. Work session with Planning Commission or relevant land use authority;

4. Formal Action by Planning Commission or relevant land use authority;

5. Formal Action by City Council or County Commission;

6. City or County Engineer Review; and

7. City or County Attorney Review.

Many cities and counties have additional steps, *e.g.*, submission of sketch and/or preliminary plats. It should also be remembered that subdivision is often only one facet of the land use approval process. Other approvals such as a master plan approval may also be necessary. Once again, consulting the particular entity involved is an absolute necessity.

In any event, however, once a plat has been properly acknowledged, certified, and approved by all necessary parties or representatives, the owner must, "within the time period designated by ordinance," record the plat in the county recorder's office for the county where the platted lands lie. UCA §§ 10-9a-603(5)(a) & 17-27a-603(5)(a). Should the owner fail to record within the required time period, the plat becomes voidable. *Id.* at -603(5)(b). It is typical, however, for the city or county approving the plat to make arrangements for the conveyance of a completed plat to the county recorder.

IV.III.4 *Common Areas.*

Areas designated as common areas on a properly approved and recorded plat may not, under the provisions of the Act, "be separately owned or conveyed independent of the other parcels created by the plat." UCA §§ 10-9a-606(1) & 17-27a-606(1). This provision ensures that "common" areas remain "common" and do not pass into the hands only of those whose deeds happen to recite the conveyance of an interest in the "common" along with the private parcel conveyed.

The Act is quite particular, in fact, mandating that "ownership interest in a [common] parcel ... shall ... be considered to be included in the description of each instrument describing a parcel on the plat by its identifying plat number, even if the common area interest is not explicitly stated in the instrument." UCA §§ 10-9a-606(2)(b) & 17-27a-606(2)(b). And the same is true of taxability: "[F]or purposes of assessment, [ownership of a common parcel is to] be divided equally among all parcels created by the plat, unless a different division of interest for assessment purposes is indicated on the plat or an accompanying recorded document." UCA §§ 10-9a-606(2)(a) & 17-27a-606(2)(a).

IV.III.5 ***Dedication of Streets and Public Places.***

A properly made, acknowledged, and recorded plat "operate[s] as a dedication of all streets and other public places," vesting the fee in such parcels in the city or county "for the public for the uses named or intended" in the plat. UCA §§ 10-9a-607(1) & 17-27a-607(1). This section grants a determinable fee to city or county in "all streets and other public places." Typically, if streets are to be private, they are so shown on plat. The law, however, provides for dedication of all streets. If a public street is vacated or not used, a reversion will automatically occur, s*ee Falula Farms, Inc. v. Ludlow*, 866, P.2d 569 (Utah App. 1993), the fee vesting in whoever held the land prior to the dedication or their successor(s) in interest.

The Act also specifies that the dedication of unimproved streets or other public places "does not impose liability upon the city or county" for them. *Id.* at -607(2). This language is a response to *Cox v. Utah Mortg. and Loan Corp.* , 716 P.2d 783 (Utah 1986), where the Utah Supreme Court found that Pleasant Grove City had a duty under former enabling law to bring about a completion of the improvements in the streets. Whether the new statutory language erases this duty entirely is as yet unknown. Changes in the Government Immunity Act may also help shield government. Plainly, this uncertainty renders this area ripe for a new case.**[61]**

IV.III.6 ***Prohibitions.***

The LUDMA prohibits the sale of any subdivided land "before a plat of the subdivision has been approved and recorded." UCA §§ 10-9a-611(1)(a) & 17-27a-611(1)(a). A metes and bounds description in the conveying instrument does not render such a prohibited transaction valid. *Id.* at -611(1)(b). Nevertheless, such a violation on the part of the seller "does not affect

the validity of the instrument" conveying the property, nor does it affect "whether the property ... [conveyed] complies with applicable municipal ordinances." *Id.* at -611(1)(c). The city or county "may bring an action" seeking an injunction, abatement, merger of title, or any other relevant causes of action, "to prevent, enjoin, or abate the violation" of the provisions of LUDMA or to any ordinance enacted pursuant thereto. *Id.* at -611(2)(a) & (b). The city or county "need only establish the violation to obtain [an] injunction." Id. at -611(2)(c).

IV.iv. PLAT AMENDMENT & VACATION

With or without a petition, land use authority may vacate or amend a plat following the public notice and meeting requirements set forth in LUDMA. See UCA §§ 10-9a-608(1)(a) & 17-27a-608(1)(a).

IV.iv.1 *Plat Petitions.*

A petition to vacate, alter, or amend a plat, part of a plat, or a street or lot in a plat may be filed by "[a]ny fee owner ... of land within [a] subdivision that has been laid out and platted" pursuant to relevant law. *Id.* at -608(1)(a). A petition must include the names and addresses of all owners of record of land in the entire plat; the names and addresses of the owners of property adjacent to any street the petitioners propose to have vacated, altered, or amended; and the signatures of all the owners who consent to the petition. *Id.* at -608(4).

IV.iv.1/a. Generally.

Where a petition is filed, and either (i) an owner within the plat objects within 10 days of notification or (ii) "all of the owners in the subdivision have not signed the revised plat," the land

use authority must hold a duly noticed public hearing**[62]** within 45 days "after the day on which the petition is filed." *Id.* at -608(1)(b).

Following the duly noticed public hearing, if satisfied that there is good cause for the proposed vacation or amendment and no public street, right-of-way, or easement will be vacated or ameded, the land use authority may vacate, or amend the plat, UCA §§ 10-9a-609(1) & 17-27a-609(1). If a public street, right-of-way, or easement will be affected, the process found in § 609(5) must be followed. The approval is shown "by signing an amended plat showing the vacation or amendment," *id.* at -609(1). The petitioner must therefore expect to foot the bill for the preparation of an amended plat showing the changes. It is up to the land use authority, however, to "ensure that the amended plat ... is recorded in the office of the county recorder ...." UCA §§ 10-9a-609(2) & 17-27a-609(2).

IV.iv.1/b. **Protection of Energy Devices.**

Interestingly, the Act permits a land use authority to refuse to approve or renew any plat or subdivision, or any sort of dedication, if it contains any sort of restriction or prohibition against "reasonably sited and designed solar collectors, clotheslines, or other energy devices based on renewable resources." UCA §§ 10-9a-610 & 17-27a-610.**[63]**

IV.iv.1/c. **Vacating a Street or Alley.**

If a petition to vacate part or all of any public street, right-of-way, or easement contemplates the vacation or is received and meets the requirements of UCA §§ 10-9a-609.5(1) & 17-27a-609.5(1), the land use authority must, first, provide notice as required by UCA §§ 10-9a-208 & 17-27a-208 (*see* fn.6, above). That done, a public hearing is held and then " if

good cause exists for the vacation and neither the public interest nor any person will be materially injured by the vacation." UCA §§ 10-9a-609.5(2) & (3) & 17-27a-609.5(2) & (3), the legislative body by ordinance may vacate some or all of a public street, right-of-way, or easement. The legislative body shall ensure that the plat or ordinance is recorded in the county recorder's office. UCA §§ 10-9a-609.5(4) & 17-27a-609.5(4).

Codifying relevant case law, the Act provides that

> [t]he action of the legislative body vacating some or all of a street, right-of-way, or alley that has been dedicated to public use: operates to the extent to which it is vacated, upon the effective date of the recorded plat, as a revocation of the acceptance thereof, and the relinquishment of the [municipality's or county's] fee in the vacated street, right-of-way, or easement; and (b) may not be construed to impair (i) any right-of-way or easement of any lot owner or (ii) the franchise rights of any public utility.

UCA §§ 10-9a-609.5(5) & 17-27a-609.5(5).

IV.iv.1/d. **Changing the Name of a Subdivision.**

"The name of a recorded subdivision may be changed," the Act provides, UCA §§ 10-9a-608(6)(a) & 17-27a-608(6)(a), "by recording an amended plat making the change." The process is as described above for any other vacation or amendment, and, as with any other plat, the responsible surveyor must certify that he or she holds a valid license, has completed a proper survey of the property the plat depicts, and has placed monuments as represented on the plat. UCA §§ 10-9a-608(6)(b) & 17-27a-608(6)(b) (cf. UCA §§ 10-9a-603(4)(b) & 17-27a-603(4)(b)).

Obviously, a plat cannot be amended to give a subdivision the same name as another recorded subdivision. UCA §§ 10-9a-608(6)(c) & 17-27a-608(6)(c). A document filed to change the name of a recorded plat is voidable if it does not comply with the provisions of the Act. Id. at -608(6)(d).

IV.iv.2 ***Exceptions to Plat Amendment Requirements.***

IV.iv.2/a. Parcel Joinder.

An exception may be made to the established vacation/alteration/amendment process, and the public hearing altered to a simple public meeting, if a petition seeks only "to join two or more of the petitioner fee owner's contiguous lots" and notice has been given pursuant to local ordinance. *Id.* at -608(2)(a)(i).

IV.iv.2/b. **Exchanges of Title to Portions of Adjacent Parcels.**

Additionally, the owners of adjacent parcels, "described by either a metes and bounds description or by a recorded plat may exchange title to portions of those parcels if the exchange of title is approved by the land use authority." UCA §§ 10-9a-608(5)(a) & 17-27a-608(5)(a). The land use authority must approve such an exchange if it "will not result in a violation of any [local] land use ordinance." *Id.* at -608(5)(b).

If such an exchange is approved, notice of the approval, along with a conveyance of title must be recorded with the county recorder. *Id.* at -608(5)(c)(i) & (ii).**[64]** The notice of approval must (A) "[be] executed by each owner included in the exchange and by the land use authority," (B) contain an acknowledgement for each party executing the notice in accordance

with Title 57, Chapter 2a "Recognition of Acknowledgements Act," and (C) "recite[] the descriptions of both the original parcels and the parcels created by the exchange of title."

V. JUDICIAL CHALLENGES

V.i. PROCEDURAL REQUIREMENTS

In *Brendle v. City of Draper*, 937 P.2d 1044 (Utah App. 1997), the City Council lacked jurisdiction over an appeal of a planning commission decision to permit lot owners to build house when the appeal was not filed within the 14-day appeal period set forth in the relevant ordinance. The Act gives 30 days for the appeal of zoning decisions. *See* UCA §§ 10-9a-801(2)(a) and 17-27-801(2)(a). Failure to file an appeal to the District Court within 30 days is a jurisdictional defect.[65]

V.ii. STANDING AND EXHAUSTION OF ADMINISTRATIVE REMEDIES.

UCA §§ 10-9a-801(1) & (2)(a) and 17-27a-801(1) & (2)(a) require both exhaustion of one's administrative remedies as well as standing for judicial review:

> No person may challenge in district court a county's land use decision made under this chapter, or under a regulation made under authority of this chapter, until that person has exhausted the person's administrative remedies as provided in Part 7, Appeal Authority and Variances, if applicable. Any person adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local land use decision is final.

Any person "adversely affected" by any final decision may petition the district court to review the decision. Prior to the enactment of LUDMA, ensuring that an appeal had been brought before the appropriate body(ies) was sometime very difficult. Under LUDMA, however, each city and county must specify the particular appeal authority for each appeal or variance request. This tangle should not, therefore, cause anymore heartburn, so long as, before any appeal to the district court is considered, you first make certain your appeal has been brought before the appropriate appeal authority pursuant to local ordinance. Failure to exhaust your administrative remedies will, in the absence of unusual circumstances, be fatal to your appeal to the district court.[66] See *Patterson v. American Fork City*, 67 P3d 466 (Utah 2003) and *Salt Lake Mission v. Salt Lake City*, 184 P3d 599 (Utah 2008).

Case law suggests that to be adversely affected, and thus to have standing to bring an action, you must have an interest greater than that of the general public. *Harris v. Springville City*, 712 P.2d 188 (Utah 1984); *Nat'l. Parks & Cons. Ass'n. v. Bd. of State Lands*, 869 P.2d 909 (Utah 1993). The petition must be filed within thirty days after the decision is rendered. UCA §§ 10-9-801(2), (6) & 17-27a-801(2), (6).

Upon an appeal to district court, "[t]he land use authority or appeal authority, as the case may be, shall transmit to the reviewing court the record of its proceedings, including its minutes, findings, orders, and, if available, a true and correct transcript of its proceedings." UCA §§ 10-9a-801(7)(a) & 17-27a-801(7)(a). "If the proceeding was tape recorded, a transcript of that tape recording is a true and correct transcript...." *Id.* at -801(7)(b). The importance of the record cannot be exaggerated. Where a record exists, "the district court's review is limited to the record...," *id*. at -801(8)(a), unless evidence was offered below but improperly excluded, *id.*

Conversely, where there is no record, "the court may call witnesses and take evidence." *Id.* at -801(8)(b).

In *Culbertson v. Bd. of County Commissioners,* 2001 UT 108, 44 P.3d 642, Salt Lake County "closed"—rather than vacating—a segment of roadway so that it could convey an access easement to abutting owners, "which [would] allow better access to their respective properties than by having the property revert as a matter of law, half to each by vacation." 2001 UT 108 at ¶3. The Culbertsons brought suit after a commercial building was constructed which encroached upon the road. The Utah Supreme Court pointed out that the applicable state statutes, while making provision for vacature, do not recognize "closure." The roadway therefore remained a public road, which the County had improperly narrowed by allowing the commercial encroachment.

The Court also restated the burdens of proof relative to maintaining an action to enjoin violation of a zoning ordinance. First, the Court noted, "a showing that [a] zoning ordinance has been violated is tantamount to a showing of irreparable injury . . . to the public," 2001 UT 108 at ¶54 (*quoting Utah County v. Baxter*, 635 P.2d 61, 64 (Utah 1981)); therefore, a county need not show specific irreparable injury: it need only establish the violation to obtain an injunction, *id.* (*citing* UCA § 17-27-1002(1)(b) (1999), enacted to codify the Court's ruling in *Baxter*, now § 17-27a-802(1)(b)). A private party, on the other hand, "must both allege and prove special damages peculiar to himself in order to entitle him to maintain an action to enjoin violation of a zoning ordinance." *Id.* (*quoting Padjen v. Shipley*, 553 P.2d 938, 939 (Utah 1976)). In addition, the private party's damages "must be over and above the public injury which may be caused by the violation of the zoning ordinance." *Id.* (*quoting Padjen*, *supra*).[67]

The *Culbertson* plaintiffs, however, satisfied their burden, and the Court remanded the case for the trial court to make findings as to damages. The Court concluded by explaining that

> where the encroachment is deliberate and constitutes a willful and intentional taking of another's land, equity may require its restoration, without regard for the relative inconveniences or hardships which may result from its removal." . . . [L]ocal zoning authorities "are bound by the same terms and standards of applicable zoning ordinances and are not at liberty to make land use decisions in derogation thereof.

Id. at ¶56 (*quoting Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assocs.*, 535 P.2d 1256, 1259 (Utah 1975), and *Springville Citizens for a Better Community v. City of Springville*, 1999 UT 25, ¶30, 979 P.2d 332).

In *Patterson v. American Fork City*, 2003 UT 7, 67 P3d 466 (Utah 2003), the Court held that Patterson had not exhausted his administrative remedies and thus could not maintain their action against the City. The Court also dismissed Patterson's civil rights claims under 42 USC § 1983, holding that Patterson had no property right to a land use approval. The Court specifically rejected Patterson's claim of vested of rights under the seminal decision in *Western Land Equities v. City of Logan*, 617 P.2d 388 (Utah 1980).

V.iii. STANDARDS OF REVIEW: THE TWO PRONGS OF "ARBITRARY, CAPRICIOUS OR ILLEGAL"

In *Springville Citizens*, the Utah Supreme Court reversed the trial court which had granted summary judgment for the City on the basis that substantial compliance by the City with is own

ordinances in approving the PUD was sufficient. The Supreme Court held that a municipality must comply with mandatory provisions of its own ordinance, substantial compliance is not sufficient. However, those challenging the City's compliance must demonstrate how the noncompliance prejudiced them or led to a different result. The matter was remanded to the trial court to determine the effect of noncompliance by the City with its own ordinances.

Since *Springville Citizens*, there have been several Court of Appeals decisions which have addressed the arbitrary and capricious standard of review of land use decisions. In *Harmon City, Inc. v. Draper City*, 2000 UT App 31, 997 P.2d 321, the Court of Appeals distinguished *Harmon City* from *Springville Citizens* in concluding that there are *two* standards of review under the "arbitrary and capricious" banner. For adjudicative/administrative matters such as Board of Adjustment decisions (now, of course, *Appeal Authority* decisions), the land use decision must be supported by substantial evidence. On the other hand, for legislative matters such as rezoning of property, the decision need only be reasonably debatable that it is in the interest of the general welfare.

Judge Jackson wrote a lengthy dissent, arguing that the substantial evidence should apply to review of all land use decisions under the arbitrary and capricious standard. In *Bradley v. Payson City Corp.*, 2001 UT App 9, 17 P.3d 1160, the Utah Court of Appeals again faced the issue of whether there are two standards under arbitrary and capricious review. On certiorari to the Utah Supreme Court, 2003 UT 16, 70 P.3d 47 (Utah 2003), Chief Justice Durham, writing for a unanimous Court, clarified that the "arbitrary and capricious" appellate review standard in fact comprises *two* standards: If the action being reviewed is adjudicative or administrative, "arbitrary and capricious" calls for a substantial evidence test; *i.e.*, whether substantial evidence

support the decision.[68] For legislative actions, on the other hand—such as the amendment of a zoning ordinance, for instance—"arbitrary and capricious" actually means "reasonably debatable." This highly deferential standard favoring legislative action is yet another harkening back to local government police power and the protection of the general welfare. Such legislative act, in short, will be upheld unless it is "wholly discordant to reason and justice." *Bradley*, 2003 UT 16, ¶14 (quoting *Dowse v. Salt Lake City*, 255 P.2d 723, 724 (Utah 1953)).

LUDMA's drafters, noting the importance of this dichotomy, incorporated it into the Act itself: "A decision, ordinance, or regulation," declares the Act, UCA §§ 10-9a-801(3) & 17-27a-801(3), "involving the exercise of legislative discretion is valid if the decision, ordinance, or regulation is reasonably debatable and not illegal .... A final decision of a land use authority or an appeal authority [both are administrative and/or quasi-judicial bodies] is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal."[69]

In light of the statutory standard on appeal to the courts, it is best to diligently search for illegality in the administrative land use process. The review of a claim of illegality, i.e. not following state law or local ordinance, will be reviewed under the much more favorable standard, at least to the appellant, of correctness. See most recently *Peterson v. Riverton City,*243 P3d 1261 (Utah 2010) where a request for a zone change for a single parcel was held to be legislative and subject to the deferential reasonably debatable standard.

V.iv. NATURE OF APPELLATE PROCEEDING.

The appeal to the district court must be filed within 30 days and is almost always based on the factual record created below. UCA §§10-9a-801 & 17-27a-801. Only if a record was either not made or evidence was improperly excluded, may evidence be taken by the district court. *Morra v. Grand*

County, 230 P3d 1022 (Utah 2010) affirmed that regardless of whether the appeal is of an administrative or legislative decision, the record, if one exists, must be transmitted to the district court. As there is no rule of civil procedure covering the situation where a district court is acting as an appellate court, a motion for summary judgment is the typical vehicle to have the appeal heard.

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[1] It should be noted here that Chicago's city fathers had been working toward this same notion as a result of the city's eponymous fire (1871), adopting the first comprehensive building code in the United States in 1871, a building-height restriction of 130 feet in 1893, and a series of "frontage-consent" ordinances granting residents a measure of control over neighborhood uses. In 1919, in response to the New York code, Illinois adopted the "Glackin Law," giving municipalities authority to regulate land use with the approval of neighborhood property owners. If 40 percent approved the zoning plan, an Illinois municipality could formulate a zoning ordinance appropriate for the neighborhood. The state repealed the Glackin Law in 1921, however, replacing it with a new state zoning-enabling act drafted by the zoning committee of the Chicago Real Estate Board. The city adopted its first zoning ordinance in 1923. (Janice L. Reiff, Ann Durkin Keating, and James R. Grossman, "Zoning," *The Encyclopedia of Chicago* (2005), *http://www.encyclopedia.chicagohistory.org*. Joseph P. Schwieterman and Dana Caspall.

[2] New York City Department of City Planning, "Zoning History." *http://home2.nyc.gov/html/dcp/html/zone/zonehis.shtml*.

[3] Numerous communities throughout the country followed New York's example, adopting zoning codes establishing various zones and excluding incompatible uses. Among these was the City of Euclid, Ohio (*see infra*).

[4] It was codified at Chap. 119, Laws of Utah 1925 became Art. 3, Chap. 15, R.S.U. 1933; then U.C.A. 1943, Title 15, Chap. 8, Art. 3. In the present Utah Code, the provisions controlling zoning appear in Utah's Land Use, Development, and Management Act (the LUDMA), codified at UCA Chapters 10-9a (part 5) and 17-27a (part 5).

[5] 260 U.S. 393 (1922).

[6] Id. at 415.

[7] 272 U.S. 365 (1926).

[8] *Ambler Realty Co. v. Village of Euclid, Ohio*, 297 F. 307, 315 (D.C. Ohio 1924).

[9] Also a member of the Hoover-Bassett 1924–26 SZEA team. A Harvard graduate and corporate lawyer from Cincinnati, Bettman had, ten years prior to the *Euclid* case, drafted a 1915 Ohio bill authorizing cities to create citizen-dominated planning commissions. The law specified that once the commission adopted the plan, it could not be violated by the city council (a provision echoed by Utah law today). This was the first such planning legislation in the country and set the stage for local community planning in America.

[10] Ironically, after all the legal fencing, and despite the zoning map, the Ambler tract remained vacant for fifteen more years, until World War II resulted in its becoming an industrial site after all: a General Motors aircraft plant. After the war, GM's Fisher division turned out auto bodies and later trim in the same location. Even more ironically, GM has now left Euclid, leaving the city synonymous with zoning an enormous empty factory on an otherwise vacant lot. *Id.*

[11] Interestingly, Houston, Texas, which grew from some 50,000 at the turn of the 20th to well over 2,000,000 today, continues to operate without any zoning ordinances. The city's voters have soundly trounced efforts to enact a zoning ordinance three times: 1948, 1962, and 1993. The '93 referendum was a relatively close call: 53% opposed to 47% in favor, despite the support of both the serving and the former mayor, the entire city council, 160 homeowners groups, and the *Houston Post*. (Kevin M. Southwick, "The Dead Zone: Houston, Texas, Residents Vote Against Zoning Ordinance," *Reason Magazine* (Feb. 1994).)

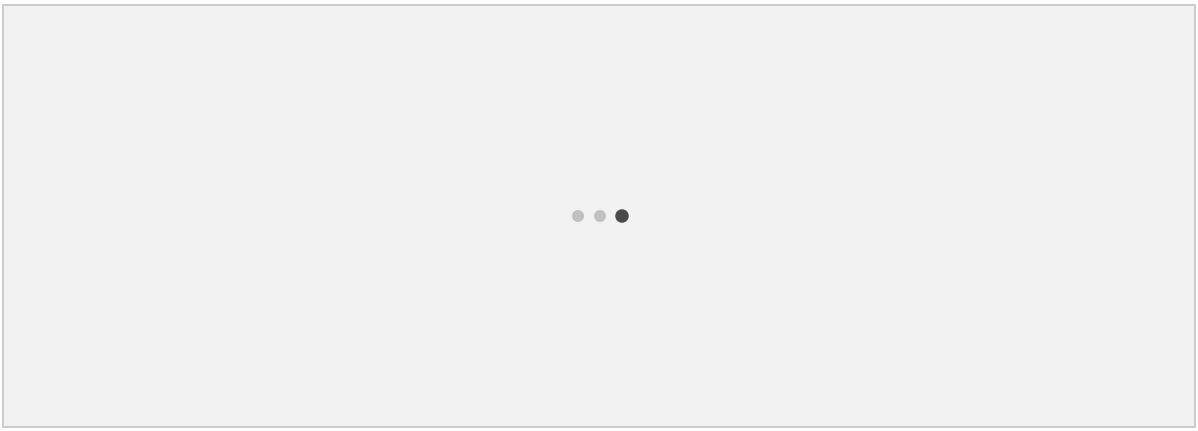
[12] There have been a number of reactions to what has come to be called "Euclidean" (or "Building-Block") zoning, the standard zoning paradigm throughout the United States. Under heavy fire for its rigidity and provenance from what is seen by many as an outdated planning theory, Euclidean zoning has been set aside in an increasing number of locales by other zoning models.

Under "performance" zoning (aka "Effects-Based Planning"), for example, property developers can apply credits (the system is often points-based) toward meeting established zoning goals by implementing selections from a menu of compliance options (mitigation of environmental impacts, public amenities, affordable housing units, etc.). Highly flexible, performance zoning is difficult to implement, placing a heavy burden of discretion upon the supervising authority. It has not been widely adopted, consequently, and usually appears only in certain categories within a more traditional prescriptive code.

Like Euclidean zoning, "incentive" zoning first appeared in Chicago and New York. Incentive zoning is a reward-based system encouraging development that meets established urban development goals. The local government establishes a set of prescriptive development limitations modifiable by an extensive complementary list of incentive criteria. Developers are rewarded for incorporating into their projects desired development criteria. Common examples include FAR (floor-area-ratio) bonuses for affordable housing provided on-site and height limit bonuses for the inclusion of public

amenities on-site. Incentive zoning has become more common throughout the United States during the last 20 years, but often requires extensive ongoing project review and the balance between scope and value of incentives.

“Form-” or “design-based” zoning, finally, relies on inter-related rule schedules applicable to development sites according to both prescriptive and potentially discretionary criteria. These criteria are typically dependent on lot size, location, proximity, and other various site- and use-specific characteristics.



Design-based codes offer considerably more flexibility than do Euclidean codes, but, being a comparatively new approach, such codes may be rather challenging to create, especially since they rely upon illustrations and diagrams, to which many planners are unused. When form-based codes do not contain appropriate illustrations and diagrams, however, they have been criticized as being difficult to interpret. As a result, design-based zoning remains as yet a rarity in the US. Louisville, Kentucky, however, recently (2003) adopted a design-based code. The Louisville Code creates “form districts,” each meant to recognize that some areas of the city are more suburban in nature, while others are more urban. Building setbacks, heights, and design features vary according to the form district. In a “traditional neighborhood” form district, for instance, a maximum setback might be

15 feet from the property line, while in a suburban “neighborhood” there may be no maximum setback.

These model summaries are quoted or adapted from the “Zoning” article available on the internet *Wikipedia*, http://en.wikipedia.org/wiki/Zoning.

[13] 141 P.2d 704 (Utah 1943).

[14] *Id.* at 708–09 (emphasis added; citations omitted).

[15] The *Marshall* Court’s summary of the rationale behind zoning provides an interesting historical context for the decision:

> …. Only if its action is confiscatory, discriminatory, or arbitrary, will the court invoke the rule of the decalogue, “Thou shalt not.” Here the general zoning plan of the city set within a reasonable walking distance of all homes in Residential “A” districts the possibilities of such homes securing daily family conveniences and necessities, such as groceries, drugs, and gasoline for the family car, with free air for the tires and water for the radiator, so the wife and mother can maintain in harmonious operation the family home, without calling Dad from his work to run errands.
>
> ….
>
> …. The city commission evidently decided that this method would promote the public welfare, by keeping the home as the sphere of the mother's influence, the father's haven of rest, and the children's paradise. It was not for the trial court to say it could not do so.

141 P.2d at 711. Needless to say, modern cases tend not to echo these premises as the basis for municipal zoning.

[16] *See*, *e.g.*, *Gibbons & Reed Co. v. North Salt Lake City*, 431 P.2d 559 (Utah 1967).

[17] *Marshall*, 141 P.2d at 711. The judiciary, however, may no longer have the option of rejecting such claims, at least, insofar as conditions or other such requirements upon new developments are concerned. The new LUDMA statute expressly incorporates the "essential nexus" language of *Dolan v. Tigard*, 512 U.S. 374, 383-84 (1994): "A municipality 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, both in nature and extent, to the impact of the proposed development." UCA §§ 10-9a-508, 17-27a-507.

[18] Id. at 708.

[19] Id. at 711.

[20] Id. at 709.

[21] 212 P.2d 177 (Utah 1949).

[22] 212 P.2d at 181–182 (and quoting *Wilkins v. City of San Bernardino*, 175 P.2d 542, 549 (California, *en banc*, 1946) (emphasis added)).

[23] 280 P.2d 974 (Utah 1955).

[24] *Id.* at 974–75.

[25] *Id.* at 975.

[26] That the Court would uphold sideyard and setback regulations seems a foregone conclusion, especially in light of the fact that these were the bases for the 1916 New York zoning ordinance, whose drafter, Edward Bennett, was the architect of the SZEA, the template for most state enabling acts.

[27] 533 P.2d 292 (Utah 1975).

[28] *Id.* at 294.

[29] *Id.* at 293.

[30] *Id.* at 294 (emphasis added).

[31] 617 P.2d 388 (Utah 1980).

[32] *Id*. at 390.

[33] UCA §§ 10-9a-505(2), 17-27a-505(2).

[34] *Id.*

[35] UCA §§ 10-9a-102(1), 17-27a-102(1)(a) (emphasis added).

[36] UCA §§ 10-9a-102(2), 17-27a-102(1)(b). It remains to be seen whether the courts will view this list as exhaustive or not, although it certainly appears to be broad enough to cover most traditional and familiar land-use regulations.

[37] Note that "consistent with the purposes set forth in this chapter" is a 2006 addition, a legislative reminder, perhaps, to local governments of the source and limit of their zoning and land-use powers (despite the judiciary's obvious reluctance to overturn decisions based on such claims).

[38] The creation of Townships falls largely outside the scope of this general overview. The process, however, is set forth in UCA § 17-27a-306. Suffice it here to say that a township may be created by petition of 10% of the private real property owners and 10% of the value of private real property in a contiguous area of unincorporated county (§ -306(1)(c)) Both mailed and published notice are required. A properly noticed public hearing must be held before a township may be created A

2005-LUDMA township must either be a "designated place" by the US Census Bureau (§ -306(1)(b)(iii)) or satisfy a set of demographic criteria: it must (i) contain (A) between 20%–80% of either (I) the total private land area or (II) the total value of locally assessed taxable property in the unincorporated county. Failing this, a proposed township must contain (B)(I) 5% (1st-, 2nd-, or 3rd-class counties) or (II) 25% (4th-, 5th-, or 6th-class counties) of the population of unincorporated county area.

[39] Township planning commissions are also empowered to make recommendations concerning incorporation of areas located within such a township, including recommendations that the county legislative body protest any proposed annexation. UCA §17-27a-302(2).

[40] Those familiar with prior law will notice that power to *administer* zoning ordinances or to hear other matters as designated by the local legislative body, UCA §§ 10-9-204 & 17-27-204 (2004), are conspicuously absent from the list of planning commission powers and duties. This is a direct result of LUDMA's redistribution of land-use authority, and we shall discuss this reassignment in its proper order.

[41] Once a referendum petition against a county ordinance meets the requirements of the statute, the ordinance subject to the referendum "does not take effect" until voted on favorably by qualified voters. *See* UCA § 20A-7-601(4)(b). Recently, the Utah Supreme Court, in *Mouty v. Sandy City Recorder*, 2005 UT 41, 122 P.3d 521, pointed out that, while "land use law," as defined in the election code (UCA § 20A-7-601(2)(a)), includes "land use development code[s], ... annexation ordinance[s], and comprehensive zoning ordinances," the term does not include "amendment [of] a zoning category." *Id.* at ¶39 (although, of course, would certainly fall within the ambit of "land use ordinance" as defined by LUDMA, UCA §§ 10-9a-103(14) & 17-27a-103(16)). Hence, ruled the Court, referendum on a zone amendment is not held to the higher requirements to which referenda on "land use laws" are. Note, however, that although

Zoning ordinances, are subject to referendum, they cannot be *enacted* by initiative. *See Dewey v. Doxey-Layton Realty Co.*, 3 Utah 1, 277 P.2d 805 (1954).

[42] Under two recent opinions by the Utah Supreme Court, it appears that any land use decision by a legislative body; even a legislative body that has mixed powers; i.e. legislative and executive, as many city councils do; will be likely legislative. In *Carter v. Lehi City*, 212 Ut 2, 269 P3d 141 (Utah 2012,) the Court repudiated a three part test that it had enunciated in *Citizens Awareness Now v. Marakis*, 873 P2d 1117 (Utah 1994) and modified in *Friends of Maple Mountain v. Mapleton City*, 228 P3d 1238 (Utah 2010.) In place of the Marakis Test the Court enunciated two guidelines; (1) legislative power involves promulgation of laws of general applicability and weighing of broad competing policy considerations; and (2) the formal nature of the body involved in the land use decision and the formal nature of its action.

Thus, even single parallel rezone will be legislative in nature, making very deferential review in the courts and subject to referenda. See also *Peterson v. Riverton City*, 2010 Ut 58.

[43] It should be noted that in many situations where, under past law, a public hearing was required before both the planning commission and the legislative body, the new LUDMA provides for the planning commission to hold the hearings, while the legislative body need hold only a duly noticed public meeting. Surprisingly, however, in light of this new hearing-below-meeting-above arrangement, neither a hearing nor a public meeting needs to be held for the adoption of the General Plan. *See* UCA §§ 10-9a-404 & 17-27a-404.

[44] Oddly, while the county provision explicitly provides that the county legislative body "may adopt an ordinance mandating compliance with the general plan," UCA § 17-27a-405(2), no such provision appears in the municipal code. It thus remains to be seen whether a municipal general plan may be rendered mandatory by ordinance or not.

[45] The 2013 Utah Legislature added specific notice requirements for zoning-map and zoning-map-amendment hearings in addition to the general requirements for all public hearings in connection with LUDMA (q.v., fn. 56, below). This "courtesy notice," as the statute calls it, must be "sen[t]" to "each owner of private real property … located entirely or partially within the proposed map at least 10 days prior to the scheduled … hearing." UCA §§ 10-9a-205(4)(a), 17-27a-205(4)(a). That this language calls for notice to owners of property "within the proposed map" rather than "within the area on the proposed map to be amended," appears to require this "courtesy notice" to the owners of ***all the land*** in the city, county, or town. For a provision which will most likely be interpreted as a jurisdictional requirement, this wording seems either impossibly draconian or alarmingly careless. The various points mandated for inclusion are listed in §§ -205(4)(b). The provision ends with a declaration that the "courtesy notice" may be "included in the notice" mailed to property owners under §§ -205(2)(c)(ii). UCA §§ 10-9a-205(4)(c), 17-27a-205(4)(c).

Exasperatingly, the new provision does not make clear whether "sending" the courtesy notice means by mail, email, courier, face-to-face delivery, telegram, candy bomber, smoke signal, sky-writing, sandwich board, town crier, or psychic projection. Rationality dictates that the notice be mailed like the other notices required by LUDMA, but one can never be certain without either taking one's chances in court or requesting more particular language from the legislature.

[46] The 2014 Utah Legislature mended a rather critical oversight by adding that, if a local legislative body has failed to designate an LUA for a given type of application, then the local legislative body itself is the default LUA. UCA § 10-9a-103(23)(b), 17-27a-103(27)(b). Curiously, there is no similar specification of the local legislative body as the default Appeal Authority. *See* UCA § 10-9a-103(2), 17-27a-103(2).

[47] It is not entirely clear why, but the 2014 Utah Legislature enacted a provision as to the conditions necessary for land-use application ***review***, although the language already in place (relating to entitlement to application approval) obviously entails LUA review:

> (1) (a) *(i) An applicant who has filed a complete land use application, including the payment of all application fees, is entitled to substantive land use review of the land use application under the land use laws in effect on the date that the application is complete and as further provided in this section.*
>
> *(ii)* … [A]n applicant is entitled to approval of a land use application if the application conforms to the requirements of the county's land use maps, zoning map, and applicable land use ordinance in effect when a complete application is submitted and all application fees have been paid ….

UCA §§ 10-9a-509, 17-27a-508. On the other hand, it is good to cross all the **t**'s and dot all the **i**'s: one man's lily gilding is another man's assurance double sure.

[48] It should be noted at the outset, of course, that the term *board of adjustment* no longer appears anywhere in the Utah Code. Boards of adjustment have not precisely been abolished, since, in theory anyway, the board of adjustment of a city or county could, with a minimal amount of paperwork, be named an "appeal authority"—the city or county might even keep the name "board of adjustment" (although the name wouldn't really mean anything legally). In a word, it might be best to change the name; but you needn't rattle the cage overmuch. The same people can serve; it simply requires an ordinance specifying the change. "That which we call a rose by any other name ...."

[49] The reader may perhaps have heard of the ancient efficiency principle known as OCCAM'S RAZOR: "Do not multiply things without need" (from the Latin *entia non sunt multiplicanda praeter necessitatem*). Often it is loosely applied in the sense that "the simplest explanation (or mechanism

for doing things) is probably the right (or best) one," but others prefer Henry David Thoreau's homespun poetry: "simplify, simplify, simplify," or the even more pithy "keep it simple, stupid." However one chooses to translate the principle, the idea cannot have any better application than in local government. Like an engine, the more parts there are to local procedure, the more likely it is that one of them will eventually give way, perhaps stalling the entire system. It may sometimes be true that "two heads are better than one," but it is often equally true that three heads are worse, four unmanageable, and five almost certain calamity. It is certainly not *un*wise to divide up appeals and variances, where possible (although it might be entirely unnecessary in a small community where such things are rare), but there is no need to create numerous boards or bodies for appeals that may be few and far between. The reader will know the needs and intensities of his or her own community far better than the authors, of course, and we do not therefore (indeed we cannot) advise you one way or the other. We invite you, however, to ponder Occam's razor in your organizational cogitations.

[50] On the other hand, it must be borne in mind that "[o]nly those decisions in which a land use authority has applied a land use ordinance to a particular application, person, or parcel may be appealed to an appeal authority." UCA §§ 10-9a-707(4) & 17-27a-707(4). Where a decision comes from someone besides a designated LUA, in other words, no appeal authority may review the decision. Such a situation would probably have to go directly to district court, although the matter should be closely reviewed vis-à-vis local ordinances to make certain.

[51] In *Xanthos v. Board of Adjustment of Salt Lake City*, 685 P.2d 1032 (Utah 1984), the Supreme Court clarified in detail the conditions that must exist for the granting of a variance, codified here, specifically including requirements that hardship be shown to be more than mere economic loss and that special circumstances exist with respect to the property in question, which circumstances relate to the required showing of hardship.

[52] *Walton v. Tracy Loan & Trust Co.*, 92 P.2d 724 (Utah 1939)), the Utah Supreme Court held that a Board of Adjustment could not grant variances from the use restrictions in the zoning ordinance. This prohibition is now statutorily applicable to the AAs that are their heirs.

[53] The substantial evidence requirement was recently reaffirmed in *Wadsworth Construction, Inc. v. West Jordan City*, 2000 UT App 49, 999 P.2d 1240. There, the Court of Appeals reversed summary judgment in favor of West Jordan, holding that the city's denial of a conditional use permit was arbitrary, capricious, and without sufficient factual basis. West Jordan argued that such reasons as it had set forth for the denial sufficed in light of the high level of deference owed to a city council's decision on review. (West Jordan's ordinances place the forum for a land use appeal with its City Council rather than its Board of Adjustment.) The Court of Appeals pointed out, however, that the deferential presumption of validity only attaches to a municipality's legislative actions; review of its administrative and adjudicative decisions—such as denial of an application for a conditional use permit—focuses on whether or not substantial evidence supports the decision.

In concluding that West Jordan's denial of Wadsworth's application was not supported by substantial evidence, the Court of Appeals noted that "the only evidence in the record supporting [the City's finding that outdoor storage would be detrimental to the area] are the concerns expressed by neighboring landowners." Public comment alone, the Court explained, cannot serve as a basis for denial of a conditional use permit application; however, the record indicated no investigation as to the validity of the concerns voiced. The City also failed to make a finding that Wadsworth's proposed conditional use would constitute a nuisance, but determined that it "may be considered" as such, based, again, on neighbors' concerns about "rodent traffic" and dust. Moreover, the area around the parcel whereon Wadsworth proposed its conditional use contained several parcels put to similar uses. The Court therefore determined that West Jordan's denial of Wadsworth's application

for a conditional use permit was arbitrary and capricious, and reversed the trial court's grant of summary judgment in the City's favor.

[54] It should be remembered that State and Federal constitutional claims are subject to exhaustion of Administrative remedies and ripeness requirements. See *Salt Lake City Mission v. Salt Lake City,* 184 P3d 599 (Utah 2008).

[55] *See*, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 47 S. Ct. 114, 117, 71 L.Ed. 303 (1926) (75% diminution in value); *Hadacheck v. Sebastain*, 239 U.S. 394, 394, 36 S. Ct. 143, 143, 60 L.Ed. 348 (1915) (92.5% diminution); *Pace Resources, Inc. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir. 1987) (89.5%); *Wiliam C. Haas & Co. V. City of San Francisco*, 605 F.2d 1117, 1121 (9th Cir. 1979) (95%); *Sierra Terreno v. Tahoe Reg'l Planning Agency*, 79 Cal. App. 3d 439, 144 Cal. Rptr. 776, 777 (Cal. Ct. App. 1978)(81%).

[56] To be properly noticed, a public hearing must comport with the requirements of UCA § 10-9a-205 or § 17-27a-205: notice must be *mailed* to each affected entity (*i.e., "a county, municipality, independent special district,, local district, school district, interlocal entity, a specified public utility, a property owner, a property owners association, or the Utah Department of Transportation, if (a) the entity's services or facilities are likely to require expansion or significant modification because of an intended use of land; (b) the entity has filed with the municipality a copy of the entity's general or long-range plan; or (c) the entity has filed with the municipality [or county] a request for notice during the same calendar year*, UCA §§ 10-9a-203 & 17-27a-203) at least 10 (calendar) days before the public hearing. Notice must also be *posted* in three public places or on the community's official website. Finally, notice must also be *either published* in a newspaper of general circulation in the community *or mailed* at least three days before the hearing to "each

property owner whose land is directly affected by the land use ordinance change ... and ... each adjacent property owner within the parameters specified by municipal ordinance.

[57] Until the passage of LUDMA in 2005, the county enabling statute lacked the language including as "subdivision" the division of land for commercial, agricultural, and industrial purposes. Arguably, therefore, up until that time, the partitioning of land for such purposes could not be called a "subdivision," subject to the various subdivision requirements, in a unincorporated area.

[58] Note that, procedurally, a document recorded in the county recorder's office that divide property by a metes and bounds description *does not* create an valid subdivision without the land use authority's certificate of written approval. The absence of such a certificate, however, does not affect the validity of a recorded document. Additionally, a document lacking such a certificate can be corrected by the recording of an affidavit to which the written approval is attached. UCA §§ 10-9a-605(3) & 17-27a-605(3).

[59] Local government web sites are plentiful in the 21st century. Many of Utah's municipal and county sites include links to the local code as well as subdivision information. Links to Utah municipalities can be found on the Utah League of Cities and Towns' Index of Cities—

www.ulct.org/ulct/about/linkstocities.html

and the Utah Association of Counties' site includes links to the various county websites—

www.uacnet.org/about-counties/links-to-cos-and-others/

Be aware, however, that such these websites are not regulated, a city or town may or may not have one, nor might it be up to date, or even necessarily accurate. Despite these serious concerns, on the other hand, most such sites are both adequate (many are far more than adequate) and, regardless of the skills behind the site, both sincerely and earnestly maintained.

[60] *Note to Owners:* Generally, a local land planning, surveying, or engineering firm will be familiar with the plat requirements. If you are not familiar with such a firm, the planning department of the city or county will most likely be able to give a recommendation.

[61] The generality of this language would also appear to protect the city or county from suits based on damages caused by the state of an unimproved road. Again, however, this provision has yet to be judicially considered, and it is not clear how much protection this language will afford.

[62] The Act cites as proper notice that required by UCA §§ 10-9a-208 & 17-27a-208, even though that section's title references only "public street[s] or right[s]-of-way." In any case, proper notice requires a mailing to each record owner and "affected entity" (see fn. 1, above), and published in a newspaper of general circulation, posted on the property and published on the Utah Public Notice Website, at least ten days before the hearing, UCA §§ 10-9a-208(2) and 17-27a-208(2).

[63] It's rather odd to hear "clotheslines" called "energy devices based on renewable resources," but of course, that's precisely what they are.

[64] The provision makes plain, however, that the recording of a "notice of approval ... does not act as a conveyance of title to real property and is not required for the recording of a document purporting to convey title to real property." UCA §§ 10-9a-608(7)(d) & 17-27a-608(7)(d).

[65] See *Fox v. Park City*, 200 P3d 182 (Utah 2008), for a discussion of the actual or constructive notice that starts the running of the appeal period. See also *Republic Outdoor Advertising v. UDOT (*2011 Ut App 198*)*

[66] Unusual circumstances are (1) irreparable injury, (2) likelihood of oppression or injustice, (3) exhaustion would serve no purpose or is futile, or (4) an administrative agency or officer has acted outside of the scope of its defined statutory authority. *Salt Lake City Mission* at ¶ 11.

[67] The Court further held that, because the plaintiffs were residents of Salt Lake County, they were not jurisdictionally required to exhaust administrative remedies. *Id.* at ¶30–31 (*quoting* UCA § 17-27-1002 (1999), now § 17-27a-801(1)).

[68] Substantial evidence is further defined in the Supreme Court's holding in *Bradley* as the quantum and quality of relevant evidence that is sufficient to convince a reasonable person to support a conclusion. *Quoting First Nat'l Bank of Boston v. County Board of Equalization*, 799 P.2d 1163, 1165 (Utah 1990).

[69] The inclusion of "and is not arbitrary, capricious, or illegal" here is quite bizarre, as it—at least technically—undoes the clarification the provision was meant to offer. Rather than defining "arbitrary and capricious" in the administrative context, this provision simply adds it in again as one element of validity. This may very easily lead to the courts having to define it again.