THE UTAH LAND USE INSTITUTE

Processing Land Use Applications

Utah Case Law Update

Utah Land Use Regulation Topical Series

Craig M. Call, J.D., Author

May 2023

Funding for these materials is provided by the Utah Department of Workforce Services, Division of Housing and Community Development. The Office of the Property Rights Ombudsman has also provided funding for this training program from the 1% surcharge on all building permits in the State of Utah. The Utah Land Use Institute deeply appreciates the ongoing support of the S. J. and Jessie E. Quinney Foundation and Salt Lake County as well.

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2023 Case Law Update

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This review discusses four land use cases decided in recent years by the Utah Supreme Court and Court of Appeals. They provide four specific case studies which focus on how local administrative decisions are scrutinized on appeal. These cases were written, not just for local authorities, property owners, and neighbors of development projects, but also as a guide for district court judges and those who practice before them on how to review local land use decisions. They each represent an excellent case study basis to emphasize different aspects of local review of land use applications.

Background

Briefly it is important to emphasize the land use actions can take two forms:

1. Legislative acts by the legislative body such as the City Council or County Commission. These include amending the local ordinances, changes to the zoning map, annexation, adoption and amendment to the general plan, and some other general policy actions.
2. Administrative acts by whatever entity the legislative body has appointed to review land use applications. These include subdivision review, conditional use permits, site plan review, building permits, land use appeals, variances and other actions which apply the ordinances that have been adopted by the legislative body.

When a local administrative land use decision is challenged in court, the state code provides that:

> A court shall presume that a final land use decision of a land use authority or an appeal authority is valid unless the land use decision is arbitrary and capricious; or illegal.
>
> A land use decision is arbitrary and capricious if the land use decision is not supported by substantial evidence in the record.
>
> A land use decision is illegal if the land use decision is based on an incorrect interpretation of a land use regulation; conflicts with the authority granted by this title; or is contrary to law. Utah Code Ann. § 10-9a-801(3) (municipalities); § 17-27a-801(3) (counties).

Under Utah law, there are two kinds of allowed uses that can be defined in local ordinance:

1. Permitted uses – allowed outright without case-by-case review of the appropriateness of the use.
2. Conditional uses – allowed, but with conditions designed to mitigate negative aspects of the use. Utah Code Ann. § 10-9a-507(4) (municipalities); § 17-27a-506(4) (counties).

As luck would have it, each of the court cases we will consider here involves a dispute over a conditional use. When considering a conditional use application, the review must include these steps:

1. Identify the reasonably anticipated detrimental effects (RADEs).
2. Determine whether, in this specific location and under the specific aspects of this particular proposal, the RADEs can be "mitigated". Note that "mitigated" is not "eliminated". If mitigation cannot occur, deny the application.

3. If mitigation can occur, impose reasonable conditions which mitigate the RADEs and approve the proposed application. Utah Code Ann. § 10-9a-507 (municipalities) § 17-27a-506 (counties).

Summary of the Law

We will take the court cases in order, as each builds on the previous decision, even to the point that the next case in order will often cite the cases we may have just reviewed in the sequence.

It is important to note that while these are conditional use cases, what we learn from them about the arbitrary and capricious standard is applicable to the review of <u>any</u> administrative application.

***McElhaney v. Moab* 2017 UT 65**

The resort town of Moab has significant challenges along with incomparable assets. Lots of people like to come and stay for just a little while. In response to the demand, it is only natural that the Air BNB phenomenon has caught on big in Grand County. A recent web search identified 270 houses, condos and townhomes which were shown to be available for rent during a given week in November of 2023. It's a big business there.

Mary and Jeremy McElhaney own a house at the end of a long cul-de-sac and wish to take advantage of the zoning ordinance provisions allowing a bed and breakfast as a conditional use in the R-2 zone. As our story points out to get to the McElhaneys you would pass more than 20 other homes - just from the beginning of the dead-end street to the proposed B&B. Their idea was opposed in earnest by the neighbors. The Moab City Council acted to prohibit short term rentals on any cul-de-sac several years after the McElhaneys applied, but that later prohibition was not an issue for this application, filed when such a use was allowed.

State Law: A land use authority shall approve a conditional use if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards. Utah Code Ann. § 17-27a-506(2)(a)(i).

Local Standards: From the court opinion, we learn that the Moab ordinance had standards for the review of conditional uses. These included (as paraphrased by the court):

1. The use must be consistent with the Moab General Plan. *McElhaney,* ¶ 8.
2. The use must impose minimal negative impact on the area. *McElhaney,* ¶ 10.
3. The applicant bears the burden to demonstrate that the application meets the standards. *McElhaney,* ¶ 29.
4. Failure to meet one or more of the applicable criteria may be cause for denial. *McElhaney,* ¶ 29.

At the first hearing before the Planning Commission, neighbors voiced concerns about traffic, noise, parking, lighting, storm water drainage, and general incompatibility with the neighborhood. City staff was directed to investigate. The McElhaneys responded that the traffic would be lessened because they would close the existing day care facility they operated at their home. They had adequate parking and would address storm water concerns. *McElhaney,* ¶ 3.

The city staff reported back that a B&B would create less traffic than a single family home and that the parking was adequate. *McElhaney,* ¶ 4. The Planning Commission recommended approval of the use, with four conditions:

1. The bed and breakfast shall be reviewed each year for code compliance;
2. All lighting shall be downward directed and full cutoff as required by [Moab Municipal Code] 17.09.660(H), Lighting Plan.
3. Fencing and/or landscaping shall be used to buffer the parking area and the entrance from the street. . . .
4. The daycare center will discontinue operations once the bed and breakfast facility is operational.

The Commission also found that the McElhaneys could mitigate the negative impacts of the B&B if it abided by these conditions. *McElhaney,* ¶ 5.

Under the Moab code, the land use authority for a conditional use is the City Council, which met to consider the recommendation of the Planning Commission. Again the neighbors expressed opposition, including concerns about loud Jeep, UTV and ATV traffic, danger to children playing in the streets, the residential integrity of the neighborhood, light pollution, decreased property values, and possible road deterioration. *McElhaney,* ¶ 6.

The Council voted 3:1 to deny the use. Each councilmember made a statement, including these;

1. The use was not consistent with the General Plan and would introduce a commercial use in the area.
2. Tourism is taking over the town and there's less space that belongs to locals.
3. The use would have an impact on the neighborhood and the clear intent of the code's requirement for minimal negative impact was to listen to the neighbors and do what they wished. *McElhaney,* ¶¶ 8-10.

Finding that these comments were not based on substantial evidence in the record, nor adequate analysis of the standards in the ordinance or state law that govern how a conditional use application is to be reviewed, the District Court overturned the decision to deny the use. *McElhaney,* ¶ 13.

On appeal, the Utah Supreme Court retained jurisdiction on the matter and did not, as is usual, refer the matter to the Court of Appeals. By doing so, the Court used *McElhaney* to clarify key issues in administrative appeals and establish some landmark standards. The issue considered on appeal is the trial court's decision, not the local government's decision. This clarifies the duty to preserve issues for appeal at the trial court as well as before the local body. The Court also stated with emphasis the need for findings and conclusions in the local record. It was inappropriate for the District Court to review the application and gather more information above the record before it.

On the merits, the Supreme Court ordered the matter be returned to the District Court with instructions to remand the matter back to the City so that a proper record could be created. The Court noted that there was no finding of what the potential detrimental effects of the use might be and no analysis in the record of what reasonable conditions might mitigate them.

The District Court should have noted the lack of adequate findings and conclusions to support the decision and remanded the matter back to the City to try again. The Court did note, however:

1. It would be difficult to find that a use which is legally provided for in the zoning ordinance was inconsistent with the general plan;
2. The City must specifically identify what impacts would be "more than clearly minimal"; and

3. There must be findings and evidence to demonstrate why the McElhaney's proposed mitigation measures would not mitigate the reasonably anticipated detrimental effects of their use. *McElhaney,* ¶ 40.

Bottom Line:

1. **Vested Rights.** A land use application is entitled to approval if it complies with the ordinances in place when the application is filed and all applicable fees are paid. If it complies, it must be approved. The review of an application thus involves only the question "Does this application comply with the ordinances?" Utah Code Ann. § 10-9a-509 (municipalities) and § 17-27a-508 (counties).
2. **Substantial Evidence.** Substantial evidence is required for each part of the decision to approve or deny an administrative application. For a conditional use, evidence to support the identification of the RADEs. Evidence to support the decision as to whether each RADE can be mitigated or not. Evidence to support the determination that specific conditions will mitigate the RADEs and that they are not unreasonable.
3. **Term of Art.** The term "substantial evidence" is a legal term of art. This means that those words convey the meaning of thousands of court cases in administrative law and include that entire body of law. Substantial evidence does not exist in the absence of findings in the record that explain the basis for an administrative decision. *McElhaney,* ¶ 34.
4. **The Record.** It is not the job of the District Court to create a record and find substantial evidence to support a decision. If the local land use authority or appeal authority does not do that, including the statement on the record of the reasons for its decision, then no one else can.
5. **Remand.** If there is no basis in the record to review the local decision, the court is to send the matter back to the land use authority to try again.

***Kilgore Companies v. Utah County* 2019 UT App 20.**

At the Southern end of Utah County remains some of the most open and productive agricultural land along the Wasatch Front. The little town of Benjamin – barely more than a crossroads in the green space – is home to some folks who have enjoyed the country life while being just a quick drive East to the burgeoning metro area that stretches from Lehi to Spanish Fork. A quick look at Google Earth shows open fields and farming operations with hardly a sign of urban sprawl. A thousand people or so live in the area.

But to the West – at West Mountain – are valuable gravel deposits and an asphalt batch plant owned by Kilgore Companies. It is fully permitted and allowed in the mining and grazing zone of Utah County. As it expands to meet the increasing demands for construction in the area, Kilgore determines that it needs to build very tall structures to efficiently handle its materials. It has received unanimous approval from the Utah County Board of Adjustment in the recent past for three 100 foot silos and two additional 65 foot silos, which have been erected. But it needs more capacity, and more silos for its operations. Within months of the first approvals, Kilgore asked for a conditional use permit for two more 65 foot silos.

State Law: A land use authority shall approve a conditional use if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards. Utah Code Ann. § 17-27a-506(2)(a)(i).

Appliable Standards: UCLUO subsection 7-20(C) provides that "the Board shall grant approval" if the conditional use:

(1) does not "degrade the public health, safety or welfare";
(2) is "consistent with the general purposes and intent of the land use ordinance";
(3) is "consistent with the 'characteristics and purposes' stated for the zoning district involved and the adopted general plan";
(4) is "compatible with the public interest and with the characteristics of the surrounding area";
(5) does "not adversely affect local property values";
(6) "compl[ies] with all of the terms and requirements of the land use ordinance"; and
(7) does "not result in a situation which is cost ineffective, administratively infeasible, or unduly difficult for the provision of essential services." *Kilgore*, f. 1.

The ordinance allows 40 foot tall silos as a permitted use, so the only issue is whether the additional 25 foot height is to be approved.

The Board held a hearing. Citizens expressed concern regarding local property values, traffic, road safety, light pollution, and the impact that dust and other emissions have on public health. *Kilgore*, ¶ 5.

The county zoning administrator issued a report that stated that the application complied with the ordinances and should be approved, stating that the proposed conditional use would "not degrade the public health, safety, or welfare, because only the height of the silos could be considered, and not the operations of the plant, which is subject to "bonding requirements and the approved travel route and traffic plan analysis." *Kilgore*, ¶ 6.

Kilgore provided the opinion of a professional appraiser who stated that the additional siloes "would have an inconsequential visual impact on nearby properties . . . based on the presence of the three 100 foot silos, which have a dominant position relative to any silos of a lesser height [that] could be place on the site." *Kilgore*, ¶ 7.

Residents complained that their property values had been diminished. One stated that a realtor told him that his property value was "probably going to be cut in half". Other stated that they would not have purchased their homes if they had known that the plant would operate as it does. Another stated that the "homes are not of value any more." *Kilgore*, ¶ 8. They complained of truck traffic, excessive light, dirt which caused asthma in children, the smell of the smoke produced, and that trucks hauling asphalt did not stop at stop signs and were damaging the roads. *Kilgore*, ¶ 10.

The Board stated, after reviewing the testimony of the public, the evidence provided by Kilgore, and the County standards, that:

There are six different forms of emissions related to the plant.
Dust is often a product of asphalt production.
Emissions can affect "reproduction, cause birth defects, [and cause] cause harmful effects on the skin, bodily fluids, and immune systems." *Kilgore*, ¶ 9.

Kilgore responded that the height of the silos had no impact on any of the concerns expressed. If tall silos were not allowed, it would simply build lower silos and its operations would continue to expand as planned. The truck traffic was already limited to 150 trips per day. It also provided evidence that the Division of Air Quality had inspected the plant and informed Kilgore that it was "doing really well". *Kilgore*, ¶ 11. Officials of the company also stated that taller silos would result in less movement of materials and would avoid outside storage and mixing of materials, which would negatively affect air quality. *Kilgore*, ¶ 19.

The Board denied the application and determined that:

1. The additional height degrades the property values of adjacent properties, and
2. The increased height for additional silos would continue this degradation, and
3. That [Kilgore] has not shown that the application will not degrade the public health, safety, or welfare. *Kilgore*, ¶12.

Holding: Kilgore met its burden to establish by a preponderance of the evidence (Utah County Standard) that it complied with the standards. The testimony of plant officials was substantial evidence because of their expertise in the industry. The expert appraisal established that the height of the silos would have no negative effect on property values. Insufficient evidence was provided in the record to establish that the height of the silos alone would result in any detrimental effects unique to the height of the silos and not related to the operation of the plant in general. Since Kilgore could build any number of silos under the Utah County regulations, no evidence was provided to suggest that taller silos would have a greater impact than shorter silos. *Kilgore*, ¶ 27.

What about the *McElhaney* precedent? Utah County argued that the Courts should not have set aside the decision by the Board of Adjustment, but should have remanded the matter back to the Board for further evidentiary proceedings, as the Utah Supreme Court held in *McElhaney v. Moab*, 2017 UT 65, 423 P.3d 1284. The Kilgore decision holds that where the Board issued findings and explained its reasoning, the court could review the record and determine that there was no basis for the denial. *Kilgore*, f. 3. "We cannot determine how the Board could have reached its conclusion without ignoring this competent and credible evidence submitted by Kilgore." *Kilgore*, ¶ 22. There was no need to remand back for more review by the board.

Bottom Line:

6. **Expertise of Applicant.** The evidence provided by company officials based on their expertise was held to be substantial evidence.
7. **Expertise of Planning Staff.** The analysis by the county planning staff was held to be substantial evidence.
8. **Public Comments.** The statements of the general public about matters of professional expertise, including hearsay statements by realtors, was held to not be substantial evidence.
9. **Specific Application**. In any land use application, including for a conditional use, the issue is limited to the effect of the specific application, and not to the general operation of an existing use where the proposed use has no effect on the impact of the existing use.
10. **Burden on Applicant.** Perhaps unlike the situation in *McElhaney*, Kilgore Companies performed its task well. It established by a preponderance of professional, relevant, and substantial evidence that its application complied with the standards in the ordinance.
11. **Burden on Opposition.** Those opposing conditional use permits should consider placing their focus on proposing reasonable conditions to mitigate the reasonably anticipated detrimental effects (RADEs), and perhaps not on arguing that the RADEs cannot be mitigated and thus that the proposed conditional use may be denied. The statute specifically reminds those involved that "mitigated" does not mean that the RADEs must be "eliminated" by the proposed conditions. Utah Code Ann. § 17-27a-506(2)(a)(ii).

Allan R. Staker v. Town of Springdale, 2020 UT App 174

The main public entrance to one of Utah's spectacular National Park – Zion – is through Springdale, a small community of about 500 permanent residents and between four and five million annual visitors. The crowds have become unmanageable of late, and access to the park is now by shuttle only most of the year.

Which raises the question where do people park? Parking provided by the Park Service fills early, according to the website. While there is a limited amount of paid parking available in Springdale, a fellow named Allan Staker determined about seven years ago that there was opportunity for more. Staker owned a three acre parcel of land on the South end of town, right on the main tourist road to and from the Zion entrance.

He proposed the creation of a parking lot with 83 spaces, removal of the existing home on the land, and planting screening vegetation along the property lines he shares with neighbors. The land is zoned "Valley Residential" which is intended to encourage "residential uses with incidental agricultural pursuits." *Staker*, ¶ 4.

Despite the intent expressed in the descriptions of the zone, parking lots were allowed in the zone by conditional use when Staker applied for one. The Town amended the ordinances after he applied to prohibit parking lots as a use in the zone. *Staker*, ¶ 5, f.3. Before that amendment, other parking uses were allowed in other areas of the zone. *Staker*, f.4.

State Law: A land use authority shall approve a conditional use if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards. Utah Code Ann. § 19-9a-507(2)(a)(i).

Appliable Standards: Springdale, Utah, Code § 10-9B-1 provided that conditional uses may only be suitable in some locations and required the planning commission and town council to decide if the conditional use does not "unreasonably interfere with the lawful use of surrounding properties" or "create a need for essential Municipal services which cannot be reasonably met within three (3) months and the party seeking the conditional use is willing and able to contribute to the cost of such services" *Staker*, ¶ 5.

The Director of Community Development provided a memorandum stating that the proposed use could be considered in light of several factors:

- The lot is adjacent to existing residential uses
- Will increase traffic, noise, and general activity
- May require mitigation such as screening, landscaping buffers, and similar measures
- May justify a limit on noises between 11 PM and 7 AM. *Staker*, ¶ 6.

The Planning Commission recommended that the Town Board deny the use and determined that:

- The proposed lot cannot be screened adequately from surrounding properties, including nearby two story homes.
- Allowable land uses are established to avoid incompatible uses in close proximity . . . and preserve peace, quiet, and privacy in the residential zones.
- The proposed use is incompatible with the general plan and
- It would change the appearance and character of the Village Residential designation. *Staker*, ¶ 7.

The Town Council held another hearing and denied the conditional use, based on:

- The Planning Commissions recommendations
- The use is in the middle of an existing residential neighborhood
- The property is less than 20 feet from a residence
- The front yard of another residence would look onto the use
- The use would substantially increase traffic, activity and noise in an existing residential neighborhood and bring congestion from other areas.

- The use would emit excessive noise
- Municipal services could not be met within three months because of the new concentrated ridership on shuttles.
- Public restrooms would also be required out of concern for public health. *Staker*, ¶ 8.

Staker appealed to the Town Appeal Authority, which held yet another hearing. In affirming the denial, the Appeal Authority also held:

- The Planning Commission and Town Council thoroughly discussed the site conditions, surrounding property uses, potential adverse effects on surrounding properties and whether those impacts could be mitigated.
- The surrounding properties are primarily residential.
- The proposed use would unreasonably interfere with established lawful uses of surrounding properties.
- The Appeal Authority concluded that the use was allowed, but in the particular proposed location the reasonably anticipated detrimental effects could not be mitigated, as the use would invariably interfere with the right to quietly and peaceably enjoy ones property.
- A reasonable mind could conclude that operating a commercial parking lot in the middle of an existing residential neighborhood would increase traffic, noise, and other interferences with surrounding residential uses. *Staker*, ¶ 11.

At the District Court, the judge ruled that while the record was "less than ideal with respect to details", a reasonable mind could have concluded that the proposed use could not be mitigated in this specific location and there was sufficient and substantial evidence in the record to support the conclusion. *Staker*, ¶¶ 13-15.

The Court of Appeals agreed and ratified the denial. The evidence in the record that was sufficient to support the decision included:

- The uncontradicted fact that a residence existed 20 feet from the proposed lot.
- The site plans and other documents submitted showed parking uses close to neighboring residences.
- The surrounding lots are used primarily for residential purposes.
- Operating a commercial parking lot in the middle of an existing residential neighborhood, with attendant noise and traffic, would unreasonably interfere with other residential uses.
- The specific location and the use of surrounding properties formed the basis for the denial, not the general characteristics of parking lots in general.
- The decision makers did not make consent of the neighbors a requirement of approval but acted appropriately in listening to those concerns. "There is no impropriety in the solicitation of, or reliance upon, information which may be furnished by other landowners in the vicinity" while it is true that public clamor alone may not serve as the basis for an administrative land use decision. *Staker*, ¶¶ 30-36.
- While Staker claimed that the failure to consider mitigation measures was not supported by substantial evidence in the record, the record shows that the Town considered Staker's proposed visual and sound barriers and reduction in the number of stalls proposed. Based on other evidence, the Town was persuaded that these were not sufficient in light in the proximity of neighboring houses. There was extended discussion in the record by decision makers about mitigation options.
- The appeal authority's decision sufficiently informed the court of the basis of the decision, such that the reviewing court knew why the authority ruled as it did. The record was adequate to meet the requirements of the holding in *McElhaney v. Moab,* 2017 UT 65. *Staker,* ¶ 40.

- State code provides that "Conditional use" means a land use that, because of the unique characteristics or potential impact of the land use on the municipality, surrounding neighbors, or adjacent land uses, *may not be compatible in some areas* or may be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts. Utah Code Ann. 10-9a-103 – definition of "conditional use". (*Emphasis added*).
- In arguing that mitigation measures could have resolved the concerns about the use, Staker bears the burden to demonstrate the adequacy of that mitigation. He has not met that burden here. *Staker,* ¶ 42.

Judge Pohlman dissented from the crucial holding of the Court. She explains in her dissent that the opinions of neighbors are not sufficient evidence that the reasonably anticipated detrimental effects could not be mitigated. While agreeing that the issue is critical to the analysis, she argues that more objective and expert evidence must be provided to support the conclusion that these effects could not be reasonably mitigated by the proposals Staker made to deal with them. *Staker,* ¶ 57-59.

Bottom Line:

12. **Findings and Conclusions.** Springdale town survived this challenge because of extended analysis of the issues on the record. Through the three levels of review conducted by the Town's land use decision-makers, there were adequate findings of fact and conclusions of law to support the decision.
13. **Deference to Locals.** The Court's duty to defer to the local decision makers may have carried the day in this case. While the record was deemed barely adequate, it was sufficient to preserve the tradition that a court will not overturn local decisions if they can be upheld.
14. **Quality of Evidence.** The Applicant could have provided a better record to support his position if he had engaged professional expertise to demonstrate that his proposed mitigation measures would have acted to mitigate the RADE's. Had he done so, the result might have been different, as indicated by the dissenting opinion.

Northern Monticello Alliance, LLC v. San Juan County, 2023 UT App 18
(cited as *NMA II*)

In 2012, the San Juan County Planning Commission issued a conditional use permit authorizing construction of a wind farm North of Monticello. Conditions attached to the permit were not memorialized in a written document, but were "gleaned from the minutes and transcript" of the public hearing. These included:

1. Incorporate as much flicker, light, sound, mitigation as possible and meet all industry standards of those challenges.
2. Any and all new land purchase lease deals be in writing for any contiguous and affected landowners.
3. Any mitigation and standards and conditions of this CUP must be met by any and all project development people . . at the time of building permit issuance. *NMA II* ¶ 2.

The project was built and as our story unfolds, was owed by Sustainable Power Group LLC (sPower). In August of 2015, Northern Monticello Alliance LLC (NMA), an association of property owners near the wind farm site, complained to the Planning Commission that sPower was violating the CUP. A hearing was held. NMA attended the hearing, but only sPower was allowed to present evidence. *NMA II* ¶ 3.

According to the minutes, "Studies were done relating to sound, flicker, and light. Thresholds were determined and affected lands were indicated. Mitigation for lands affected were determined and compensation amounts decided." *NMA II* ¶ 3.

The Planning Commission voted not to revoke the CUP. It produced no written findings. According to the minutes of the first meeting, "Studies were done relating to sound, flicker, and light. Thresholds were determined and affected lands indicated. Mitigation for lands affected were determined and compensation amounts decided." Minutes of the second meeting state "The other issue [up for vote was] whether or not any mitigation for sound, light, and flicker had taken place. This is a more subjective issue and not black and white. It was determined that mitigation had taken place as much as possible at this time." *NMA II* ¶ 4.

That's it. That's the record. No specific findings of fact and no conclusions of law. No analysis of what the legal issues were and how they were resolved. No explanation of what evidence was specifically relied upon and how that evidence was applied to the relevant county code which governed the review of conditional uses.

NMA appealed the decision to the San Juan County Commission. In the local code, the appeal was to be considered on this basis: "[t]he Appeal Authority shall[,] upon appeal, presume that the decision applying the land use ordinance is valid and determine only whether or not the decision is arbitrary, capricious, or illegal." (Emphasis added.) *NMA II* ¶ 19. This standard is what attorneys refer to as a "record review" where deference is extended to the land use authority which made the decision and the appeal body or officer can only look to the record and decide if it includes the required substantial evidence – findings and conclusions.

The Planning Commission informed the County Commission that "it had held the two meetings and decided by unanimous vote that as much mitigation as possible had occurred under the conditions it set for the project in 2012," The brief given to the County Commission did not include any findings of fact or conclusions of law. *NMA II* ¶ 5.

The County Commission, in a bit of a convoluted manner, upheld the Planning Commission decision and did not revoke the CUP. In its decision, the County Commission relied on new information but also did not include adequate findings, including "the evidence upon which it relies, the law upon which it relies, and its interpretation of the law." *NMA II* ¶ 26.

So its 2023, and the 2015 decision by the San Juan County Planning Commission is now remanded back to the Commission to start over and do it right this time. Seven and a half years later.

Bottom Line:

15. **Who Creates the Record.** There is only one entity that can create the required record. If that's the original land use authority, then neither the appeal authority nor the court can supplement the record. Either do it the first time or plan on doing it again.
16. **Must be an Adequate Record.** Applicants and third parties cannot rely on an approval in their favor unless they do their part to provide evidence and analysis to support the decision. If the local body does not have the ability to provide an adequate record, anyone who wishes to see that decision upheld must protect its own interests by bolstering that record themselves.

17. **Standing.** In today's land use climate, there are three entities – the municipality, the applicant, and third parties with "standing" to challenge a decision - which have the ability to intervene and undo approvals or denials.
18. **Local Appeal Standard.** There are two options for how an appeal authority is to review the decision of a land use authority. One is as this San Juan County case – on the record. The other, and the default by state law if the other standard is not adopted by the city or county, is de novo. This means that the appeal authority can make the decision "anew". In this latter option, any deficiencies in the record can be cured by creating a new record that includes the original decision plus more evidence and reasoning. This second option may set the stage better for the district court review when it comes to that – there are two chances to get it right. On the other hand, many jurisdictions would prefer that the land use authority have the last word because that entity might be the legislative body itself, or might have expertise and local knowledge that a hearing officer or little-used board of adjustment might lack.

Best Practices

1. Local decision-makers must understand that if an application meets the requirements of the ordinance it must be approved. The sole issue in land use administration is whether the application complies with the ordinances.
2. Local officials, applicants, and others must follow the law.
3. That said, the burden is on the applicant to establish by substantial evidence in the record that the application complies with the requirements in the ordinances. Among the types of evidence that are allowed as substantial evidence are:
    a. The opinion of the project engineer and the municipal engineer.
    b. The opinion of a seasoned applicant or its staff with expertise in the subject matter of the application.
    c. Of course, the opinion of the planner and the local building and fire officials.
    d. Others involved with expertise in the issues raised by the application, such as water engineers, traffic engineers, law enforcement and others.
4. The opinions of members of the land use authority and the public are not necessarily substantial evidence.
5. Substantial evidence is evidence that is 1) relevant, 2) independent, and 3) credible enough to persuade a reasonable mind of the truth of the matter supported by the proffered evidence.
6. If there is substantial evidence to support only one conclusion, then that conclusion must be adopted. If there is substantial evidence on both sides of an issue that is determinative of the review, the decision maker may go either way.
7. An application must also be legal, even if it complies with the local ordinance. It must be legal under state, federal and local law. If application is deemed legal or illegal, the decision-maker must enter conclusions in the record explaining that conclusion.
8. In determining legality, statutes and ordinances are to be interpreted based on common rules of interpretation, including:
    a. Implement the true intent and purpose of the legislative body that enacted the law. The best evidence of the legislature's intent is the plain language of the statute itself.
    b. Presume that the legislature was deliberate in its choice of words and used each term advisedly and in accordance with its ordinary meaning.
    c. Where a statute's language is unambiguous and provides a workable result, we need not resort to other interpretive tools, and our analysis ends.

d. Each part or section be construed in connection with every other part or section so as to produce a harmonious whole.
e. The expression of one term should be interpreted as the exclusion of another.
f. Do not infer substantive terms into the text that are not already there.
g. We assume, absent a contrary indication, that the legislative body which enacted the law used each term advisedly and seek to give effect to omissions in statutory language by presuming all omissions to be purposeful.
h. Ordinances are to be interpreted in favor of the use of property. Provisions limiting the use of property are to be strictly construed in favor of the application.

9. Local decisions must be supported by substantial evidence and legal analysis in the record. The decision-maker should adopt findings of fact and ensure that the written record and any audio or visual recordings provide a basis for each factual conclusion. The decision-maker should also provide reference to the legal basis for the decision by entering summary conclusions of law in the record.
10. On appeal, municipalities should consider allowing a "de novo" review of administrative matters so as to allow for the perfection of the record if an adequate record has not been established.
11. If the appeal to the appeal authority is "on the record", the appeal authority must not take any new evidence and only consider whether there was sufficient evidence in the record below to sustain the decision and whether the decision was consistent with relevant law. If there was not sufficient evidence, the appeal authority is to remand back to the decision-maker to try again.
12. When reviewing conditional use permits, the land use authority charged to review applications must follow these steps and document with evidence how the application complies or doe not comply with each numbered step. It is to be noted that the applicant bears the burden to establish that the application qualifies for approval:
    a. What are the reasonably anticipated detrimental effects (RADEs)?
    b. Do the standards in the ordinance allow for consideration of how to mitigate each identified RADE?
        i. If so, can each identified RADE be mitigated in a manner consistent with the standards in the ordinance?
        ii. If so, what reasonable conditions can be imposed to mitigate each specifically identified RADE?
        iii. If the standards in the ordinance do not apply to a given RADE, then that RADE cannot be considered in the review and cannot form the basis for a denial.
    c. Once the mitigating conditions are determined according to the standards in the ordinance, approve the permit.
    d. If it is determined that any given RADE cannot be mitigated, and a denial is proposed, consider these issues:
        i. The public policy involved in allowing a conditional use has already been made by including it in the ordinance. It is insufficient to identify RADEs that are clearly associated with the proposed use in any location and under any circumstances. Those RADEs would have already been considered by the legislative body when approving the use as a conditional use and it is therefore presumed that they can be mitigated.
        ii. The denial of a conditional use would only be appropriate when a RADE cannot be mitigated because of factors related to the specific location proposed for the use or specific and unique characteristics of the proposed use, and not because of factors general to that type of use.
        iii. A denial must be supported by substantial evidence in the record. If substantial evidence provided is offered by the applicant, and it supports approval, then a

denial must be supported by substantial evidence as well. If the only substantial evidence in the record supports approval, the use must be approved.

iv. The applicant may be required to provide substantial evidence that conditions proposed by the applicant will mitigate the RADEs.

Considerations in Drafting Ordinances

1. A planning commission member or citizen may not read the state code, but only the local ordinance, to determine how a land use application is to be processed. Consider including language in the ordinance that replicates the state statute, such as the vested rights language at Utah Code Ann. §10-9a-509.
2. Consider appointing land use authorities other than the legislative body to handle all administrative functions and preserving the role of the legislative body for legislative actions only. Avoid having the city council or county commission act on business licenses, conditional uses, minor development agreements, and similar applications.
3. Never appoint the legislative body act to act as an appeal authority.
4. Consider including a provision that when acting on administrative matters the land use authority shall include findings of fact and conclusions of law in the record of the decision.
5. Consider allowing the appeal authority to review administrative decisions de novo so that a new record can be made or the existing record embellished.
6. Codify the training requirement of four hours per year for planning commission members and perhaps members of an appeal authority if that involves more than one hearing officer.
7. Minimize the number of conditional uses provided. Outline conditions for certain uses in the code rather than providing that conditions are to be imposed ad hoc on each proposed use.
8. For conditional uses which are provided for, create clear and objective standards in the ordinance and avoid subjective wording such as “complies with the general plan” or “is consistent with the character of the neighborhood”.

Restatement of the "Bottom Line"

1. **Vested Rights.** A land use application is entitled to approval if it complies with the ordinances in place when the application is filed and all applicable fees are paid. If it complies, it must be approved. The review of an application thus involves only the question "Does this application comply with the ordinances?" Utah Code Ann. § 10-9a-509 (municipalities) and § 17-27a-508 (counties).
2. **Substantial Evidence.** Substantial evidence is required for each part of the decision to approve or deny an administrative application. For a conditional use, evidence to support the identification of the RADEs. Evidence to support the decision as to whether each RADE can be mitigated or not. Evidence to support the determination that specific conditions will mitigate the RADEs and that they are not unreasonable.
3. **Term of Art.** The term "substantial evidence" is a legal term of art. This means that those words convey the meaning of thousands of court cases in administrative law and include that entire body of law. Substantial evidence does not exist in the absence of findings in the record that explain the basis for an administrative decision. *McElhaney,* ¶ 34.
4. **The Record.** It is not the job of the District Court to create a record and find substantial evidence to support a decision. If the local land use authority or appeal authority does not do that, including the statement on the record of the reasons for its decision, then no one else can.
5. **Remand.** If there is no basis in the record to review the local decision, the court is to send the matter back to the land use authority to try again.
6. **Expertise of Applicant.** The evidence provided by company officials based on their expertise was held to be substantial evidence.
7. **Expertise of Planning Staff.** The analysis by the county planning staff was held to be substantial evidence.
8. **Public Comments.** The statements of the general public about matters of professional expertise, including hearsay statements by realtors, was held to not be substantial evidence.
9. **Specific Application**. In any land use application, including for a conditional use, the issue is limited to the effect of the specific application, and not to the general operation of an existing use where the proposed use has no effect on the impact of the existing use.
10. **Burden on Applicant.** Perhaps unlike the situation in *McElhaney*, Kilgore Companies performed its task well. It established by a preponderance of professional, relevant, and substantial evidence that its application complied with the standards in the ordinance.
11. **Burden on Opposition.** Those opposing conditional use permits should consider placing their focus on proposing reasonable conditions to mitigate the reasonably anticipated detrimental effects (RADEs), and perhaps not on arguing that the RADEs cannot be mitigated and thus that the proposed conditional use may be denied. The statute specifically reminds those involved that "mitigated" does not mean that the RADEs must be "eliminated" by the proposed conditions. Utah Code Ann. § 17-27a-506(2)(a)(ii).
12. **Findings and Conclusions.** Springdale town survived this challenge because of extended analysis of the issues on the record. Through the three levels of review conducted by the Town's land use decision-makers, there were adequate findings of fact and conclusions of law to support the decision.
13. **Deference to Locals.** The Court's duty to defer to the local decision makers may have carried the day in this case. While the record was deemed barely adequate, it was sufficient to preserve the tradition that a court will not overturn local decisions if they can be upheld.

14. **Quality of Evidence.** The Applicant could have provided a better record to support his position if he had engaged professional expertise to demonstrate that his proposed mitigation measures would have acted to mitigate the RADE's. Had he done so, the result might have been different, as indicated by the dissenting opinion.
15. **Who Creates the Record.** There is only one entity that can create the required record. If that's the original land use authority, then neither the appeal authority nor the court can supplement the record. Either do it the first time or plan on doing it again.
16. **Must be an Adequate Record.** Applicants and third parties cannot rely on an approval in their favor unless they do their part to provide evidence and analysis to support the decision. If the local body does not have the ability to provide an adequate record, anyone who wishes to see that decision upheld must protect its own interests by bolstering that record themselves.
17. **Standing.** In today's land use climate, there are three entities – the municipality, the applicant, and third parties with "standing" to challenge a decision - which have the ability to intervene and undo approvals or denials.
18. **Local Appeal Standard.** There are two options for how an appeal authority is to review the decision of a land use authority. One is as this San Juan County case – on the record. The other, and the default by state law if the other standard is not adopted by the city or county, is de novo. This means that the appeal authority can make the decision "anew". In this latter option, any deficiencies in the record can be cured by creating a new record that includes the original decision plus more evidence and reasoning. This second option may set the stage better for the district court review when it comes to that – there are two chances to get it right. On the other hand, many jurisdictions would prefer that the land use authority have the last word because that entity might be the legislative body itself, or might have expertise and local knowledge that a hearing officer or little-used board of adjustment might lack.