Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
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May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

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May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

Utah Land Use Initiatives and Referenda: The Legislative/Administrative Distinction

The Utah Land Use Institute
Craig M Call
May 14, 2019

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
> . . .
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

The pivotal word here is "legislation". Many controversies and extended litigation have flowed from the critical distinction between what is a local "legislative" act and what is a local "administrative" or "executive" act.

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[1] Article VI, Section 1.

[2] See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (—The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . .‖ (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

[3] In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶ 3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶ 7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

The basic concept is that not every land use decision by a local government council or commission is subject to review by the voters. Administrative acts are not "referable", which is to say that they may not be referred to the ballot box by a citizen petition. Legislative acts are always referable, because the voters constitute a separate and equal legislative body, with the power to initiate, review, and repeal legislation.[4] Just as the city council could change its mind and undo its own decisions about the land use code and zoning map, so may the voters. Either of the two legislative entities can review and revise the decisions of the other. Politically, however, once the citizens have spoken on an issue it is unlikely that the local city council will attempt to undermine the result of a referendum or initiative.

Recently the Utah Supreme Court has had to consider a series of issues related to referenda. There have been far fewer disputes about citizen initiatives and thus less wrangling about the types of local land use laws which are legitimate subjects for the citizens to take directly to the ballot box independent of any action by the local city council or county commission.[5]

The main issue litigated recently is which decisions by a city council the voters can refer to referendum and which the voters cannot. When a referendum petition is filed there is often resistance, not only from the elected officials who made the decision, but often from those who benefitted from it. The usual case is that a property owner or developer has gained support from the local council or commission for a development, and then a group of neighbors or other citizens who oppose that specific project seek a public vote to overturn that approval. The citizens usually desire to see the plans amended or, in most cases, stopped altogether.

What Local Land Use Decisions are Subject to Referenda?

While the state legislature has been given the authority by the Constitution to set rules for referenda and initiatives, its decisions in that regard have been closely scrutinized by the Utah Supreme Court, which jealously guards citizen's rights in this regard.[6] From a series of prominent decisions made in recent years, we can easily recognize that some local land use decisions clearly fall within the citizen's powers to review and some are clearly beyond those powers. In the center, for better or for worse, there is some gray area where what is and is not subject to ballot box review is more difficult to determine.

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[4] *Sevier Power*, ¶7; 196 P.3rd 583.

[5] *Sevier Power* dealt with a petition by voters in Sevier County who initiated an ordinance that would have required a public vote before a coal-fired power plant could be constructed. The case raised an issue not clarified by the Supreme Court in its opinion. The Court ruled that the citizen initiative was properly certified by the County Clerk but did not address the text of the proposed ordinance, which would have created a conditional use permit process that the public alone could approve or deny. According to the proposed ordinance, a vote of the electorate would be required after a future CUP application was submitted. Since conditional uses are by definition an administrative act, it would have been interesting to know how the court would have viewed this attempt by the voters to insert themselves in administrative matters. However, the matter was resolved on the basis that the adoption of the initiative itself would be a legislative act. The Court cited precedents that administrative acts may not be thus initiated, but the Court did not extend its discussion to address the issue of whether the text of the specific law initiated would set the stage for some future inappropriate administrative review by the voters. See discussion at PP. 14-16 where the Court chose to "express no opinion on the wording of the initiative at issue."

[6] *Carter,* ¶ 3.

Legislative Decisions – These are Subject to Review by the Voters

The land use community, the Legislature and the Court is in general agreement that some decisions clearly are "referable". When the local council or county commission makes the following legislative decisions, a referendum petition can be filed within limited time frames:

- Adoption of or amendment to the General Plan.
- Changing the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
- Amendments to the zoning map, including the rezoning of a particular parcel of land.[7]
- Annexation of new areas into the city limits of a municipality.

The Supreme Court has stated clearly that once a referendum is under consideration, any development rights arising from the legislative act that will be voted on are on hold, and those favoring the original decision must wait for the voters' decision.[8]

Administrative or Executive Decisions – These are Not Subject to Review by the Voters

Clearly not "referable" (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[9] When a developer comes in for a building permit, a subdivision approval, a conditional use permit or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is pretty specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application. The standard is expressed in state statute:

> (1) (a) (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations: (A) in effect on the date that the application is complete; and (B) applicable to the application or to the information shown on the application. (ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application

[7] *Krejci v. Saratoga Springs*, 2013 UT 74.
[8] A developer does not obtain any "vested rights" as a result of a legislative decision that is subject to referendum. Until the voters have spoken the effect of the city council's decision is suspended. *Mouty*, ¶¶ 14-16.
[9] *Carter*, ¶ 17.

> and pays application fees, unless: (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.[10]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting" are limited.[11] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law. If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time to file a petition to refer the matter to the voters. If that was not done then the density and lot size issues, for example, are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, after the application is filed the developer's rights have usually "vested".

Thus if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial evidence that the application as approved did not conform to the ordinances.[12] There is usually no viable opportunity to amend the ordinances retroactively to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared or the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law. As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election

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

[11] The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

[12] A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. § 10-9a-701 et. seq. (Municipalities) and § 17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. § 10-9a-801 (municipalities) and § 17-27a-801 (counties).

who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some "Planned Unit Developments".
- Some development plans, including what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[13]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[14] We have been given the framework for the debate, but no clear bright line

[13] "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

[14] Fortunately the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. § 20A-7-607(4)(a).

guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[15] As stated in its Krejci decision, "The bright-line rules in Carter were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[16] For better or for worse, the largest and most controversial projects are more likely than the small one to involve the kinds of issues that the Court has decided the voters may review.

The Guidelines

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."
>
> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a trio of specific cases and the analysis provided by the Court in each instance.

Krejci – Single Lot Rezone Held to be Legislative Act

The Supreme Court had ruled decades ago that single-lot rezones were not subject to citizen review as they were akin to administrative acts.[17] The Legislature had also specifically excluded one parcel rezoning as the subject of referenda.[18] In 2012, in *Carter*, the Court raised

[15] For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

[16] 2013 UT 74, ¶ 29.

[17] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

[18] Utah Code Ann. § 20A-7-102. By this statute, Utah voters were authorized to pursue a petition for a law "to be submitted to . . . a vote of the people if it is a local law." A "local law" is statutorily defined as "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution," but "individual property zoning decision(s)" are excluded. Id. § 20A-7-101(12). This language has been amended to no longer apply to referenda, but on its face would still apply to a voter initiative.

the issue, and then reserved the question for future consideration.[19] The time had come in *Krejci v. Saratoga Springs*[20] for that review.

Krejci[21], involved a single lot rezone although the "lot" involved was a significant parcel of land. Within a 640 acre development known by the same name as the city, managed by a homeowner's association, was a twelve-acre parcel of undeveloped land. Originally included in the development plan for multi-family housing, it was not zoned for the desired density until the City Council did so in 2012. Neighbors of the parcel quickly filed a referendum petition.

In *Carter,* the Court first articulates that legislative power gives rise to new law, while executive power implements a law already in existence.[22] And it described the core hallmarks of legislative power: "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."[23]

Krejci specifically calls out that provision in state statute that attempted to exclude single-lot rezoning decisions from referenda[24] and states clearly that, notwithstanding the statute, "site-specific rezoning" is a legislative act and thus subject to referendum.[25] In making the decision, the Court also overturned two previous decisions which had been consistent with the former statute.[26]

Suarez – Planned Unit Development Amendment Held to be Legislative Act

In a case with significantly more complicating factors, the Court reviewed a decision by the Grand County Council related to a nearly 2000 acre Planned Unit Development referred to as Cloudrock.

This was the second round of review by the County for the development involved. Previous developers had obtained approvals which were revised at the request of a new property owner. The more recent resolution adopted by the Council involved several amendments, including a 67.5 percent reduction in lodging units and a 64 percent increase in mesa residential units. It did not increase the density of the project. After the approval, citizens argued that the decision was administrative and subject to appeal to the local appeal authority. The county argued that the decision was legislative and thus had to be challenged in the District Court.

On appeal, the Utah Supreme Court held that the Cloudrock plan amendment was legislative because 1) it created new law; 2) it is a law of general applicability and 3) the Council

[19] *Carter*, ¶ 75.
[20] 2013 UT 74.
[21] The lead plaintiff's name is pronounced "Kray-chee"
[22] *Carter*, ¶ 57.
[23] Id. ¶ 75.
[24] Utah Code Ann. § 20A-7-102. See footnote 18 above.
[25] *Krejci*, ¶ 38.
[26] *Bird v. Sorenson,* 394 P.2d 251 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

considered policy matters. The reasoning of the Court seemed to rely on several aspects of the Council's decision:

- The contract at issue was amended and restated in its entirety. It replaced the original agreement.
- The County's land use ordinance provided that PUD amendments were to be reviewed under the same procedure as zoning map and text amendments and considered as changes to the zoning map.
- The decision amended the size of the project by shifting nearly 100 acres in or out of its boundaries.
- The 2012 approval included maps depicting the location of development zones.
- The decision puts forth regulation within the created zones.
- The decision was based on general policy concerns rather than individual circumstances.[27]
- The decision stated on the face of the agreement that the agreement runs with the land and applies to all future owners of the property.[28]
- The process of approval included public hearings and review by the Planning Commission prior to the Council's action, just as a legislative act would require.
- The decision was expressed in the form of a legislative ordinance. While this was not dispositive, the form of the decision was relevant.[29]
- The fact that some aspects of the decision were administrative did not change the nature of the action because the Council "rolled them all together into one land use approval having the form of an ordinance."[30]

[27] "For example, in *Suarez v. Grand County*, we found that the Grand County Council weighed broad policy considerations when it considered, among other things: (1) the suitability of the development based on environmental and scenic quality impacts, (2) the consistency of the proposed use with the character of existing land uses in the area, (3) the mitigation of any potential adverse effects of the development, and (4) the ability of the public infrastructure to serve the development." *Baker*, P. 19, citing *Suarez*, 2012 UT 72, ¶ 39, 296 P.3d 688.

[28] In *Baker*, the Court considered abandoning a factor in the legislative/administrative analysis related to whether legislative decisions "run with the land" as advocated by Justice Thomas Lee in his concurring opinion but chose not to do so.

[29] "When land use decisions are at least arguably legislative, we give understandable deference to the formal nature of the government body involved in making them and the formal nature of the zoning ordinance." *Suarez*, P. 20. It was noted that the form of a decision as an ordinance will be particularly persuasive when a local government entity, after making the decision in the form of a legislative act, decides to argue that the decision was administrative when faced with a referendum on the matter. *Save Beaver County v. Beaver County*, 2009 UT 8, ¶¶ 18-19. 203 P.3rd 937. In *Bradley v. Payson City*, 2003 UT 16, ¶ 22, 70 P.3rd 47, the City of Payson had conceded a PUD approval to be administrative and thus the Court treated the decision in a manner consistent with that conclusion. It is to be noted, however, that the Court is reluctant to use the criteria of the form of a local land use decision as a significant factor in the analysis because to do so would present "the potential for abuse by the proverbial fox guarding the henhouse. That is, a municipality wishing to have its actions found to be legislative or administrative could characterize and process its own actions in a way that leads to its desired result." *Baker*, f.7.

[30] Suarez, f55

Baker v. Carlson – Development Agreement was Administrative Act; Development Plan was Legislative

On the heels of *Krejci* and *Suarez* came the next logical case. Where in *Suarez* the County sought a determination that its decision was legislative, in *Baker* the City of Holladay argued that approval of another large project was purely administrative. Both cases involved a subsequent amendment or replacement of an original development plan.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated and obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted over more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is about 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site. Also to be approved is an agreement for the development of land which confirms specific development rights and duties. A development plan and a development agreement were in place when the Ivory team arrived on the scene. Both were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/ legislative dichotomy – the development plan was legislative in nature but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;
3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and

6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[31] The Court seems to deem it significant that the Holladay code states that a development plan in the Mixed Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[32]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression". These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasons the Court, there is no underlying law to apply to the supposed administrative decision.[33]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into contract with a specific entity are not legislative.[34]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[35]

[31] *Baker*, ¶ 21.
[32] *Baker*, ¶ 25.
[33] *Baker*, f.5.
[34] *Baker*, citing *Carter* at 2012 UT 2, ¶ 67.
[35] It is to be noted that *Baker* discusses the Court's previous holding in Suarez that a development agreement in that case was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000 acre site and that the context of the challenge to Grand County's actions did not differentiate between the different components of the Cloudrock decision as was done in the *Baker* (Cottonwood Mall) case.

3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[36]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[37]

And so, while the Court discusses it's reasoning in detail in *Carter, Krejci, Suarez and Baker*, the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively. There are, however, some methods that local officials and developers can use to avoid a ballot box review.

Practical Considerations and Best Practices

For Local Government:

1. Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
2. Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (the legislative body can impose specific criteria to guide those decisions by others.)
3. Create specific criteria in the ordinance that must be followed when the city council subsequently decides to make administrative decisions, such as to approve site plans and development agreements.
4. Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific real estate when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
5. Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council can continue to handle items it wishes to be exempt from voter review.

For Developers and Property Owners:

1. Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.
2. File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting

[36] The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.
[37] *Baker*, P. 38, citing *Krejci*, ¶ 34.

what is allowed if your application is not filed and paid for before a pending ordinance is proposed.

3. If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
4. Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time. Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
5. Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
6. If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question. According to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.
7. Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
8. Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.