2024 Update to Ground Rules: Your Handbook to Utah Land Use Regulation

New Section - **Development Agreements**

Nature of the Decision

In many situations, the interests of both the community and the applicant for development approval may benefit from entering into a development agreement, as specifically provided for in state code.[1] Development agreements are site-specific – they only apply to a specific development and are commonly recorded on the county land records so that any future property owner is given legal notice of the terms that may apply to occupancy of the property. A development agreement recorded on your title should be carefully reviewed because it probably includes provisions which bind all future property owners as well as the original developer.

A development agreement cannot be required of someone who wishes to develop property unless the developer wishes discretionary approvals from the municipality or county involved.[2] A development agreement cannot bind the government entity involved to enact future land use regulations or to change the zoning designation of a parcel of land.[3] If zoning or regulation changes are desired, they should be made before the execution of the development agreement.

Approval of a development agreement may be either an administrative or legislative act, depending on the content of the agreement.[4]

In a significant change, the Utah legislature provided recently that if a development agreement is reviewed and approved in the same manner as a change in the land use regulations or rezoning, the development agreement does not need to be consistent with the current land use regulations. The regulations may be modified for the specific development while still leaving in place the unamended regulations which would still apply to all other land uses in the county or municipality.[5]

What this means is that a proposed development agreement which modifies the land use regulations should first be placed on the agenda for public hearing before the planning commission. The planning commission should then make a recommendation to the legislative body and the legislative body then reviews and approves it by legislative ordinance.[6]
The best practice to accomplish this one-time adjustment of the regulations would be to list the development agreement as a separate agenda item, distinct from the other development approvals considered for a given project. The agreement should also be voted on separately. Some types of development cannot be reviewed by the legislative body, (such as subdivisions[7]), so this process may involve one land use authority reviewing the administrative aspects of the development, while the planning commission and legislative body review and approve the legislative development agreement. Again, this is only necessary if the development agreement includes a waiver or modification to the otherwise applicable land use regulations.[8]

Who makes the decision?
This depends on whether the development agreement is legislative of administrative. Either the land use authority, such as the planning commission, or the legislative body may be charged by the local ordinance to approve an administrative development agreement. Even if the legislative body makes the decision, the agreement may be an administrative act.[9] If approving the agreement is a legislative act, only the elected legislative body can approve it.

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[1] Utah Code §10-9a-532 (municipalities) §17-27a-528 (counties).
[2] Utah Code §10-9a-532(2)(d) (municipalities) §17-27a-528(2)(d) (counties).
[3] Utah Code §10-9a-532(2)(a) (municipalities) §17-27a-528(2)(a) (counties).
[4] Utah Code §10-9a-532(2)(b) (municipalities) §17-27a-528(2)(b) (counties).
[5] Utah Code §10-9a-532(2)(a)(iii) (municipalities) §17-27a-528(2)(a)(iii) (counties).
[6] The process for reviewing and approving amendments to the land use regulations are found at Utah Code §§10-9a-501 through 503 (municipalities) §§17-27a-501 through 503 (counties).
[7] Utah Code §10-9a-604.1(1)(b) (municipalities) §17-27a-604.1(1)(b) (counties).
[8] See footnote 5, above.
[9] *Baker v. Carlson*, 2018 UT 59. See extended discussion of the case in this volume, at p.219-222

What notice is required?
Review and approval of a development agreement almost always involves some kind of other land use application. If the application is administrative, then the notice requirements for that particular type of application will be provided for in the local ordinance. The review of the main application would likely involve the development agreement and the same notice provisions would likely apply. If the development agreement is legislative, and is consistent with the land use regulations, there is no provision in state law that requires a public hearing. If the development agreement acts to waive or modify the land use regulations, only then would a public notice and hearing be required by state law.[10]

What public input is required?
No public input is required by state law if the application involved is not a zone change, ordinance or general plan amendment, or annexation. Unless local ordinances provide for public input or the development agreement proposes a waiver or modification of the land use regulations for the specific development involved, no hearings are required.[11]

What are the issues?
This process involves issues that are as broad as any considered by land use decision-makers. The applicant and the municipality or county sit down and negotiate the terms and details. The land use authority, not the public, represents the interests if the community and negotiates conditions and restrictions for the future use of the property. The applicant has the opportunity through a development agreement to obtain the needed certainty going forward so that a project, such as one to be reviewed and approved over several phases, can be pursued and financed with limited risks.

Common issues include utilities, access, landscaping, amenities, densities, fees and costs, public improvements, design of proposed structures and a host of other topics. Remember that if the project is allowed under the code and the land use authority has no discretion to deny it, the applicant need not agree to enter into a development agreement[12].

How is the decision appealed?
If administrative, the decision is appealed to the local appeal authority, as explained in Chapter 15. If legislative, the decision is appealed to the district court or may be made the subject of a referendum, as outlined in Chapter 17.

Tips for participants.
Both the applicant for land use approvals and the local government entity involved in approving a development agreement must have skilled legal counsel to advise them. This corner of land use law involves some perils and risks that other land use transactions do not. For example, once a party has given up certain rights in a development agreement, they no longer exist. After an agreement is signed, issues arising from the agreement can become subject to contract law, and are therefore not subject to land use processes. For example, the short statute of limitations that applies to challenging a land use decision may not apply to a contract claim under a development agreement.

As to the public role, of necessity the extended negotiation involved and the required multiple drafts of any proposed development agreement that may be circulated make it very difficult to accommodate public notice and input, neither of which is required by law unless the agreement waives or modifies existing regulations.[13] Any public involvement is likely to be informal where there is no public hearing required. Where a hearing is required, a copy of the proposed agreement should be available for the public to review and comment on before the hearing. Otherwise, public access is limited. The Government Records Act does not require disclosure of drafts and negotiation documents.[14] The only version that the public might be able to see is the final one, which must be disclosed at the time of approval.

Anyone wishing to influence how a development agreement is to be written should maintain an open, informal conversation with the applicant and/or the local officials who are at the table and preparing the agreement. This is an area where public participation is limited.

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[10] See footnote 5, above.
[11] See discussion, above.
[12] Utah Code §10-9a-532(2)(d) (municipalities) §17-27a-528(2)(d) (counties).
[13] See footnote 5, above.
[14] Utah Code§ 63G-2-305(22) (Government Records Access and Management Act or "GRAMA"). There may be other exceptions to public access to documents involved in development agreement negotiation among the long list of documents which are listed as protected under GRAMA. See also Appendix A.

New Language – Standing – Who Can File an Appeal

Who can file an appeal?

"Standing" is a legal term of art that means the person asking the question is entitled to the answer. If the law says you have no standing – no legal interest in the issue, then you have no right to demand the issue be heard at all, much less that it be resolve in your favor.[15]

The applicant typically has standing to challenge a denial of his application. The local land use ordinance may allow neighbors or others the right to bring a challenge or to file an appeal whether the application is approved or denied.

If the ordinance does not grant a specific right of appeal to someone other than the applicant, a person who seeks to appeal must claim that they will suffer some specific harm as a result of the decision that is different than the harm generally suffered by the community in general.[16] In rare circumstances involving issues of significant importance, such as health and safety, a representative plaintiff may bring appeals on behalf of the entire community.[17]

In a recent case, neighboring property owners claimed that an energy company did not comply with the terms of a previously issued conditional use permit which allowed a series of wind turbines. The Utah Supreme Court agreed that the neighbors had standing to file an appeal but went on to rule that the neighbors could not appear and present evidence at the appeal hearing because they were not entitled to rights of due process under the specific facts of that case.[18]

The local ordinance could have provided due process rights for those who brought the appeal, but it did not. Under the related case law, to have due process rights that would entitle them to be heard the neighbors would have had to demonstrate that the decision appealed from would have affected some "constitutionally protected property interest."[19] This they

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[15] *Specht v. Big Water Town*, 2017 UT App 75. Although Specht lived on the cul-de-sac which the local council agreed to alter, he did not have standing to challenge the alterations because he did not prove that he was harmed by the decision. ¶¶51-53. A plaintiff must establish that the challenged decision has prejudiced some substantial personal right. It is not enough to argue that the community at large has been injured. The injury must be personal to the plaintiff. A plaintiff must also prove that there is a reasonable likelihood that the local government's decision would have been different if the decision had followed the law. *Potter v. South Salt Lake City*, 2018 UT 21, ¶33, citing and clarifying *Springville Citizens v. Springville*, 1999 UT 25, 979 P,2d 332.

[16] Utah Code Ann. §10-9a-801(2)(a) (municipalities) §17-27a-801(2)(a) (counties) limits those bringing actions to challenge land use decisions to "adversely affected" parties. The code at Utah Code Ann. §10-9a-103 (municipalities) §17-27a-103 (counties) defines "adversely affected party" to mean a person other than a land use applicant who: (a) owns real property adjoining the property that is the subject of a land use application or land use decision; or (b)will suffer a damage different in kind than, or an injury distinct from, that of the general community as a result of the land use decision." See also *Springville Citizens v. Springville*, 1999 UT 25 ¶31; *Cedar Mountain Environmental v. Tooele County*, 2009 UT 48 ¶¶8-14.

[17] *Cedar Mountain*, Id., citing *Sierra Club v. Utah Air Quality Board*, 2006 UT 74, ¶19.

[18] *Northern Monticello Alliance v. San Juan County (NMA),* 2022 UT 10 ¶¶22-38.

[19] Id., Commentary: A protected property interest is a legitimate claim to some benefit beyond an abstract need for, or unilateral expectation of, a benefit. The required property interest must be secure and entitled. *NMA* ¶32. A protected property interest is not subject to local discretion. *NMA* ¶34. Protected property interests may include the right to reasonable access *Hampton v. State Road Commn.* 21 Utah 2d 342, 445 P.2d 708, 711 (Utah 1968); the right to be free from adverse effects which are so severe that they would create an actionable common-law nuisance *Cedar Mountain Environmental v. Tooele County*, 2009 UT 48 ¶13, 214 P.3d 95, 100; the right to continue a non-conforming use or to occupy a non-complying structure, *Rock Manor Trust v. State Road Comm'n*, 550 P.2d 205 (Utah 1976) , Utah Code Ann. §10-9a-511 (municipalities), 17-27a-510 (counties); the right to be free from public or private trespass on private land *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430, 102 S. Ct. 3164, 3173 (1982) *See also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893 (1992) ("[A]t least with regard to permanent invasions[], no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."); government-enabled permanent occupancy of private property by another person or entity, *Loretto*; the loss of all economically viable use of a legally established parcel of land due to governmental action, *Lucas*; the right of air, light, and view across a public street (note this only applies to a public street, not other public or private property) *Dooley Block, Inc., v. Salt Lake Rapid Transit Co*., 9 Utah 31, 33 P. 229; *Utah State Road Commission v. Miya*, 526 P.2d 926, 928-929 (Utah 1974); interference with easement rights, such as the easement rights that a third party may have exist across the land which is the subject of the land use decision. Easements are property interests. Utah Code Ann.

did not do. Since the local ordinance did not provide due process rights to them, they were properly denied the right to participate in the hearing held to consider their own appeal. Only the owners of the wind farm were allowed to present evidence that they complied with the conditions attached to their permit.[20]

That said, if your constitutional rights or protected property interests are affected, you have standing to protect them. Check the local ordinance and ask the staff or local government attorney or your own lawyer to be sure you have standing before you initiate an appeal.

Local Deference - new footnote related to deference to local government interpretation of statutes and ordinances.

Existing Footnote 13 as amended: Utah Code Ann. §10-9a-707(4) (municipalities); Utah Code Ann. §17-27a-707(4) (counties). *Outfront Media v. Salt Lake City*, 2017 UT 74 ¶12, f.13. "Given that we do not defer to state agencies on pure questions of law, there is even less reason to defer to local agencies' interpretation of ordinances, given that these local agencies 'do not possess the same degree of professional and technical expertise as their state agency counterparts' citing *Carrier v. Salt Lake City*, 2004 UT 98, ¶ 28

§17B-2a-820; the right to lateral support of one's property as might be threatened by excavation of neighboring land *Salt Lake City v. JB. & R.E. Walker, Inc*., 253 P.2d 365, 123 Utah 1 (Utah 1953); "very likely" future flooding problems *Brown v. Division of Water Rights*, 2010 UT 14 P. 24; and others. It is not sufficient to claim that the application violates the local ordinance – the person bringing the appeal must also demonstrate that his or her personal protected property interest is at risk. Protected property interests do not include the right to the highest and best use of property or the right to preserve the current market value of one's property (*Smith Investment v. Sandy*, 958 P.2d 245 (Utah Ct. App. 1998); a view across neighboring properties which are not public streets; the right to be seen by traffic, or the right to the most convenient access, so long as the access provided is reasonable *UDOT v. Ivers*, 2005 UT App 519 P.18. Standing and due process rights do not arise from the general burdens that growth, additional traffic and congestion, temporary construction, and other such inconveniences that development imposes on a neighborhood or the community at large.

[20] *Id.*