UTAH LAND USE REGULATION DESKBOOK 2011

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UTAH LAND USE REGULATION DESKBOOK

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by

The Utah League of Cities and Towns
50 South 600 East, Suite 150
Salt Lake City, UT 84102

The Utah Land Use Institute
139 Historic 25th Street
Ogden, UT 84401

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SECTION 3 | Enforcement and Appeals Procedures

3.1 Enforcement of Land Use Ordinances

1. **Formal Requirements Only.** Municipality may not impose requirements on the holder of an issued land use permit that are not expressed:
   a. In the land use permit; or
   b. In documents upon which the land use permit is based; or
   c. the written record evidencing the approval; or
   d. in LUDMA; or
   e. in the municipality's ordinances. 10-9a-509(1)(h)
2. **Certificate of Occupancy.** Municipality may not withhold a certificate of occupancy because of an applicant's failure to comply with a requirement that is not expressed:
   a. In the building permit or documents upon which the building permit is based;
   b. In LUDMA;
   c. In the municipality's ordinances. 10-9a-509(1)(i)
3. **Municipality Must Follow Ordinances.** A municipality is bound by the mandatory terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances. 10-9a-509(2); *Springville Citizens v. Springville,* 1999 UT 25; *Culbertson v. Salt Lake County,* 2001 UT 108
4. **Private Enforcement.** A municipality or any adversely affected owner of real estate within the municipality may enforce land use ordinances and the LUDMA statute by instituting proceedings for:
   a. Injunctions:
      i. Which shall be granted to a municipality if the violation is established; 10-9a-802(1)(b)
      ii. Which may only be granted to a property owner seeking to enforce the ordinance or statute upon a showing of standing, prejudice, and appropriate cause; *Specht v. Big Water Town,* 2007 UT App 335
   b. Mandamus;
   c. Abatement;
   d. Or other appropriate actions. 10-9a-802(1)(a)
5. **Private Enforcement Only if Adversely Affected.** Property owners may only enforce a land use ordinance if they:
   a. Own property within the municipality; 10-9a-802(1)(a)
   b. Are "adversely affected" which means:
      i. That the property owner has been prejudiced by the violation or pending violation; and
      ii. Can establish what relief, if any, they are entitled to as a result of the illegal decision. *Springville Citizens v. Springville,* 1999 UT 25; *Specht v. Big Water Town,* 2007 UT App 335
6. **Current or Prospective Violations.** Enforcement actions may be brought against violations which have occurred or which are about to occur. 10-9a-802(1)(a)
7. **Local Penalties.** The municipality may establish penalties for the violation of LUDMA or land use ordinances created under the authority of LUDMA. The penalties must be established by ordinance. 10-9a-803(1)
8. **State Penalties.** The penalty for violation of LUDMA under state law is a class C misdemeanor. A class C misdemeanor is punishable by:
   a. Up to 90 days in jail; 76-3-204
   b. A fine of up to $750.00 for a person. This limit does not apply to a fine against a business entity; 76-3-301

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c. Other penalties and costs. 76-3-201

9. **Attorney's Fees.** Attorney's fees may only be assessed against those bringing an action related to land use issues if the action is brought in bad faith. *Hatch v. Boulder Town,* 2001 UT App 55, ¶15. Attorneys fees may be ordered against a local government in the land use regulation context, however, if appropriate to vindicate a strong or societally appropriate public policy, to compensate a party for the cost of litigation that exceeds his or her interest in the lawsuit, and where an exceptional case justifies such an award as an equitable remedy. *Culbertson v. Salt Lake County,* 2008 UT App 22

3.2 Appeal Authority

3.2A General Provisions

1. **Required.** Each municipality adopting a land use ordinance shall:
   a. Establish one or more appeal authorities to decide:
      i. Requests for variances from the terms of the land use ordinances; and
      ii. Appeals from decisions applying the land use ordinances;
      iii. Appeals from the payment of fees under 10-9a-510. 10-9a-701(1)
   b. Enact an ordinance establishing a reasonable time of not less than ten days to appeal to an appeal authority a written decision issued by a land use authority; 10-9a-704(1)
   c. If the council has not adopted an ordinance establishing a time to file an appeal to the board of appeals, a party shall have ten calendar days to appeal a written decision issued by a land use authority. 10-9a-704(2)
2. **Right to Appeal.** Decisions of a land use authority in administering or interpreting a land use ordinance may be appealed:
   a. To the appeal authority appointed by ordinance to hear such an appeal;
   b. By the applicant, the municipality, or any person adversely affected by the decision;
   c. Within the time period established by ordinance;
   d. By alleging that there is an error in any order, requirement, decision, or determination made by the land use authority in the administration or interpretation of the land use ordinance. 10-9a-703
3. **Options.** A municipality may:
   a. Enact by ordinance the designation of separate appeal authorities to hear variance requests and other distinct types of appeals from the decisions of land use authorities;
   b. Require by ordinance that an adversely affected party must present to an appeal authority every theory of relief that it can raise in district court;
   c. Provide that specified types of land use decisions may be appealed directly to district court; 10-9a-701(4)
   d. Establish a standard of review for appeals of land use authority decisions. 10-9a-707(1)
4. **One Appeal.** A municipality may not require an adverse party to pursue duplicate or successive appeals before the same or separate appeal authorities prior to going to court. 10-9a-701(4)(d)
5. **Process.** An appeal authority shall:
   a. Act in a quasi-judicial manner; and
   b. Serve as the final arbiter of issues involving the interpretation or application of local land use ordinances; and 10-9a-701(3)
   c. Conduct each appeal and variance request as provided in local ordinance; and
   d. Respect the due process rights of each of the participants. 10-9a-706

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i. The demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved; *Rupp v. Grantsville City,* 610 P.2d 340, 341 (Utah 1980)

ii. The minimum requirements of due process are adequate notice and an opportunity to be heard in a meaningful manner; *Dairy Product Services v. Wellsville*, 2000 UT 81, ¶ 49.

iii. To be considered a meaningful hearing, the concerns of the affected parties shouldbe heard by an impartial decision maker; *V-1 Oil Co. v. Dept. of Environmental Quality,* 939 P.2d 1192, 1193 to 1197 (Utah 1997)

iv. In addition, a record is helpful to allow for judicial review, though where not available or complete, the reviewing court must be allowed to determine the facts to ensure due process was given. *Xanthos v. Board of Adj.,* 685 P.2d 1032 1034 (Utah 1984).

6. **Board Procedures.** If the appeal authority is a multiperson board, body, or panel, it shall:

   a. Notify each of its members of each meeting or hearing; and

   b. Provide each member the same information and access to municipal resources as any other member; and

   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. 10-9a-701(5)

7. **Duty to Exhaust.** Each adversely affected person who wishes to challenge a local land use decision shall, before going to court, timely and specifically challenge the local land use decision in accordance with local ordinance. 10-9a-701(2); *Patterson v. American Fork City,* 2003 UT 7, ¶14.

8. **Deadlines Mandatory.** An appeal must be filed within the strict timeline imposed by state law or by local ordinance. Even the municipality is bound by such time limits and cannot reverse a local administrative land use decision if the decision is not timely appealed. *Brendle v. City of Draper,* 937 P.2d 1044 (UT App 1997)

3.2B Appeals Procedures

1. **Can Only Appeal Decisions Applying Ordinance.** Only 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. 10-9a-707(4)

2. **Burden.** The appellant has the burden of proving that a land use authority has erred. 10-9a-705

3. **Standard of Review.** The appeal authority shall:

   a. Review matters brought before it as if the matter had not been decided before (that is, de novo) unless the council has set a different standard of review. 10-9a-707(2) Examples of a different standard of review might include a standard of deference to the land use authority making the decision unless clear error is shown;

   b. Review an issue related to the interpretation and application of a land use ordinance for correctness: 10-9a-707(3)

      i. In interpreting the meaning of zoning ordinances, the previous decision that is being reviewed as to the meaning of an ordinance is not entitled to deference. The appeal authority need not give any deference to the interpretation involved in the board, commission, official or council's decision that is being appealed to the appeal authority; *Carrier v. Salt Lake County,* 2004 UT 98, ¶26-29.

ii. The board is to review the staff 's interpretation for correctness, giving it no deference. Although the person or entity making the appeal has the burden of proving that an error has been made, the person need show only an error in an order, requirement, decision, or determination made by an official in the administration or interpretation of the zoning ordinance. There is no requirement that the appeal authority give any deference to the administrator or executive official making the determination. The issue is whether the decision applying the ordinance correct, and not did the person making the decision act reasonably. *Brown v. Sandy City Board of Adj.,* 957 P.2d 207 (UT App 1998)

4. **Interpreting Ordinances.** How to interpret the meaning of an ordinance or rule:

   a. When we interpret a law, we look first to its plain language; only if the law's language is ambiguous do we rely on other methods of statutory interpretation; *Toone v. Weber County,* 2002 UT 103, ¶ 12.

   b. Because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner; *Patterson v. Utah County Bd. of Adj.,* 893 P.2d 602, 606 (UT App 1995)

   c. The primary goal in interpreting the law is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve; *Mouty v. Sandy City,* 2005 UT 41, ¶17.

   d. In cases of apparent conflict between provisions of the same law, it is the appeal authority's duty to harmonize and reconcile statutory provisions, since the court cannot presume that the legislature intended to create a conflict; *Bennion v. Sundance Development,* 897 P.2d 1232, 1235-1237, (Utah 1995)

   e. A provision treating a matter specifically prevails over an incidental reference made thereto in a provision treating another issue, not because one provision has more force than another, but because the legislative mind is presumed to have stated its intent when it focused on that particular issue; *Bennion v. Sundance Development,* 897 P.2d 1232, 1235, (Utah 1995)

   f. It is axiomatic that a statute should be given a reasonable and sensible construction and that the legislature did not intend an absurd or unreasonable result. *State ex rel. Div. of Consumer Prot. v. GAF Corp.,* 760 P.2d 310, 313 (Utah 1988)

5. **Separate Appeals Body.** An appeal authority may not entertain an appeal of a matter in which the appeal authority, or any participating member of the appeal authority, had first acted as a land use authority. 10-9a-701(3)(b)

6. **Substantial Evidence.** Any decision by the appeal authority is subject to 10-9a-801(3)(c). It is only valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.

3.2C Variances

1. **Characteristics.** Variances:

   a. Involve a waiver or modification of the requirements of a land use ordinance as applied to a parcel of property; 10-9a-702(1)

   b. Do not vary the use of property; 10-9a-702(5)

   c. Run with the land. 10-9a-702(4)

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2. **Requested by Property Owner.** A variance may be requested by a person who owns, leases, or holds some other beneficial interest in a parcel of property that is to be the subject of the variance request. 10-9a-702(1)

3. **Required Findings.** A variance may only be granted if all of the following findings are made on the record:

   a. 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. 10-9a-702(2)(a)(i) An unreasonable hardship can only be found when the alleged hardship:

      i. Is located on or associated with the property and not from conditions that are general to the neighborhood;

      ii. Comes from circumstances peculiar to the property, and not from conditions that are general to the neighborhood;

      iii. Is not self-imposed;

      iv. Is not primarily economic, although there may be an economic loss tied to the special circumstances of the property; *Chambers v. Smithfield City,* 714 P.2d 1133 (Utah 1984)

   b. There are special circumstances attached to the property that do not generally apply to other properties in the same zone. 10-9a-702(2)(a)(ii) The appeal authority may find that special circumstances exist only if the special circumstances:

      i. Relate to the hardship complained of; and

      ii. Deprive the property owner of privileges granted to other properties in the same zone;

      iii. Are not simply differences between the property and others in the area; *Xanthos v. Board of Adj.,* 685 P.2d 1032 (Utah 1984)

   c. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone; 10-9a-702(2)(a)(iii) and

   d. The variance will not substantially affect the general plan and will not be contrary to the public interest; 10-9a-702(2)(a)(iv) and

   e. The spirit of the land use ordinance is observed and substantial justice done. 10-9a-702(2)(a)(v)

4. **Burden.** The applicant bears the burden of proving that all the conditions justifying a variance have been met. 10-9a-702(3)

5. **Conditions.** In granting a variance, the appeal authority may impose additional requirements on the applicant that will:

   a. Mitigate any harmful effects of the variance; or

   b. Serve the purpose of the standard requirement that is waived or modified. 10-9a-702(6)

6. **Substantial Evidence.** Decision granting a variance must be supported by findings and substantial evidence in the record of the proceedings where the decision to grant the variance was made. *Wells v. Salt Lake City Bd. of Adj.,* 936 P.2d 1102, 1104-1105, (UT App 1997)

3.2D Decisions by the Appeal Authority

1. **Effective Date.** The decision of an appeal authority takes effect on the date when it is issued in writing or as otherwise provided by ordinance. 10-9a-708(1)

2. **Appeal to District Court.** Once a written, final decision is made by the appeal authority, or other final action is taken by the appeal authority as defined by local ordinance:

   a. The decision is ripe for an appeal of the matter to district court under 10-9a-801; and

   b. The 30-day time period begins to run during which an appeal to district court may be filed under 10-9a-801(2) and 801(4); 10-9a-708(2)

c. The strict application of the appeals deadline may not apply if the appeal authority failed to conform to the notice requirements of LUDMA (unless the aggrieved person who should have had notice, had "actual notice" of the pending decision). 10-9a-801(4)

3.2E District Court Review

1. **Exhaust Local Remedies First.** Before challenging a municipality's land use decisions in district court, a person must make an appeal through the local appeals process. 10-9a-801(1); *Patterson v. American Fork City,* 2003 UT 7, ¶17

   a. A person need not appeal a local *legislative* decision to the local appeal authority. Legislative decisions include:

      i. Enacting or amending an ordinance;

      ii. Adopting the general plan;

      iii. Changing the zoning classification of a property; or

      iv. Annexing land;

   b. A person must appeal through the local appeal authority process most *administrative* decisions, including any decision interpreting or applying the land use ordinance, such as:

      i. Subdivision actions;

      ii. Conditional use permit decisions;

      iii. Building permit matters arising from the land use ordinance rather than the building code (the building code creates its own separate appeals process);

   c. A person may appeal a decision from the appeal authority to court, even if that appeal authority decision is the first action taken on a matter within the local administrative process. An example of this would be a variance decision, which is only heard once locally before it may be taken to the district court. 10-9a-708; 10-9a-801(2) and (4)

2. **Thirty Day Deadline.** In order to appeal a decision to district court, the person must file a petition for review with the court within 30 days of the date that the land use decision is final: 10-9a-801(2)(a) and (6)

   a. A local appeal authority decision is final when it is reduced to writing. 10-9a-708

   b. Other land use decisions are final:

      i. As provided for in local ordinance;

      ii. When reduced to writing. 10-9a-704

3. **Faulty Notice.** The 30-day deadline to file an appeal:

   a. Might not limit the right of a person to appeal to the district court if the municipality did not comply with the notice requirements of 10-9a-205 for the meeting or hearing where the decision to be appealed was made.

   b. The notice requirements are:

      i. Notice required prior to a public *hearing* to adopt or modify a land use ordinance; 10-9a-205(2)

         A. Ten calendar days notice;

         B. Mail to affected entities; and

         C. Post in three physical locations, or on the municipal website; and

         D. Publish in newspaper and Post on the Utah Public Meeting Notice website. (State website not required if municipality's annual budget is less than $1 million.) 10-9a-204(3), 52-4-202(3)(b); or

         E. mail to each property owner whose land is directly affected by the land use ordinance change and adjacent property owners within a distance specified by local ordinance;

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ii. Notice required prior to a public *meeting* to adopt or modify a land use ordinance: 10-9a-205(3)

A. Twenty-four hour notice;

B. Post in three physical locations or on the municipal website.

c. If the notice requirements were met for the meeting or hearing where the decision was made, the 30-day deadline to file litigation applies, and any lawsuit challenging the decision will likely be dismissed if not timely file. 10-9a-801(2)(a)

d. In order to challenge the notice requirements, and thus avoid the 30-day filing deadline, the person making the challenge cannot have had actual knowledge that the decision was pending at that meeting or hearing. A person attending the meeting, for example, cannot challenge notice of the meeting. 10-9a-801(4)

4. **Ombudsman's Arbitration of a Taking.** The 30-day deadline to file an appeal is stayed, so the time limit stops running for the narrow issues raised in a request for arbitration filed with the office of the property rights ombudsman before the 30-day period has run out. 10-9a-801(2)(b) These issues include only constitutional takings issues as defined in 13-43-102 and thus are limited to certain property rights questions such as:

a. Whether a land use decision has denied the property owner all economically viable use of his or her property; *Arnell v. Salt Lake County Bd. of Adj.,* 2005 UT App 165

b. Whether a land use decision has imposed burdens on the property owner that are grossly disproportionate when weighed against the public benefits conferred and the property owner's reasonable investment-backed expectations; *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978);*Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, (2005)

c. Whether the approval of a land use application has been made subject to an illegal exaction. *B.A.M. Dev., L.L.C., v. Salt Lake County,* 2006 UT 2

5. **No Change in Decision's Effective Date.** Filing an appeal does not stay the decision of a land use authority or appeal authority:

a. There is no stay provided for in statute for decisions of a land use authority;

b. An appeal authority decision may be stayed if, before filing a petition with the court, the aggrieved party petitions the appeal authority to stay its decision;

c. The appeal authority may stay its decision if it finds that doing so is in the best interest of the municipality;

d. The aggrieved party may also seek an injunction staying a decision by an appeal authority. 10-9a-801(9)

6. **Judicial Deference.** In reviewing a local land use decision, the courts shall give deference to the municipality and shall:

a. Presume that the decision, ordinance, or regulation is valid; and

b. Determine only whether the decision is arbitrary, capricious, or illegal. 10-9a-801(3)(a)

7. **Standard of Review.** The standard of review that a court will apply in judging a municipality's land use decision depends on whether the decision is administrative or legislative:

a. Decisions by a legislative body may be either legislative or administrative; *Keigley v. Bench,* 89 P.2d 480, 483 (Utah 1939)

b. Legislative decisions create new law. Administrative decisions execute or implement existing law; *Low v. City of Monticello,* 2002 UT 90 ¶23

c. All acts by a city council in a city using the "council-mayor" form of government are legislative. *Mouty v. Sandy City,* 2005 UT 41 ¶36 (According to the ULCT directory, these cities include: Holladay, Hooper, Logan, Marriott-Slaterville, Murray, Naples, Ogden, Provo, Riverton, Salt Lake City, Sandy, South Salt Lake, and Taylorsville. Check local ordinances to be sure what form of government your city uses.)

8. **Administrative Decisions.** Administrative decisions by a land use authority are valid if they are supported by substantial evidence in the record and are not otherwise arbitrary, capricious, or illegal: 10-9a-801(3)(c)

   a. A decision that is the result of careful consideration and supported by substantial evidence is not arbitrary. *Caster v. West Valley,* 2001 UT App 220, ¶4 (quoting *Patterson v. Utah County Bd. of Adj.,* 893 P.2d 602, 604 n. 6 (UT App 1995)

9. **Legislative Decisions.** Legislative decisions by the council are valid if it is reasonably debatable that the decision, ordinance, or regulation *promotes the purposes of LUDMA* and is not otherwise illegal. This is a 2006 change in the law. Before that change, a legislative decision would be upheld if it was reasonably debatable that the decision promoted the general welfare and was not otherwise illegal. *Harmon City v. Draper,* 2000 UT App 31; *Bradley v. Payson,* 2003 UT 16 The purposes of LUDMA are:

   a. 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 and its present and future inhabitants and businesses;

   b. To protect the tax base;

   c. To secure economy in governmental expenditures;

   d. To foster the state's agricultural and other industries;

   e. To protect both urban and nonurban development;

   f. To protect and ensure access to sunlight for solar energy devices;

   g. To provide fundamental fairness in land use regulation; and

   h. To protect property values. 10-9a-102(1)

10. **Illegal Decisions.** A local decision is illegal if it is determined that the decision, ordinance, or regulation violates a law, statute, or ordinance that was in effect at the time the decision was made or the ordinance or regulation adopted:

    a. Local actions must specifically comply with mandatory provisions of relevant ordinances. Substantial compliance is not sufficient; *Springville Citizens v. Springville,* 1999 UT 25 ¶28-29

    b. LUDMA does not limit constitutional claims against local government decisions. *Hatch v. Boulder Town Council,* 471 F.3rd 1142 (10th Cir. 2006); 10-9-801(3)(d)

11. **Burden.** The person challenging a land use decision bears the burden of proof. *Harmon City v. Draper,* 2000 UT App 31 ¶28

12. **Record.** If a land use decision, ordinance, or regulation is challenged, the municipality shall transmit to the reviewing court the record of its proceedings including its:

    a. Minutes;

    b. Findings;

    c. Orders;

    d. If available, a true and correct transcript of its proceedings;

    e. A transcript of a tape recording is adequate. 10-9a-801(7)

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13. **Record Review.** If there is a record of an *administrative decision* by a land use authority or an appeal authority, the district court's review is limited to the record. The record is to include only the evidence that was offered to the land use authority or the appeal authority, as the case may be, before the decision was made. 10-9a-801(8)(a)

14. **Lack of a Record.** If there is no record, the district court may call witnesses and take evidence. 10-9a-801(8)(b)

3.3 Initiative and Referendum

1. **Constitutional Right.** The Utah Constitution provides for the right of citizens to propose laws (referred to as "initiative") and, in certain circumstances, to review and vote on laws enacted by the municipality's legislative body (referred to as "referendum"). Article VI, Section 1(2)(b)

2. **Protected by the Courts.** The rights of initiative and referendum are compelling public interests and are entitled to protection by the courts. *Mouty v. Sandy City,* 2005 UT 41

3. **Legislative Issues Only.** Only legislative issues, and not administrative matters, may be the subject of initiative or referendum. *Keigley v. Bench,* 89 P.2d 480 (Utah 1939); *Citizen's Awareness Now v. Marakis,* 873 P.2d 1117, 1122 (Utah 1994) But note that all acts by a city council in a city using the "council-mayor" form of government are legislative and therefore subject to referendum. *Mouty v. Sandy City,* 2005 UT 41 par 36 (According to the ULCT directory, these cities include: Holladay, Hooper, Logan, Marriott-Slaterville, Murray, Naples, Ogden, Provo, Riverton, Salt Lake City, Sandy, South Salt Lake, and Taylorsville. Check your local ordinance to be sure if your community also should be included)

4. **Land Use Initiatives.** Under the former law, land use laws and amendments to land use ordinances could not be proposed by initiative, because the state statutes require a hearing and review process involving the planning commission when a land use law is enacted. *Dewey v. Doxey-Layton Realty Co.,* 277 P.2d 805 (Utah 1954); 20A-7-401(1)(b). The *Dewey* precedent was overturned without the Court specifically stating so in *Sevier Power v. Hansen*, 2008 UT 72, where an initiative imposing a conditional use permit process on power plants was allowed to proceed to the ballot box. The appropriateness of allowing the public to vote on clearly administrative land use issues was not considered by the Court.

5. **Only Comprehensive Zoning Decisions.** The rezone of individual property is not subject to referendum. *Wilson v. Manning,* 657 P.2d 251 (Utah 1982); 20A-7-101(12)(b) Other changes to the zoning ordinance are subject to referendum if they are comprehensive scope and general applicability. *Mouty v. Sandy City,* 2005 UT 41 par 39; 20A-7-101(12)(b) The implementation of a land use ordinance is not subject to referendum. 20A-7-401(2); *Wilson v. Manning,* 657 P.2d 251 (Utah 1982);

6. **Resolutions.** Resolutions expressing the sentiments of a legislative body are not subject to referendum because they do not create law. *Citizens for Responsible Transportation v. Draper,* 2008 UT 43

7. **Mandatory Duty of Municipality.** If a petition for referendum is properly presented to public officials, those officials are required by law to present the issue to the public for a vote. 20A-7-607 to 609

8. **Petitions—Number of Voters.** The number of current, registered voters that must sign a petition to submit a matter to referendum varies based on the number of votes cast for governor in the most recent election:
   a. 25,001 or more — 10% of the votes cast;
   b. 10,001–25,000 — 12.5% of the votes cast;
   c. 2,501–10,000 — 15% of the votes cast;
   d. 501–2,500 — 20% of the votes cast;
   e. 251–500 — 25% of the votes cast;
   f. 250 or less — 30% of the votes cast. 20A-7-601(1)
9. **More Signatures for Land Use Ordinances.** If the decision to be submitted to the voters is a land use development code, an annexation ordinance, or a comprehensive zoning ordinance, the percentages are:
   a. 20% of the votes cast in a city of the first or second class (more than 65,000 residents);
   b. 35% of the votes cast in other municipalities. 20A-7-601(2)
10. **Five Day Deadline.** The petition to require a referendum must be filed within 5 days after the passage of the local law, which is the date the legislative body voted. 20A-7-601(4) There are specific requirements for formatting and other details that must be complied with found at 20A-7-602 through 610.
11. **Vested Rights.** An applicant seeking a land use permit has no vested rights arising from a legislative land use decision until the 5 day period passes during which a referendum petition can be filed, and if properly filed, until the voters ratify the legislative decision. *Mouty v. Sandy City*, 2005 UT 41, ¶¶ 14-15
12. **Timing of Election.** A referendum is to be voted on at the next regular general election unless the legislative body calls a special election. 20A-7-609(2)(a)
13. **Repeal of Law Before a Vote.** The repeal of a law by the legislative body nullifies the need for a vote by the public, even if new and similar laws are passed. *Carpenter v. Riverton City,* 2004 UT 68

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4.7 Appeals from the Land Use Authority

It would be great if every land use authority always objectively applied the law of the jurisdiction to the facts of the application. They don't always get it right. They are human.

Even when the land use authority gets it exactly right, opinions can differ as to whether the law was applied correctly. No matter how tightly the local land use ordinance is written, creative minds can find ambiguity.

It is the appeal authority's role to correct land use authority errors and to interpret local land use ordinances. The appeal authority acts as the jurisdiction's final word on the application. Insulated from the heat of the original land use authority decision, the appeal authority serves as the jurisdiction's last good chance to "get it right."

The appeal authority is the person, board, commission, agency, or other body designated by ordinance to decide an appeal of a decision of a land use application or a variance.

Historically, boards of adjustment have served as the appeal authority for most appeals in most jurisdictions. Because appeals and requests for variances are infrequent, and because the expectations for appeal authorities to act in a "quasi-judicial" manner have risen in the last decade, many jurisdictions have replaced their boards of adjustment with a professional hearing examiner or a professional Board of Land Use Appeals.

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4.7 Checklist | Appeals from Decisions Applying the Land Use Ordinance

- ☐ 1. Determine that a final land use decision has been rendered by a land use authority.
- ☐ 2. Determine that the request for appeal was filed in a timely manner. State law allows the local ordinance to set a deadline to appeal. If no deadline is set by ordinance, the person bringing the appeal has ten days calendar days after the land use decision has been rendered in writing. If the appeal was not timely made, the appeal authority has no jurisdiction and may not hear the matter.
- ☐ 3. Determine that the request for appeal is sufficiently complete for consideration. If it is incomplete, tell the appellant, specifically, how the appeal is deficient.
- ☐ 4. Determine that all appeal fees have been paid.
- ☐ 5. Place the item on an agenda for the appeal authority, if the appeal authority is composed of a board or commission that includes more than one person.
- ☐ 6. Provide the required notice of the meeting to consider the application. (See Checklist 4.9 item 5.) A public hearing is not required by state law, but may be required by local ordinance. (See Checklist 4.9).
- ☐ 7. Provide the appellant with the staff report or other municipal documents to be relied upon 3 days prior to the meeting or hearing.
- ☐ 8. Review standards in the local land use ordinance and state law that apply to the consideration of the appeal.
- ☐ 9. Verify that the appeal authority is impartial and free of bias from conflicts of interest with regard to the matter before it.
- ☐ 10. Conduct the meeting, and, if a hearing is required by local ordinance as part of the consideration of an appeal application, a hearing. A hearing is not required by state law.

Continued

4.7 Checklist | Appeals from Decisions Applying the Land Use Ordinance, *Continued*

☐ 11. Act in a quasi-judicial manner and gather evidence impartially. Afford the applicant and the appellant due process, which includes the rights of notice, to be heard, to confront witnesses, and to respond to evidence submitted by others. Note: To act in a quasi-judicial manner includes the restriction of ex-parte communications between any member of the appeal authority and any individual wishing to discuss the appeal outside of a hearing. All information must be made available to all members of the appeal authority as well as both the appellant and appellee. This allows both sides the opportunity to confront witnesses and respond to evidence submitted by others.

☐ 12. If there is no standard of review provided for in the local land use ordinance, consider the appeal "de novo," which means that the appeal authority may look at the issue as a new issue, as if the matter had not been decided before. The appeal authority, if acting "de novo," does not need to defer to the prior decision of the land use authority. If the ordinance provides for a different standard of review, follow the local ordinance.

☐ 13. Allow the person bringing the appeal to present evidence supporting his or her appeal. The person bringing the appeal has the burden to show that the previous decision was in error. If the person does not meet this burden, dismiss the appeal.

☐ 14. If a person appears in opposition to the appeal and will be adversely affected if the appeal is granted, allow him or her to present evidence supporting his or her point of view. While the procedure need not be overly formal, allow each side to respond to the evidence presented by the other side.

☐ 15. Deliberate. Since an appeal authority is a quasi-judicial body, its deliberations may be conducted in private. Consider evidence that is before the appeal authority that is both relevant and credible related to the issue on appeal. Neither party to the appeal may join in the private deliberations, including the planning staff if they are defending the city's decision and are therefore a party. After considering the standards and the evidence, determine which view of the matter is correct.

☐ 16. In interpreting the law or ordinance, look to its plain language. If the ordinance has been interpreted in the past, be consistent with prior interpretation. If the ordinance is ambiguous, interpret ambiguities in a light favorable to the use of property. If it is not ambiguous, give effect to the intent of the legislative body that enacted the law or ordinance. Harmonize conflicting provisions so that they can be reconciled. Do not impose an absurd or unreasonable result.

Continued

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- ☐ 17. If, in the opinion of the appeal authority:
  - ☐ a. The appellant has provided substantial evidence in the record to support his or her point of view, and there is no substantial evidence to the contrary, approve the appeal.
  - ☐ b. The appellant has failed to provide substantial evidence in the record to support his or her point of view, deny the appeal.
- ☐ 18. Support the action of the appeal authority with evidence in the record, identifying the evidence that the appeal authority relied upon in its decision. The decision must be supported by substantial evidence in the record and not solely by public clamor. The appeal authority may be assisted by professional staff.
- ☐ 19. Preserve the record of the proceedings to document the law and evidence that was considered by the appeal authority before it made a decision related to the application.

Notes and Practice Tips

The action taken by an appeal authority is legal only if it is supported by substantial evidence in the record. "Substantial evidence" is evidence that is relevant and credible. To be relevant, it must relate to the standards in the ordinance and state law related to the review of applications for variances. To be credible, it must be objective and independent.

Public clamor is not substantial evidence. Evidence is independent—it stands on its own and is not based on public opinion. For the average person, either participating in a land use decision as a member of the appeal authority or as a citizen, his opinion is not evidence. Evidence is the justification—the facts—that are the basis for the opinion.

The opinion of expert witnesses qualified to testify in their field of expertise can be substantial evidence if proper information is provided supporting the qualifications of the persons expressing the opinions.

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4.8 Variances

A variance is a limited means by which a property owner can obtain relief from certain provisions of a land use ordinance. Variances are governed by 10-9a-702. A variance is appropriate when, because of particular physical surroundings, shape, or topographical conditions of the property, compliance with the land use ordinance would result in a particular hardship upon the owner. (Hardship is distinguished from a mere inconvenience or a desire to make more money.) The petitioner must prove according to that:

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;
2. There are special circumstances attached to the property that do not generally apply 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.

The appeal authority may not find an unreasonable hardship unless the alleged hardship:

1. Is located on or associated with the property for which the variance is sought; and
2. Comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood.

In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship, the appeal authority may not find an unreasonable hardship if the hardship is self-imposed or economic. In determining whether or not there are special circumstances attached to the property, the appeal authority may find that special circumstances exist only if the special circumstances:

1. Relate to the hardship complained of; and
2. Deprive the property of privileges granted to other properties in the same zone.

Generally, a variance process is designed to prevent a regulatory “taking” of private property. However, because a variance allows the applicant to circumvent the zoning laws of the jurisdiction, the applicant has the burden of proving that all of the conditions justifying a variance have been met.

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Once granted, variances run with the land, meaning that the right to the variance is transferred from owner to owner over time.

Because variances are designed to alleviate the physical restraints of zoning in certain circumstances, they are not available to allow a use that is not contemplated in the zone. In granting a variance, the appeal authority may impose additional requirements on the applicant that will:

1. Mitigate any harmful effects of the variance; or
2. Serve the purpose of the standard or requirement that is waived or modified.

Only the appeal authority is vested with the authority to grant variances. The appeal authority could be different for each land use application if the municipality chooses. The appeal authority may not be the same person or board that took final action on the land use application. Any appeal of the decision must be made to the district courts. There is no legal way to grant a variance that would change the use of a piece of property. Use variances are not allowed.

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4.8 Checklist | Variances

☐ 1. Determine that a variance from the strict application of the land use ordinance could be appropriate for the physical circumstances involved with a potential application. Use variances are not allowed.

☐ 2. Determine that the variance application is sufficiently complete for consideration.

☐ 3. Determine that the variance fee has been paid.

☐ 4. Place the item on an agenda for the appeal authority.

☐ 5. Provide the required notice of a meeting to consider the application. (See Checklist 4.9 item 5.) A public hearing is not required by state law, but may be required by local ordinance. (See Checklist 4.9)

  ☐ a. If the appeal authority is composed of a board or commission that includes more than one person, then notify the members of the appeal authority of the meeting.

☐ 6. Review standards in the local land use ordinance and state law (10-9a-702) that apply to the consideration of a variance. They are stated in item 10 of this checklist.

☐ 7. Verify that the appeal authority is impartial and free of bias from conflicts of interest with regard to the matter before it.

☐ 8. Conduct the meeting, or a public hearing if required by local ordinance as part of the consideration of the variance application. A public hearing is not required by state law.

☐ 9. Act in a quasi-judicial manner and gather evidence impartially. Afford the applicant due process, which includes the rights of notice, to be heard, to confront witnesses, and to respond to evidence submitted by others.

  ☐ a. This includes the restriction of ex-parte communications between any member of the appeal authority and any individual wishing to discuss the appeal. All information must be made available to all members of the appeal authority as well as both the appellant and appellee. This allows both sides the opportunity to confront witnesses and respond to evidence submitted by others.

Continued

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☐ 10. Deliberate. Since an appeal authority is a quasi-judicial body, its deliberations may be conducted in private. Consider evidence that is before the appeal authority that is both relevant and credible related to the proposed variance. After considering the standards and the evidence, determine if the applicant has met his or her burden to establish by substantial evidence each of the required findings:

- ☐ a. 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. An unreasonable hardship can only be found when the alleged hardship:
  - ☐ i. Is located on or associated with the property and not from conditions that are general to the neighborhood;
  - ☐ ii. Comes from circumstances peculiar to the property, and not from conditions that are general to the neighborhood;
  - ☐ iii. Is not self-imposed;
  - ☐ iv. Is not primarily economic, although there may be an economic loss tied to the special circumstances of the property; and
- ☐ b. There are special circumstances attached to the property that do not generally apply to other properties in the same zone. The appeal authority may find that special circumstances exist only if the special circumstances:
  - ☐ i. Relate to the hardship complained of; conditions that are general to the neighborhood;
  - ☐ ii. Deprive the property owner of privileges granted to other properties in the same zone; and conditions that are general to the neighborhood;
  - ☐ iii. Are not simply common differences between the property and others in the area.
- ☐ c. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone; and
- ☐ d. The variance will not substantially affect the general plan and will not be contrary to the public interest; and
- ☐ e. The spirit of the land use ordinance is observed and substantial justice done.

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4.8 Checklist | Variances, *Continued*

- ☐ 11. If, in the opinion of the appeal authority:
  - ☐ a. The applicant has provided substantial evidence in the record to support all five of the required findings, and there is no substantial evidence to the contrary, approve the variance.
  - ☐ b. The applicant has failed to provide substantial evidence in the record to support any one of the five required findings, deny the variance.
- ☐ 12. Support the action of the appeal authority with evidence in the record, identifying the evidence that the appeal authority relied upon in its decision. The decision must be supported by substantial evidence in the record and not solely by public clamor.
- ☐ 13. Preserve the record of the proceedings to document the law and evidence that was considered by the appeal authority before it made a decision related to the application. Remember, any appeal of the decision is to district court.

Notes and Practice Tips

The action taken by an appeal authority is legal only if it is supported by substantial evidence in the record. "Substantial evidence" is evidence that is relevant and credible. To be relevant, it must relate to the standards in the ordinance and state law related to the review of applications for variances. To be credible, it must be objective and independent.

Public clamor is not substantial evidence. Evidence is independent—it stands on its own and is not based on public opinion. For the average person, either participating in a land use decision as a member of the appeal authority or as a citizen, his opinion is not evidence. Evidence is the justification—the facts—that are the basis for the opinion.

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