Mounting a Legal Challenge

CHAPTER 16

When Local Land Use Decisions are Illegal

We have covered a lot of ground about land use decisions and pointed out how local decisions are made. There are a number of issues, however, that apply to almost all land use decisions, and which provide grounds for someone who disagrees to make a legal challenge. They include constitutional claims and other legal precedents established by courts or statutes that nullify or frustrate local decision-making if the participants are ignorant of the limits of local authority and discretion.

A number of these issues are discussed here, but only as an overview. Lawyers and judges have considered cases in this arena for a hundred years. By now there is a lot more detail to the process than could be covered in a hundred books the size of this one.

As an introduction, it may be worth saying that there is little hope of gaining much by moving from the local, county, or municipal land use process to the courts. If the system seemed abrasive and aggravating before, mounting a lawsuit will make you look back on those hearings before the planning commission with nostalgia.

It is also essential to understand the protocols in proceeding with litigation. In many instances, local appeals must be pursued before legal action may be initiated. Only skilled land use attorneys can be relied upon to figure out when to file the appeal to the local appeal authority (see Chapter 15) and when to file in state or federal court. Sometimes, just to be sure, an attorney will do both because if the deadline for either passes and the wrong option was chosen the case is dead before it is even heard.

That said, since the normal, local approval process is affected by how cases are tried if they go to court, there may be some merit in reviewing here the major ways that local land use decisions are challenged in court.

State And Federal Constitutional Challenges

1. Loss of All Economically Viable Use

The first landmark U.S. Supreme Court opinion finding a regulation of property unconstitutional as a "taking" was handed down in 1922.[1] In the 80-plus years since then, we have had extended discussion of the matter by the courts, both state and federal. In some ways we know more and in some ways we know less about what is a taking and what is not a taking in the 21st century. What we know for sure is that a taking occurs when regulation deprives a landowner of all economically viable use of their property. After that basic rule, it gets more complicated.

Must a Regulation Allow Some Economic Use of Property?

Case Law — Lucas v. South Carolina Coastal Council

David Lucas bought two lots on the coast of South Carolina to use for the construction of summer homes. After the purchase, the South Carolina Coastal Council passed a rule that restricted construction of any buildings within 300

David Lucas bought a lot on each side of the square house shown above. The U.S. Supreme Court declared it was unconstitutional to prohibit him from using these lots to build vacation homes in 1992. Photo courtesy Prof. Daniel Mandelker, Washington University in St. Louis School of Law.

feet of the shoreline. That was a problem because his beachfront lots were not 300 feet deep. The U.S. Supreme Court heard Lucas' case in 1992.[2] They decided the state action was a taking and just compensation should be paid to Lucas for the loss of his property.

The state argued the restriction was necessary to protect the general welfare because homes would be blown apart in the next major hurricane. Lucas pointed out his lots were the only two vacant lots along that section of the coast. The burden imposed on him was severe. The Court ruled that a regulation that deprives the property owner of all economically viable use creates a "taking." This is so even if there is a legitimate public purpose behind the regulation. In fact, that's a given – the constitution says that property shall not be taken for a *public purpose* without the payment of just compensation.

After losing its case before the U.S. Supreme Court, the South Carolina Coastal Council was required to purchase the Lucas lots. It could not afford to leave the land idle so it sold the lots for development. Another home has been built on the lot in the photograph above. Photo courtesy Prof. Daniel Mandelker, Washington University in St. Louis School of Law.

The Court said the state could eliminate all use of property if any use would constitute a nuisance. Under the old common law developed by the courts over the centuries, one neighbor could not cause a nuisance to his neighbor that unreasonably interfered with the quiet enjoyment of the neighbor's property. If he did so, the neighbor could sue and recover damages for the loss of use and value.

> Since the right to create a nuisance was not a legal aspect of property ownership, no taking occurs when the government prevents a use that would be a nuisance.
>
> The Court also reasoned that a nuclear plant could be prohibited— even if that were the only use the property might support—if there were a fault line on the property and the nuclear plant might fail in a major catastrophe. Lucas' proposal was not a nuisance, however, unless the danger was great enough to require his neighbors to tear down their houses. A nuisance is not created just because the world would be better if the activity were not going on. A nuisance exists when the interference with the neighbor is severe and very disruptive.

Land use regulations that destroy all economically viable uses of property are takings. Examples may include a rule that property owners cannot build anything at all on private land that is near the city well or in the watershed. Or suppose that a legally created, vested lot was vacant at the time an ordinance change was enacted that would make the same lot illegal to create today. If the local officials seek to apply the ordinance retroactively to make the "nonconforming" lot unbuildable, that would be a taking. No economically viable use would remain.[3] Our laws related to nonconforming uses and noncomplying structures arose from constitutional law in the first place.

It would not be a "taking," however, to prohibit the use of land for residences in an area where any building on the land would be hazardous to the health and safety of the residents because of contaminated soils, imminent landslides, or repeated avalanches. The ordinance may recognize that factors exist, inherent in the property, that make it unsuitable for any use.

I remember being called to Iron County years ago to address concerns that rules might be implemented to prohibit the building of new residences on lots as small as 5,000 square feet in the rural expanses of the county. There were no sewer, water, or other municipal services in the vicinity. I was asked if the denial of permits was a taking.

"No," I said. Until it could be shown that someone could fit a safe well, an effective septic system, and a house on 5,000 square feet, then the county could take notice that any use of that small a property for a residence in an area with no public utilities

In the case of Harper v. Summit County, the Utah Supreme Court ruled that property rights include the right of neighbors to be free from nuisances such as excessive dust and noise. The case involved this loading facility on a nearby railroad line.

would be hazardous to human health. There is no taking if any potential use of the property would constitute a nuisance.

In another case a property owner called me because the city was telling anyone who wanted to lease his property that they could not occupy the retail store because there was insufficient parking. I considered this a taking because the building on the property was a legal nonconforming use which had all the parking at the time that it ever had. It was the city and the state that eliminated street parking, not the property owner.

Upon further investigation, it appeared that the city, which owned the land next door and wanted to develop that area to improve the commercial base, had offered to buy the property for a pittance and had been refused. In response, it appeared, the city refused to allow the rental of the property in what may have been a predatory effort to get the owner to sell the parcel to the city. If my facts were right, this clearly would be a taking of his vested rights of use. We negotiated a settlement, and the city paid an amount closer to the property's actual value.

2. Severe Economic Impacts

It is not as easy to win such a case, but the U.S. Supreme Court also has held that a property owner can recover just compensation when a local regulation imposes a severe burden even though some economically viable use remains.[4] The test requires a balancing of burdens and benefits.

For example, if a property owner loses almost all value so that the public can enjoy a very marginal benefit, the constitutional alarm bells may ring. On the other hand, if the public interest is compelling and the burden on the property owner relatively light, then no taking should be found.[5]

Part of the equation related to the property owner's burden is based on the owner's expectations of a profit and the investment he has made toward that end. If a property owner claimed that a new regulation cost him significant property value, his claim would likely be more successful if he paid a large sum for the property the year before and was in the process of getting permits for his planned project when the new regulation went into effect.

The same landowner would not have nearly as strong a case if he inherited the property from his father who bought it 50 years ago for what would now be considered a pittance.[6]

When is a Land Use Regulation a "Taking"?

Case Law — Smith Investment v. Sandy City

A significant Utah case involved property on 700 East in Sandy. The city down zoned the land (made its use less intensive and lowered densities) from commercial to residential. The property owner brought suit, claiming a "taking."

According to the evidence presented at trial, the value of the property involved in the lawsuit fell from $1.355 million to $775,000, a loss of 43 percent of the value. Despite this major hit, there was no "taking." According to the court:

> ". . . even when land value is substantially diminished as a result of zoning, that fact alone will not be deemed a sufficient ground for

> finding the regulation arbitrary and capricious. Such losses generally are deemed to be simply the uncompensated burdens one must accept to live in an ordered society."[7]

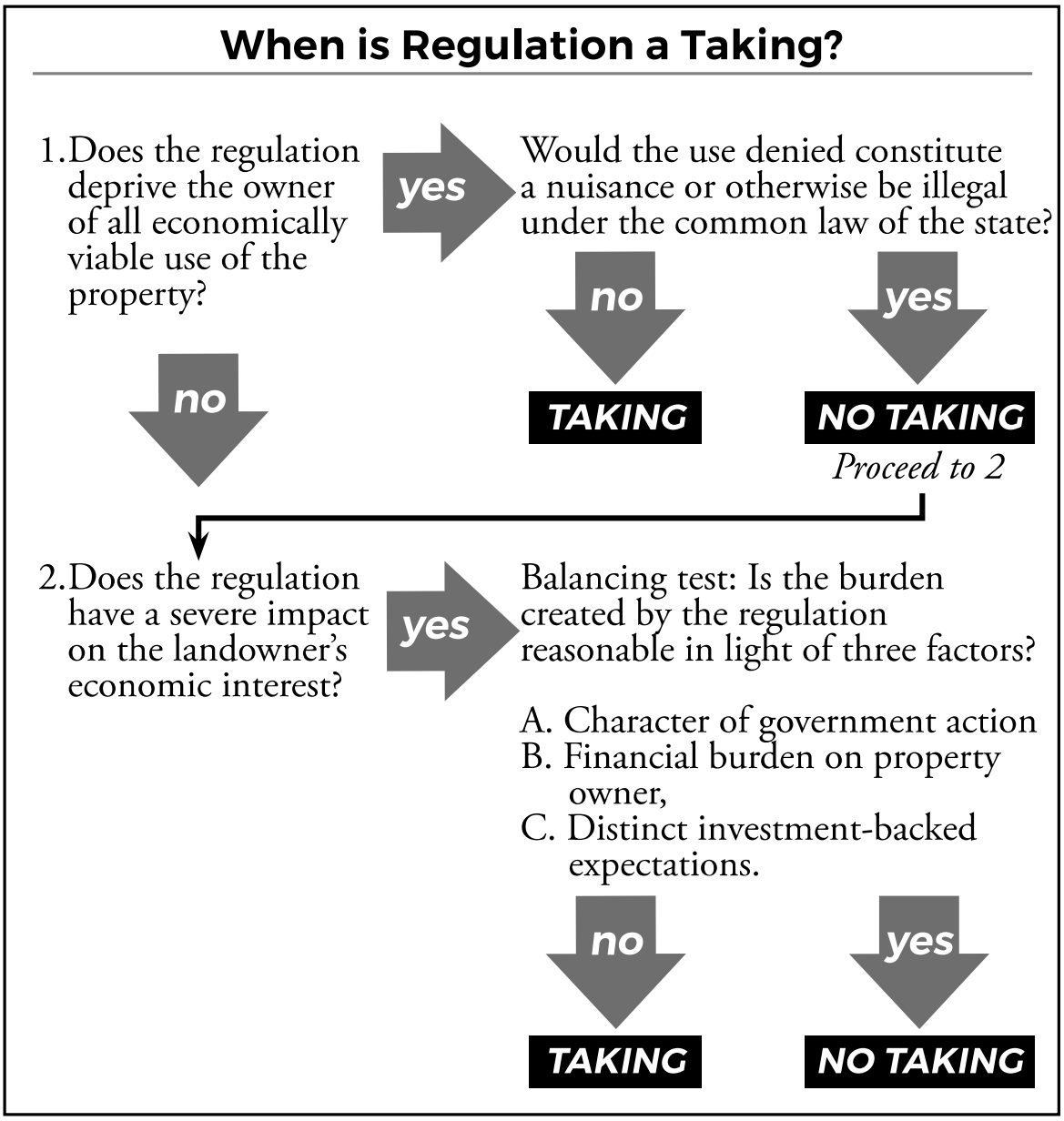
Although most of us would think a $580,000 loss is real money, the court said it was simply not unexpected that such losses would occur in a zoning context. As the Utah Courts have said:

> Indeed, zoning and rezoning present perplexing problems of economic and environmental gain and loss. While some gain, others

The land behind the Sandy Hills Shopping Center was "downzoned", from commercial to single family residential use, resulting in a protracted lawsuit. The Utah Court of Appeals held that no "taking" of private property had occurred and did not award damages, even though the property lost $580,000 in value.

> lose. It is the legislature which must strike the proper balance.[8] Mere diminution in value is insufficient to meet the burden of demonstrating a taking by regulation.[9]
>
> As the U.S. Supreme Court has explained it: Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in general law.[10]
>
> > This Court has generally been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Rather it has examined the "taking" question by engaging in essentially ad hoc (case by case) factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance.[11]
>
> Although the courts have left the door open to finding an illegal regulation when some economically viable use remains under this test, it is very rare that a property owner succeeds in challenging local land use decisions under a claim of severe economic impact. There are no cases in Utah law that have reached that conclusion.

Note that this balancing test for a "taking," where the benefits and burdens of regulations are weighed, is different from the "loss of all economically viable use" test. If all use is denied and no nuisance could be created by some economically viable use, then the regulation categorically creates a "taking," no matter how compelling a public use exists to justify the regulation.



3. Trespass—Excluding Others

Another sacred property right is the one to exclude others from your property. Under the right circumstances, it can be a taking if the government imposes a duty on you to allow the permanent or temporary occupation of any part of your property by the government, the public, or anyone acting with the supposed direction or permission of the government.[12]

Can Government Occupy Private Property?

Case Law — Loretto v. Teleprompter Manhattan

For example, a Ms. Loretto owned an apartment building in New York City. City officials directed her to allow the local cable company to put a connection box on the back of the building. She refused and won the case in the U. S. Supreme Court.[13]

In an opinion authored by Justice Thurgood Marshall, the great champion of civil rights, the city was told that the right to exclude others is significant. No property owner can be required to allow private property to be physically occupied for public purposes without just compensation.

Ms. Loretto's apartment building in New York City. Photo courtesy Prof. Daniel Mandelker, Washington University in St. Louis School of Law.

Other examples of when trespasses become takings may include:

1. when inevitably recurring floodwaters from the city storm drain system repeatedly occupy private property;[14]
2. when open space in a development that would be required under local ordinance must not only be maintained, but also deeded to the public for public use instead of being kept for use by homeowners within the project;[15] and
3. when landowners must accept trails across their property although they have done nothing to create the need for the trails.

In summary, the courts will find a "taking" if a local action results in the occupation of property or unlimited public access to the property without the payment of just compensation. This rule would not apply if dedication of a public park or trail is voluntarily negotiated in a give-and-take agreement for added density or other bonuses that are roughly proportional in value to what the property owner dedicates. It would also not apply if a road or trail had been used by the public for the ten or twenty years it would require for a permanent public access or road easement to have been created.

4. Lack of a Public Purpose—Due Process Issues

A decision or action also can be invalidated if the regulation restricts the use of private property but accomplishes no legitimate public purpose. This is almost the same thing as saying that a decision violates due process because it does not promote the general welfare and the purposes of the state land use, development, and management act as we discussed in Chapter 3.

In Utah, as elsewhere, the courts have determined that they will first look to local ordinances and state statutes to review local land use decisions rather than to the Constitution of the United States or the Utah State Constitution. If a land use decision is overturned because it violates a statute or ordinance, then the court will not review the constitutional cause of action.

As we discussed in Chapter 3, the Utah statutes have been interpreted to allow the setting aside of local decisions that are arbitrary, capricious, or illegal. This language roughly parallels the constitutional claim the lawyers call "substantive due process". Since this constitutional language has been grafted into statute, the Utah courts have reviewed local land use decisions without considering these as constitutional issues.

In one recent case, *Patterson v. American Fork City*[16], the Utah Supreme Court was asked to void local decisions by declaring that the local government had acted in a manner that was arbitrary, capricious and unreasonable. The Court declined to do so, stating that:

> Reading all of the facts in the light most favorable to Pattersons' claims, we conclude that this case involves disputes about specific local development issues, not about the deprivation of constitutional rights. Pattersons have liberally peppered their brief with strong language indicting the

> City for dozens of its decisions, but they have failed to cite a single case where developers have succeeded when pursuing [constitutional] claims on similar facts. Although Pattersons are entitled to "all inferences which are fairly supported by the evidence, [they] are not permitted to build their case on mere 'opprobrious epithets' of malice, or 'the gossamer threads of whimsey, speculation, and conjecture.'" (citations omitted).
>
> Whatever unfairness Pattersons may have experienced, nothing in the facts presented sounds constitutional alarm bells.[17]

For several years, the United States Supreme Court has held that a regulation that imposed burdens on the use of land but failed to substantially advance a legitimate public purpose could result in a successful claim for compensation under a "taking" theory. The Court abandoned this "taking" theory in 2005[18], holding that regulations which do not accomplish what they are intended or which do not advance the general welfare must now be challenged as violations of substantive due process and not as takings.

Under Patterson and other relevant Utah precedent, this means that these issues should usually be resolved under the Utah land use management statutes, not the Constitution.[19] Therefore, a person claiming that a law is arbitrary, capricious or illegal would argue that the law is applied in a manner inconsistent with purposes of the Utah Land Use, Development and Management Act, and not bring a constitutional claim.

5. Equal Protection

Land use laws, like others, must not treat people differently if they are in the same situation. A notable U.S. Supreme Court case involved a widow who, with her late husband, had successfully sued the local village in an unrelated dispute. She claimed that when she applied for a building permit, the municipality required her to provide a much larger utility easement than that required of others. Her argument was that the only reason for the larger easement was to get back at her for suing the town.

The U.S. Supreme Court decided that she had a viable case if what she alleged was found to be true.[20] In Utah, as in other places, this is a hard case to make. The Utah Supreme Court has stated that:

> Zoning decisions will almost always treat one landowner differently than another. It is the presence of evidence of vindictive action, illegitimate animus, or ill will that will distinguish run-of-the-mill zoning cases from cases of constitutional right.[21]
>
> [T]he plaintiff must present evidence that the [municipality] deliberately sought to deprive him of equal protection of the laws for reasons of a personal nature unrelated to the duties of the [municipality's] decision.[22]
>
> A showing of uneven enforcement of the law is not sufficient: what is required is a showing of a totally illegitimate animus toward the plaintiff by the [local government entity].[23]

Those claiming a violation of equal protection must provide evidence believable to the decision-maker that the only explanation for the allegedly arbitrary and capricious conduct is unlawful discrimination against a protected class or person. This is a major uphill battle and very unlikely to be successful in the courts.

6. Free Speech Protections

Mainly used in sign regulations and sexually oriented business cases, these are discussed more thoroughly in Chapter 9.

The courts have been very generous in using the free speech protections of the first amendment, just as they have in avoiding government actions that establish religion or interfere with the right of assembly.

7. Federal Statute Challenges

See the related parts of Chapter 9 about religious uses, signs, fair housing, cellular towers, and other special uses with which federal statutes have dealt. Using the commerce clause of the U.S. Constitution, Congress has pre-empted the field in some areas of land use law. Where federal law trumps, the state laws are not much help. Local zoning ordinances and decisions that operate contrary to federal statutes will be struck down.

State Statute Challenges

8. Arbitrary, Capricious, and Illegal Acts

This concept is so fundamental to land use legalities that we spent a lot of time reviewing it in Chapters 5 and 6. Rather than review it again, I merely wish to remind you that this is a paramount issue and that land use decisions will not be upheld unless they survive this test.

Legislative decisions must (1) adhere state and federal law and (2) advance the general welfare and be consistent with the Utah Land Use, Development, and Management Act.[24]

Administrative decisions must be supported by substantial evidence on the record and a correct application of the law.[25]

9. Following Required State Procedure

The state land use statutes do not say much when it comes to the day-to-day business of local land use management, but what they do say is significant and not to be ignored.

For example, Ben Toone was a resident of Ogden Valley where Huntsville and Eden are located. Some years ago, the Weber County Commission decided to sell some surplus property located in a relatively remote area of the valley to a local hunter/outfitter. Toone and others thought the sale was not at market value and should have been advertised more broadly. They brought suit in state court.

In a decision invalidating the sale, the Utah Supreme Court held that a remote part of the statutes governed the matter.[26] According to the state code in force at the time, no city or county could sell property without asking the planning commission to comment first. Of course, no one ever noticed that rule, much less followed it, and municipalities have been selling property for years without even knowing such a requirement existed.

Too bad, said the court, and struck down the sale. Although this requirement was removed by the 2003 legislature, it applied at the time of the sale and the sale was

void. While this was a pretty harsh remedy, the court made its point that the statutes are not to be ignored.

Another case involved the little town of Boulder in southern Utah. Its zoning ordinance was struck down because officials could not prove that they had a zoning map at the time they adopted the ordinance. The code says a town must have a map if it has a land use ordinance, stated the Court of Appeals: no map, no ordinance.[27]

If you do not agree with a local decision, check the related state statutes. If they have not been followed, a challenge may succeed.

10. State Policy Mandates

A related issue involves the policy mandates imposed by the legislature. These are imposed on local government because they are creatures of the state and they have no power to zone without state approval and delegation. Since the power comes from the state, the state can impose some restrictions that go along with the zoning power. As you would expect, the state on occasion waded in with regulations covering a short list of special land uses.

Some of the "strings" attached have to do with issues that the legislature addresses because some have political influence on Capitol Hill. For example, billboards and school districts both have special protections in land use.[28]

Other limitations are a result of legislative preferences and policy such as a requirement that manufactured housing be allowed in all residential zones[29] and that moderate income housing be promoted statewide.[30]

These policy mandates can be the fodder for litigation in imposing certain land uses or fighting local decisions.

What is the Effect of State-mandated Policy?

Case Law — Anderson v. Bluffdale City

A local developer acquired the right to develop a large area of property in Bluffdale, generally located east and south of the intersection of the Bangerter

Extended wrangling between the City of Bluffdale and a developer involved the issue of exclusionary zoning and a state mandate to locate moderate income housing in the community. This development, "The Bluffs", was built after settlement was reached.

Highway and Redwood Road in Salt Lake County. The City of Bluffdale had set aside the majority of its undeveloped land for one acre lots and refused to allow the densities that were desired by the landowner and several lawsuits resulted.

One series of opinions dealt with the state-mandated moderate income housing plan. The city claimed it had adopted one, but the developer claimed it was insufficient and had no potential to actually encourage those of modest means to live in Bluffdale. The trial court judge, who has since been elevated to the Supreme Court, wrote that Bluffdale was required to do more than just make a token effort at a moderate-income housing plan. He was not amused by the dismissive comments about the moderate income housing mandates by at least one member of the city council in the record of the denials.

After several opinions, the developer and community finally reached a settlement that resulted in a mix of housing types and uses with both rentals and owner-occupied residences in a planned community.

11. Following Local Ordinances

Another area of legal challenge that sometimes results in reversal of local land use decisions is a claim the city or county is not following its own ordinances. We discussed this briefly in Chapter 14 when talking about citizen enforcement of zoning ordinances, but it bears some more discussion here. We have recently had some interesting cases related to this issue.

Must Local Government Follow Its Own Ordinances?

Case Law — Culbertson v. Salt Lake County[31]

In 1991, the then owners of the Family Shopping Center (located at 900 East and Union Park Avenue and now in Midvale) wanted to expand it and include more shopping attractions for local residents. They were unable to acquire property from some of the landowners in the area, however, but they did obtain a conditional use permit from Salt Lake County that allowed them to build the rear wall of several stores in an area that was formerly part of a county street.

The homeowners facing the street sued, claiming the county could not allow a developer to reduce the width of that street from 33 feet to 25 feet because to do so violated the county's own street standards. They also sued to enforce the developer's conditional use permit, which required that curbs, gutters, and sidewalks be installed everywhere the project fronted on a public street and that landscaped setbacks be provided.

The county and the developers asserted that 1070 East and North Union Avenue are not streets at all, but "closed" roads, available only for private use by the residents. The Utah Supreme Court noted, however, that there is only one way to make a county street a private roadway and that is the official "abandonment" of the street as provided in state statute. An ordinance of abandonment was never adopted so the streets remained "public streets".

The court then went on to hold that the county has only two definitions for "street" in its ordinance – streets are either private or public. Since the streets in this case were not privately owned but remained, they must be public streets.

Before and after aerial views of the Fort Union Shopping Center vicinity showing the homes involved in the case of Culbertson v. Salt Lake County. Several county streets were obliterated in the expansion of the retail complex. The owners of the homes shown above in the center of these photographs won a lawsuit against the County and developers because the project illegally narrowed the streets in front of their residences.

Thus, the county could not allow them to be divided in violation of county street standards. The streets could not be changed to a cul-de-sac without a 50-foot turn-around as the county ordinance required. Nor could the street be limited to a width where a fire truck or garbage truck could not negotiate the roadway.

As a remedy, the court declared:

> Where the encroachment is deliberate and constitutes a willful and intentional taking of another's land, equity may require its restoration, without regard to the relative inconveniences or hardships which may result from its removal.[32]

In other words, tear down the buildings! This result, and the harsh remedy of complete invalidation of the zoning ordinance in the Boulder case cited in this chapter, point out the risk that local officials run when they do not carefully analyze local decisions and the relevant local ordinances.

This is not to say that just anyone can amble into the courtroom and bring down the local municipal power structure. The precedent established in the *Springville Citizens* case, mentioned before in Chapter 14, is that the plaintiff in such a lawsuit must show that their interests were prejudiced by the local decision.[33]

Surely the Culbertsons were—they lost their street. But the result would have been much different if they had missed the deadline to file an appeal or if the landowners had not been so vocal in the first place, pointing out the violation of their rights long and loudly in public places, and thus putting the county and the developers on notice that there were legal issues involved that remained to be resolved.

Summary—Legal Issues

We have looked at a variety of ways that local land uses can be challenged. There is also a "laundry list" at the back of this volume in Appendix 3 in the format of a checklist that could be used to determine if a local land use decision is likely to be overturned by a court.

The legal answer is not always the best answer, however. Although I am all for a property owner or citizen standing up for their rights and not putting up with illegal and discriminatory treatment, I have found in my legal career that lawsuits and legal threats are more counter-productive than helpful on most occasions.

On the street and in the neighborhood, zoning is about compatibility and appropriate community behavior. When there are conflicts, the best answer is often for both sides (or all three or four sides) to sit down with mutual respect for the rights and concerns of each other and work out solutions.

This is often not likely to happen in the heat of a land use hearing before a body of citizen planners. Someone needs to take some leadership, call out a time out, assemble the "stakeholders," and work out solutions that you do not find in a courtroom.

It is important to learn the law and know the rules. But the law is not a very efficient or satisfying tool to use in an area as subjective and emotional as land use. Give the other options a try before dropping the legal bombshell.

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1 *Penn Coal v. Mahan*, 260 U.S. 33 (1922).

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

3 The *Lucas* case was cited by Utah Courts in *Diamond BY Ranches v. Tooele County*, 2004

4 *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

5 See discussion of *Penn Central* in *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Authority*, 535 U.S. 302 (2002).

6 The U.S. Supreme Court considered such a case in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Palazzolo had acquired the subject property in the 1950s. The court recognized that even though state regulations dramatically lowered the value of his property, it was still worth more than he had paid for it decades earlier, and dismissed his *"Lucas"* style claim for the loss of all economically viable use.

7 *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 255-56 (Utah Ct. App. 1998).

8 *Id.*

9 *Id.* at 259

10 *Penn. Coal, supra,* at 413.

11 *Keystone Bituminous Coal Ass'n v. DeBenedictics*, 480 U.S. 470, 494 (1987).

12 *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2080 (2021).

13 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2080 (2021).

14 *Danforth v. United States, 308 U.S. 271, 276 (1939).*

15 *Utah Code Ann. 10-9a-508(1)(b) (municipalities), 17-27a-507(1)(b) (counties) prohibits disproportionate exactions.*

16 *Patterson v. Am. Fork City, 2003 UT 7 (Utah 2003).*

17 *Id.* ¶ 28. (cleaned up).

18 *Lingle v. Chevron U.S.A.,* 544 U.S. 528, 545 (2005).

19 *Patterson*, supra note 16. See also *Bradley v. Payson City Corp.,* 2003 UT 16, 70 P. 3d 47 (Utah 2003); 2001
UT App 9, 17 P. 3d 1160 (Utah App. 2001) vacated. *Harmon City, Inc. v. Draper City,* 2000 UT App 31, 997 P. 3d 321.

20 *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

21 *Patterson*, supra note 16, ¶31.

22 *Id.* ¶33 (cleaned up).

23 Utah Code Ann. §10-9a-801(3)(a)(ii) (municipalities); Utah Code Ann. §17-27a-801(3)(b) (counties), see also Bradley, supra note 19, ¶ 14.

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

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

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

27 *Hatch v. Boulder Town*, 2001 UT App. 55, 21 P. 3d 245.

28 Utah Code Ann. §10-9a-512, 513 (municipalities); Utah Code Ann. §17-27a-511, 512 (counties), Utah Code Ann. §72-7-501; Utah Code Ann. §§10-9-106 (2) (municipalities); §17-27-105 (counties).

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

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

31 *Culbertson v. Bd. of Cty. Comm'rs of Salt Lake Cty.*, 2001 UT 108, overruled on different grounds by *Madsen v. JPMorgan Chase Bank*, N.A., 2012 UT 51.

32 *Culbertson v. Salt Lake County*, 2001 UT 108, ¶ 56, 44 P. 3d 642 (Utah 2001), citing *Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assoc.,* 535 P.2d 1256, 1259 (Utah 1975).

33 *Springville Citizens v. City of Springville*, 1999 UT 25 (Utah 1999) ¶30.