What Legislative Discretion is Allowed to Local Government by the Utah Courts?

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Two Types of Land Use Actions

Actions taken by local governmental entities in Utah are divided into two types: legislative and administrative/quasi-judicial.[1] Legislative acts are referred to in the statute as "land use regulations" and specifically includes the adoption or amendment of a zoning map or the text of the zoning code.[2] Other actions traditionally considered legislative in nature are annexations, adoption of or amendments to the general plan, and some relatively large development plans and agreements.[3]

Legislative Acts Always by the Legislative Body

A legislative decision, under the relevant state statutes, is always made by the legislative body of a local jurisdiction. This is the Town Board, the City Council, the County Commission or the County Council, as the case may be. The legislative body is always composed entirely of elected officials, although in some forms of government the Mayor or County Executive may or may not have a vote.

Challenges to Legislative Decisions – Judicial Deference

The broad discretion afforded to legislative acts by local legislative bodies found in the statute is a codification of the common law standard laid down by the Utah Supreme Court, which stated:

> We have long recognized that zoning decisions that are made as an exercise of legislative powers are entitled to particular deference. In Crestview-Holladay Homeowners Ass'n. Inc. v. Engh Floral Co., we noted that
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> [t]he prior decisions of this court without exception have laid down the rule that the exercise of zoning power is a legislative function to be exercised by the legislative bodies of the municipalities. The wisdom of the zoning plan, its necessity, the nature and boundaries of the district to be zoned are matters which lie solely within that discretion. It is the policy of this court as enunciated in its prior decisions that it will avoid substituting its judgment for that of the legislative body of the municipality.[4]

It is from the Utah Supreme Court that the common phrase "reasonably debatable" comes.[5] The state statute relating to challenges to legislative acts includes that phrase but makes a significant change in the standard. The statute reads as follows:

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[1] Utah Code Ann. § 10-9a-103 (Municipalities); § 17-27a-103 (Counties) (definition of "land use regulation".

[2] *Id.*

[3] See, for example, *Baker v. Carlson*, 2018 UT 59, where a large development proposal in a modest-sized town was deemed a legislative act, even though the city council did not officially rezone the property and the city and the developer both styled the action a "site plan" approval.

[4] *Bradley v. Payson City*, 2003 UT 2016 ¶ 12.

[5] *Id*. At ¶14 "As mentioned at the outset, our recognition of the distinction between legislative and administrative or quasi-judicial municipal powers has consistently determined the proper standard of review applicable to municipal land use disputes. For legislative decisions, we have applied a highly deferential variation of the arbitrary

> A court shall: (i) presume that a land use regulation (legislative act) properly enacted under the authority of this chapter is valid; and (ii) determine only whether: (A) the land use regulation on is expressly preempted by, or was enacted contrary to, state or federal law; and (B) it is reasonably debatable that the land use regulation is consistent with this chapter (the State Municipal or County Land Use, Development, and Management Act or "LUDMA").[6]

Statutory Restatement of Deference

In reviewing the validity of a legislative act, however, the text of the statute would govern, not a court opinion handed down before the statute was enacted or updated. The standard of judicial review which would apply to legislative acts has been amended since the landmark *Bradley* case. Where the Bradley rule was that legislative actions would be supported if it is found to be "reasonably debatable that the decision is in the interest of the general welfare".[7]

The subsequently amended statute provides, however, that legislative acts will be upheld if it is shown to be "reasonably debatable that the land use regulation is consistent with this chapter (LUDMA)".[8] This is a significant narrowing of the issue. To the extent that the broad policy considerations referred to in *Bradley* still preserve local discretion, the policy considerations are not nearly as broad as before the new statutory limits. The revised standard implies that local enactments must be not just "in the interest of the general welfare" but also must further the defined purposes of LUDMA.

While the LUDMA purposes are broad, they are not as broad as the entire public welfare. When legislative enactments are challenged, particular attention should be given to the purposes of LUDMA. If it is shown that the enactment runs counter to these purposes, it could be argued that the local enactment is not "consistent" with LUDMA.

The Purposes of LUDMA:

> (1) The purposes of this chapter are to: (a) provide for the health, safety, and welfare; (b) promote the prosperity; (c) improve the morals, peace, good order, comfort, convenience, and aesthetics of each municipality and each municipality's present and future inhabitants and businesses; (d) protect the tax base; (e) secure economy in governmental expenditures; (f) foster the state's agricultural and other industries; (g) protect both urban and nonurban development; (h) protect and ensure access to sunlight for solar energy devices; (i) provide

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and capricious standard and limited our review to the strict question of whether the zoning ordinance "'could promote the general welfare; or even if it is reasonably debatable that it is in the interest of the general welfare.'" Smith Inv. Co., 958 P.2d at 252 (quoting Marshall, 141 P.2d at 709); Walker v. Brigham City, 856 P.2d 347, 349 (Utah 1993) (holding that the municipality's legislative decision would be upheld unless "wholly discordant to reason and justice"); Dowse, 255 P.2d at 724 (holding that zoning could be attacked only if there was "no reasonable basis therefor"). "The selection of one method of solving the problem in preference to another is entirely within the discretion of the [city]; and does not, in and of itself, evidence an abuse of discretion." Phi Kappa Iota Fraternity, 212 P.2d at 181.

[6] Utah Code Ann. § 10-9a-801(3) (Municipalities); § 17-27a-801(3) (Counties).
[7] *Bradley*, at ¶ 14, quoting *Smith Inv. Co. v. Sandy City*, 958 P.2d 245 at 252.
[8] Utah Code Ann. § 10-9a-801(3) (Municipalities); § 17-27a-801(3) (Counties).

fundamental fairness in land use regulation; (j) facilitate orderly growth and allow growth in a variety of housing types; and (k) protect property values.[9]

(2) To accomplish the purposes of this chapter, a municipality may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that the municipality considers necessary or appropriate for the use and development of land within the municipality, including ordinances, resolutions, rules, restrictive covenants, easements, and development agreements governing: (a) uses; (b) density; (c) open spaces; (d) structures; (e) buildings; (f) energy efficiency; (g) light and air; (h) air quality; (i) transportation and public or alternative transportation; (j) infrastructure; (k) street and building orientation; (l) width requirements; (m) public facilities; (n) fundamental fairness in land use regulation; and (o) considerations of surrounding land uses to balance the foregoing purposes *with a landowner's private property interests and associated statutory and constitutional* While these purposes include the general language "to provide for the general health, safety, and welfare", the statute must be read in total. If a legislative act is claimed to promote the general welfare, but runs counter to the other purposes listed, then it may be more susceptible to challenge. For example, if an amendment to the local code acts to significantly increase the cost of housing, then the benefit to existing homeowners might be claimed as promoting the general welfare. In fact, the purposes state that a legitimate objective for land use regulations is to "protect property values". However, another stated purpose of LUDMA is to "allow growth in a variety of housing types" and the statute also provides that the local general plan must include a moderate income housing plan designed to "provide a realistic opportunity to meet the need for additional moderate income housing within the next five years."[10]

Thus, while an enactment which has an adverse impact on the availability of moderate income housing may have survived a challenge based on the *Bradley* rule, it might not survive such a challenge under the current statutory rule. This is, of course, an opinion based on analysis and not upon any case law, since there is no decision from the Utah appellate courts on this issue.[11]

A Record of Decision Essential to Review

Local officials may take inappropriate comfort in the broad discretion afforded local legislators. In a review of case law, including *Bradley*, it is clear that while there is a standard of broad deference to local legislators, any court review consistently involves the record of the decision by the legislative body to determine if that discretion was abused. For example:

> The decision must simply be reasonably debatable <u>after consideration of all the evidence in favor of and against the proposed change</u>. In this case, there was clearly a reasonable basis for the Council to deny the Petersens' application.[12]

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[9] Utah Code Ann. § 10-9a-102(1) (Municipalities); § 17-27a-102(1) (Counties).

[10] Utah Code Ann. § 10-9a-403(2)(a)(2)(iii) (Municipalities); § 17-27a-403(2)(a)(2)(iii) (Counties).

[11] The Utah Supreme Court has ruled on challenges to legislative decisions since the changes to the state statute without making the distinction identified here. In *Peterson v. Riverton*, 2010 UT 58 ¶¶ 9-11, the revised statute is cited as written along side the *Bradley* rule, as written, without making reference to the difference, which was apparently not relevant to the matter and not raised in the pleadings.

[12] *Peterson v. Riverton*, 2010 UT 58 ¶ 15. (<u>emphasis added</u>).

> Based on this undisputed record, we affirm the trial court's grant of summary judgment. The public debates before the Planning Commission and the City Counsel convince us that Lehi's decision was "reasonably debatable . . Even without the public debates, Lehi's 20070189-CA 4 decision was supported by the frequent requests for zoning amendments, the previously inconsistent zoning designations, the traffic study, and the Planning Commission's recommendation."[13]
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> Payson City's reliance on the long-term policy preferences embodied in the General Plan satisfies the reasonably debatable standard . . . we are satisfied that Payson City's consideration of public comments as a justification for its zoning decision reflects a reasonable judgment that properly took into account citizens' concerns . . . Each of these concerns is a legitimate ground for denying the Plaintiffs' proposed zoning change.[14]

When a legislative decision is challenged, the courts will look for a record of the basis for the decision, even when applying the highly deferential standard.[15]

Best Practices Going Forward

With the reasonable assumption that the statutory standard for review of legislative acts will be the basis for future challenges to legislative acts, legislative bodies and their advisors and staff should consider the following recommendations:

1. Don't impose on your legal counsel the duty to provide proof that a legislative act promotes the purposes of LUDMA and is consistent with its purposes and text if the act is challenged. Provide a record of each action, even legislative actions, sufficient to meet the modest minimum standards required by the reasonably debatable standard. As your high school mathematics teacher advised, "show your work". Even better, state on the record which purposes of LUDMA are being advanced and how any apparent conflict with other purposes of LUDMA have been weighed in the final enactment.
2. Consider carefully whether or not a proposed legislative action may be challenged on the basis that while it may advance some purposes of LUDMA, it places undue burdens on achieving other stated purposes. For example, recent legislation by the Utah State Legislature clearly high light the purposes of water conservation and moderate income housing by requiring them as newly-invigorated requirements of a community's general plan.[16] To adopt an ordinance or regulation that could be argued runs counter to those highlighted purposes could trigger a challenge based on a claim that it is not reasonably debatable that the enactment is consistent with LUDMA.

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[13] *R.T. & R.H. LLC v. Lehi*, 2008 UT App 72 (Memorandum Decision – Not Published) (emphasis added).
[14] Bradley, Ibid., at ¶¶24-31. (emphasis added).
[15] *R.T. & R.H. LLC v. Lehi*, 2008 UT App 72 (Memorandum Decision – Not Published). Decided after *Bradley* but before the amended statute.
[16] Utah Code Ann. § 10-9a-403(2)(a)(2)(iii) and (iv) (Municipalities); § 17-27a-403(2)(a)(2)(iii) and (v) (Counties).