Other Local Issues

CHAPTER 11

1. Historic Districts

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

Local governments may use their extended discretion to enact ordinances that recognize and preserve the aesthetic values of districts that have a common cultural value and/or individual landmarks that have significance of their own. Historic attributes of communities may be elements in a general plan.[2] Many jurisdictions have designated certain areas as historic districts, subject to detailed architectural controls and demolition limitations. These districts are often managed by landmark commissions, such as those serving in Salt Lake City and Park City.

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

In an area of land use where there is a lot of experience with regulation and some clear federal guidelines (such as the Secretary of the Interior's Standards for the Treatment of Historic Properties[3]), it would seem to be folly to use other standards or attempt to over-regulate historic buildings.

As in any administrative scheme, the decisions made must be based on substantial evidence in the record and must substantially advance a legitimate state interest.[4] If the ordinance is written to preserve historic buildings, then the decisions made

Rendering of 1968 design by Marcel Breuer for a proposed office tower over Grand Central Terminal in New York City which touched off a battle that raged all the way to the U.S. Supreme Court. The railroad, which proposed the tower, lost the case in a landmark decision further defining what regulations constitute a taking of private property. Photo courtesy Prof. Daniel Mandelker, Washington University in St. Louis School of Law.

by the local landmarks commission in enforcing the ordinance must substantially achieve that end.

There is also a Utah statute unique to the administration of historic districts which provides that the legislative body cannot serve as the land use authority for historic districts and that if a land use regulation does not plainly restrict an application, the land use authority should interpret the ordinance in favor of the land use applicant.[5]

Conditions and terms of approval imposed by a local landmarks commission which advance some cause beyond the historic preservation may lack the "essential nexus" that is required by U.S. Supreme Court decisions to be legal and enforceable.[6] For example, property owners may have a legitimate complaint, if conditions imposed in the name of historic preservation, drive up property values thereby eliminating moderate income housing.

Historic district rules and approvals must be designed to preserve some economically viable use for the property[7] and to achieve the public goals without imposing too harsh an impact on property owners who have made substantial investments in good faith and are later treated with gross unfairness.[8]

It must be remembered, however, that courts are generally sympathetic to the community values furthered by aesthetic regulation, and it is an uphill battle to prove that

Local control of design and appearance of commercial structures will be upheld if skillfully drafted and consistently enforced, as with this big box retailer in Summit County, Utah.

the private burden is so harsh as to require compensation for excessive regulation. Although it would be hard to imagine an area of land use which has been more regulated than aesthetics, the cases invalidating such efforts by local authorities are few and far between.

One aspect of historic regulations that is most difficult for a property owner to counter is that such regulations tend to increase property values in a district or community. This simple fact makes it difficult to win the sympathy of a judge in such a subjective context. If the local government supports its decisions with substantial evidence in the record, it almost always wins.

2. Parks and Open Space

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

State and federal laws regarding these concepts are widely accepted and praised. There are not many limits on open space laws beyond the community's duty under state law to (1) allow for moderate-income housing and (2) not completely

gentrifying an entire area by making the average lot so expensive that only the elite can live there. Local laws protecting open space have usually been held valid by the courts. Indeed, across the United States, courts have upheld many local laws that enforce large minimum lot sizes. In rural areas of Utah, development standards requiring 20, 40, or even more acreage for a building lot are in place and probably legal unless challenged as exclusionary zoning or surrounded by much denser development.

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

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

Regulating for open space is not usually the problem. Where communities run afoul of the law is in their attempt to treat open space as public property. Remember that the right to exclude others is a sacred right, protected by a long line of U.S. Supreme Court decisions.[9]

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

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

In the final analysis, the best way to control open space and critical lands to which the public wants continual access is for the local community to buy the property. My

hat is off to the taxpayers of Park City and Summit County that bit the bullet and raised money to preserve precious open space. Through community action, they literally bought the farm and are now attempting to keep the community both green and safe from the litigation that comes from overreaching regulation.

3. Trails and Pathways

Without belaboring the subject, there are a few points to be made about the well-intentioned movement to crisscross the state with a network of spectacular trails. Such efforts are commendable and appropriate, as long as some restraint is used. Private property protections demand that compensation must be paid if a property owner is required to allow the public onto his property, whether the proposed corridor is a road or a trail.[10]

We must keep in mind that the laws related to roads have only in the last century involved motor vehicles. Every road was a trail 125 years ago. They were created through several methods—by use ("adverse possession" or "prescriptive easement"), by direct condemnation, or by written easement or conveyance.

If a road has been used by the public for 10 years or more without physical interruption, then the underlying landowner has, by default, transferred to the public an easement for trail use.[11]

Complicating the issue is that the interest created can run the gamut from a very limited easement to full fee simple ownership (i.e. ownership of the actual land underneath the trail). In general, if a public easement has not been created or conveyed in writing, however, putting the trail on a map or showing it in the master plan as a public trail does not make it a public trail and may violate property rights.

A property owner developing land can be legally required to acknowledge on his subdivision plat the trails that legally exist across his land. However, requiring a subdivider to create a system of new trails triggers the tests outlined earlier in Chapter 8 on imposing conditions and dedications on development. There must be a finding that the trails required of this subdivider are no more burdensome on him than the trails required of all other subdividers.

It would be illegal, for example, to require the property owners in the foothills to provide trails while those on the flats do not have to do so. There may be some

incentives offered to encourage landowners to volunteer trailways in their development plans, but a single development cannot be coerced into providing trails simply because the land involved would be an attractive place for the public to hike. See the discussion of development exactions in Chapter 8.

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

4. Home-Based Business

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

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

There is little to justify, in my mind, the excessive regulation and apprehension that these ordinances express. One wonders if there would have been an Apple Computer or Hewlett Packard if the ordinances in San Jose had been so restrictive that Steve Jobs or Bill Hewlett and David Packard could not tinker with electronics in their garages.

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

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

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

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

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

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

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

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

Does that not sound like the result of a specific problem or request? One asks what the state interest is in making sure that any residential use is only conducted by one person and not by a couple; that somehow the stock in trade of an artist is less

objectionable than the stock in trade of a craftsman; or that some use carried on in the kitchen would be appropriate, but not one carried on in the garage.

Such ordinances are regulatory overkill. Remember that when a conditional use is allowed in the ordinance, the use is to be granted unless there is substantial evidence in the record supporting the conclusion that the negative aspects of the use cannot be mitigated.[12] Without such evidence, home occupations should usually be allowed. Licensing fees may not be collected from a home-based business that imposes no more burden on the municipality than a home would impose.[13]

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

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

3 36 C.F.R. §68 in the Federal Register, Vol 60, No. 133, July 12, 1995. This reference is in the "Code of Federal Regulations" published by the U.S. Government and available in law libraries and online. The secretary's standards are available at https://www.nps.gov/tps/standards/rehabilitation/rehabilitation-guidelines.pdf.

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

5 Utah Code Ann. §10-9a-527 (municipalities).

6 *Nollan*, supra.

7 *Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1992).

8 *Penn Cent., supra, note 1; Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency,* 535 U.S. 302, (2002).

9 *Loretto v. Teleprompter Manhattan CATV Corp,*. 458 U.S. 419 (1982), *Nollan*, 483 U.S. at 825 n. 6; *Dolan v. City of Tigard,* 512 U.S. 374 (1994).

10 Id.

11 Utah Code Ann. §72-5-104(2).

12 §10-9a-507(2)(a) (municipalities) and Utah Code Ann. §17-27a-506(2)(a) (counties).

13 §10-1-203(7), (8) (municipalities) and Utah Code Ann. §17-53-216(4) (counties).