



# THE UTAH LAND USE INSTITUTE

## Public Participation

*Utah Land Use Regulation Topical Series*

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# **PUBLIC PARTICIPATION IN LAND USE PROCESSES**

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## **Introduction**

Public participation in local decision-making is fundamental to democracy. In matters that affect the character of the community in which they live, citizens feel they should have a say. Accordingly, as Yale Law School Professor Anika Singh Lemar has noted, “No other local government function, whether budgeting, policing, or education, features or prioritizes public participation to the degree seen in land use law.”

In most states and communities, the requirement for public input is in the form of a public hearing. While long considered the standard for gathering input from the community’s citizens, public hearings do have their problems. This review will summarize the background of requirements for public involvement in land use processes, the legal requirements for such, and ways to enhance and guide it.

Those reviewing this may also be interested to read other topical summaries of Utah land use law at the Land Use Library at [utahlanduse.org](http://utahlanduse.org). A video of a presentation by the author of this article is also available there.

This summary includes changes made to the code by the 2023 General Session of the Utah State Legislature.

## **1. Relevant Law**

### **a. Background**

- i. U.S. Department of Commerce in 1924 released A Standard State Zoning Enabling Act, a model for state legislatures to adopt into state codes to enable zoning and land use regulation by local governments. A revised version was released in 1926.
  1. Section 4 of the Standard Act sets forth the procedure for local governments to adopt zoning regulations, with the following caveat: “However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard.” The adoption of land use ordinances is considered to be a policy, or legislative, action.
  2. Section 7 of the Standard Act addresses the process for variances, special exceptions, and appeals. These are more in line with what is considered today to be administrative actions, where the rules and standards adopted in the codes and ordinances are applied to specific land use proposals or applications. In these situations, the Standard Act says, “All meetings of the board shall be open to the public.” It also says, “The board ... shall ... give public notice thereof, as well as to the parties in interest... .” It does not require the holding of a public hearing.
  3. The Standard Act’s distinction between zoning (legislative) decisions and adjustment (administrative) decisions comports with administrative law’s distinction between legislative and adjudicative (administrative) proceedings. Zoning adoption and changes

implicate broader interests. Adjudicative (administrative) proceedings, applying a generally applicable standard to a single parcel, present narrower issues.<sup>i</sup>

4. The Utah State Legislature adopted the Standard Zoning Enabling Act for municipalities into the Utah State Code virtually as written in 1925 (the enabling act for counties was not adopted until the 1941)<sup>ii</sup>. With numerous amendments and modifications, it has served as the basic land use enabling model for local governments since.
  5. In 1927, the Department of Commerce released the companion Standard City Planning Enabling Act, to encourage communities to prepare and adopt a master (general) plan prior to adoption of zoning. Adoption of the Planning Act was more limited by states than the Zoning Enabling Act, but a number of its provisions were incorporated in many state codes, including Utah's. Section 7 of the Planning Act includes this provision regarding a community master (general) plan: "Before the adoption of the plan or any such part, amendment, extension, or addition the commission shall hold at least one public hearing thereon..."
- b. Current Utah Statutory Regulations
- i. For legislative actions (general plan, land use ordinance, rezoning):
    1. Planning Commission required to hold one public hearing prior to recommending any general plan or amendment.<sup>iii</sup>
    2. Planning Commission required to hold one public hearing prior to recommending any land use regulation or amendment.<sup>iv</sup>
  - ii. For administrative actions (land use applications, to be reviewed by a designated Land Use Authority):
    1. No public hearing required by Utah state code.
    2. If the Land Use Authority, which is the entity charged with making administrative land use decisions<sup>v</sup>, is a public body, all deliberations and actions must be taken in an open, public meeting<sup>vi</sup>.
    3. In 2023, the Utah State Legislature passed SB174 which includes a required process for all local entities to follow in review and approval of subdivision plats for single-family dwellings, two-family dwellings, and townhomes. The new code includes a provision that in reviewing a preliminary plat application, the land use authority may receive public comment and may hold one public hearing<sup>vii</sup>.
  - iii. For land use appeals, to be reviewed and determined by a designated Appeal Authority:
    1. No public hearing required by Utah State Code<sup>viii</sup>.
    2. If the Appeal Authority is a public body, all meetings and actions must be taken in an open, public meeting<sup>ix</sup>.
  - iv. Notice to the public:
    1. SB43 passed in the 2023 Utah Legislative session:
      - a. Establishes two general categories for providing notice to the public of government actions – Class A and Class B
      - b. Each specifies the actions that are required, such as posting to websites, posting in public locations, the form and content of notices, and timeliness of notices. The primary difference between Class A and Class B notices is

where notices are required to be posted, with Class B notices stipulating posting in areas designated by the proposed action.

- c. Each category of land use action in LUDMA is identified with a requirement for either a Class A or Class B notice (see spreadsheets after endnotes).

c. Third Parties – Not Necessarily “the Public”.

- i. Some third parties have protected property interests in an administrative matter and thus have a right to be heard apart from the general public’s right. It must be noted that even if a public hearing is not provided for, these individuals or entities may have a due process right to participate.
  - 1. For example, if a variance from the side yard setback of a lot is requested, the appeal authority should normally notify the affected abutting property owner who shares the property line involved and provide notice of the matter and a chance to be heard.
  - 2. If a person has no protected property interest in a matter, they do not have the right to demand to be heard.<sup>x</sup> The Utah Supreme Court held this to be the case, stating that an entity could even be denied the right to be heard in a hearing involved in an appeal which that entity initiated. The entity wishing to be heard had no property interest and therefore was not entitled to be heard at their own appeal.<sup>xi</sup>
  - 3. Other examples of an entitled third party might be a canal company whose canal crosses a subdivided parcel if the company is commenting to protect the interests in their easement; the occupants of land abutting the parcel involved in a proposed conditional use where their comments relate to the reasonable conditions which might be imposed to mitigate the reasonably anticipated detrimental effects of that conditional use; or the owner of property that may need to be taken by eminent domain if a project is approved.
  - 4. While this consideration should not be taken to allow public comment on any issue, it is recommended that notice and hearing be provided if a person who wishes to participate could reasonably argue that they have a protected property interest in the outcome. When dealing with civic rights, it is probably better, in most situations, to err on the side of allowing participation.
- ii. Remember that just because a public hearing is not required, the land use or appeal authority may, under its own rules and format, allow for some discussion with those attending a public meeting. Such an exchange can at times allow for needed insights and is not prohibited in the state code. If not prohibited by the local body’s rules and procedures, what comment may be allowed would be up to the person chairing the meeting and/or a majority of the body holding the meeting. Also, if the applicant or some other party to the hearing wishes to call on witnesses or others to comment, they normally would have that opportunity.
- iii. It is sure, however, that those whose interest in the matter is shared with the general public or a large part of the community do not have a protected property interest in the outcome and are not entitled to participate and do not have standing to challenge an administrative decision.<sup>xii</sup>

## **2. The Challenge of Public Hearings**

- a. For Legislative Actions
  - i. Utah State Code requires only one public hearing to be held by the Planning Commission prior to it making its recommendation to the governing body.
  - ii. Attendance and commenting at public hearings has been demonstrated to not be representative of the overall community<sup>xiii</sup>.
  - iii. Other engagement methods shown to increase broader public involvement, achieve more representative input
    - 1. Public open houses
    - 2. Focus group meetings
    - 3. On-line forums, comment spaces
    - 4. Emailed information asking for return comments
    - 5. Public opinion surveys<sup>xiv</sup>
- b. For Administrative Actions
  - i. Hearings for administrative actions are not required by Utah State Code. However, many local ordinances do require public hearings for such actions. This may be a result of a general perception that all government actions should be transparent and open to public scrutiny and comment.
  - ii. Administrative actions, however, are more narrowly focused to the determination of compliance of an application for a single or small number of properties with adopted requirements and standards of the land use ordinances. If hearings are even warranted or held, they should be focused on gathering facts and information to determine compliance<sup>xv</sup>.
  - iii. Most public hearings generally solicit statements of opinion and uninformed “facts,” however, which are not conducive or relevant in making an administrative determination. Rulings by the Utah Appellate Courts have clearly stated that the opinions or consent of neighbors or the public are not appropriate factors to be considered in administrative actions<sup>xvi</sup>.

## **3. A Two-Tiered Public Input Process**

- a. Consider establishing two separate public input processes for local land use actions – one for legislative actions, another for administrative actions<sup>xvii</sup>.
  - i. For legislative actions (general plans, ordinance adoptions, property zoning, annexations), outline a broader plan for public engagement, including such things as open houses, on-line forums, websites that allow comments, focus groups, public surveys, and others. To comport with state code requirement, hold one or more public hearings.
  - ii. For administrative actions (land use applications for conditional uses, subdivisions, site plans, etc.) where it is determined that an opportunity for public engagement may be appropriate or desirable, provide for an “administrative hearing,” as no public hearing is required nor prohibited by state code. Establish rules for such administrative hearings whereby participation is open to the applicant and to those who may be directly impacted by the land use application (such as neighboring property owners); require that information provided in such hearings be based on demonstrable facts or information that can help inform the land use authority about

the compliance of the application with standards and rules established in local codes and ordinances.

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<sup>i</sup> Ibid.

<sup>ii</sup> Overview and History of Utah Zoning Law; J. Craig Smith, Smith Hartvigsen PLLC; April 2014

<sup>iii</sup> Utah Code Annotated 10-9a-404(1); 17-27a-404(1)

<sup>iv</sup> Utah Code Annotated 10-9a-502(1)(b); 17-27a-502(1)(b)

<sup>v</sup> Utah Code Annotated 10-9a-103(30); 17-27a-103(34)

<sup>vi</sup> Utah Code Annotated 52-4

<sup>vii</sup> SB174 Code Section 10-9a-604.1(7); 17-27a-604.1(7)

<sup>viii</sup> Utah Code Annotated 10-9a-7; 17-27a-7

<sup>ix</sup> Utah Code Annotated 52-4

<sup>x</sup> See *Monticello Alliance v. San Juan County*, 2022 UT 10 f.10 as well as ¶¶ 17-40.

<sup>xi</sup> Id.

<sup>xii</sup> *Specht v. Big Water Town*, 2007 UT App 335. While this case deals with “standing” and not with specific protected property interests, if Specht had had such a protected interest, his standing would have been established. For a more detailed description of the difference between standing and due process rights, see *Monticello Alliance*, referred to above. All who have protected interests have standing, but all who have standing do not have protected interests. The Specht decision helps us understand who might be entitled to participate, as it deals with the broader issue of standing and found that Specht was not entitled to be heard under that standard.

<sup>xiii</sup> Neighborhood Defenders: Participatory Politics and America’s Housing Crisis; Katherine Levine Einstein, Boston University, et.al.; Cambridge University Press; 2020

<sup>xiv</sup> <https://www.flashvote.com/case-study-elected>

<sup>xv</sup> Zoning Hearings: Knowing Which Rules to Apply; David W. Owens, Professor, School of Government, University of North Carolina; January 1997

<sup>xvi</sup> <https://propertyrights.utah.gov/find-the-law/appellate-decisions/davis-county-v-clearfield-city/>;  
<https://cite.case.law/p2d/626/440/> (Thurston v. Cache County)

<sup>xvii</sup> Inspired by a bill before the 2023 Montana State Legislature, SB382 The Montana Land Use Act;  
<https://leg.mt.gov/bills/2023/billpdf/SB0382.pdf> see Section 6 and Section 22

|   |               |               |               |
|---|---------------|---------------|---------------|
| <b>Notices Required</b>   |               |               |               |
| <b>63G-28-101 and 102</b>   |               |               |               |
|   | CLASS A       | CLASS B       | OPEN MTGS ACT |
| <b>Notice Required:</b>   | 63G-28-102(1) | 63G-28-102(2) | 52-4-202(3)   |
| Public Notice Website (pmn.utah.gov)  | x             | x             | x             |
| Notice to Newspaper   |               |               | x             |
| Post at Principal Office or Meeting Location  |               |               | x             |
| Local Public Body Website (\$250,000+ bud)  | x             | x             |               |
| Notice Posted in Affected Area  | x             | x             |               |
| Notice Within Designated Area   |               | x             |               |
| <b>Content of Notice Summary Statement:</b>   |               |               |               |
|   | 63G-28-101(3) |               |               |
| Title - Subject of Notice   |               |               |               |
| Name of Public Body or Government Official  |               |               |               |
| Clear Statement of the Matter   |               |               |               |
| General Description of Related Area   |               |               |               |
| Dates and Deadlines Applicable  |               |               |               |
| Where to Get a Copy of Complete Notice  |               |               |               |
| Website - pmn.utah.gov  |               |               |               |
| Website - Entity Publishing Notice  |               |               |               |
| Physical Address to Get Notice  |               |               |               |
| Telephone Number  |               |               |               |
| <b>Public Location:</b>   |               |               |               |
|   | 63G-28-101(5) |               |               |
| Open to Public - Can Be Privately Owned   |               |               |               |
| Closed to Public - But Notice is Visible  |               |               |               |
| Must be Reasonably Likely to be Seen by Residents   |               |               |               |
| <b>Notice within designated area:</b>   |               |               |               |
|   | 63G-28-101(1) |               |               |
| If the area is not described in the ordinance, the entire county or municipality is the area. |               |               |               |
| <b>Designated Area Notice - Use First Option Practical to Use:</b>                            |               |               |               |
|   | 63G-28-101(3) |               |               |
| Mail or Deliver to Current Address, or  |               |               |               |
| Mail or Deliver to Last Known Address. Or   |               |               |               |
| Post on Property of Owner to be Noticed   |               |               |               |
| Note: Must verify that notice remains on property   |               |               |               |
| <b>Particular Notice Requirements</b>   |               |               |               |
|   | 63G-28-102(1) |               |               |
| If Affected Area is a Street, on or near the Street.  |               |               |               |
| If Affected Area is an Easement, on or near the Easement.                                     |               |               |               |
| If Interlocal Area, within each jurisdiction  |               |               |               |
| <b>Timeliness</b>   |               |               |               |
|   | 63G-28-102(5) |               |               |
| Post notice at or prior to the beginning of the period of time required                       |               |               |               |
| Public body or official is not to remove notice during the required time period               |               |               |               |
| Public body or official verifies the notice remains through the time period and               |               |               |               |
| replaces the notice if it is removed or damaged.  |               |               |               |
| Mail notice before the beginning of the period of time.                                       |               |               |               |



|  |  |  |  |      |                                 |          |
|--|--|--|--|------|---------------------------------|----------|
| <b>Specific Notice Required</b>  |  |  |  |      |                                 |          |
| Every Public Meeting   |  |  |  | OPMA |                                 | 24 hours |
| General Plan - Prepare   |  |  |  | A    |                                 | 10 days  |
| General Plan - Hearings to Adopt or Amend  |  |  |  | A    |                                 | 10 days  |
| General Plan - Meetings to Discuss Adopt or Amend  |  |  |  | A    |                                 | 24 hours |
| Ordinance - Hearings to Adopt or Amend   |  |  |  | B    | "area directly affected"        | 10 days  |
| Ordinance - Meetings to Discuss Adopt or Amend   |  |  |  | A    |                                 | 10 days  |
| Zoning Map - Hearings to Adopt or Amend  |  |  |  | B    | "area directly affected"        | 10 days  |
| Zoning Map - Hearings to Adopt or Amend  |  |  |  | *    | "owner of affected property"    | 10 days  |
| Vacate Street - Hearing  |  |  |  | A    |                                 | 10 days  |
| Planning Advisory Areas - Hearing to Establish   |  |  |  | A    |                                 | 1 week   |
| Planning Advisory Areas - Hearing to Withdraw Area                                       |  |  |  | B    | "area proposed to be withdrawn" | 3 weeks  |
| Planning Advisory Areas - Dissolve   |  |  |  | A    |                                 | 3 weeks  |
| *Code requires separate written notice to each property owner - see statute for details. |  |  |  |      |                                 |          |