Referenda and Initiatives (Ballot Box Zoning)

CHAPTER 17

Not every state allows its citizens to either create new laws (by "initiative") or second guess decisions by state and local legislative bodies (by "referendum"). The specific wording of Utah's constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2)
>
> . . .
>
> The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.[1]

This provision creates two co-equal legislative bodies in the State – the State Legislature as one body and the legal voters as the other.[2] With particular regard to land use laws, which have proven to be controversial and emotional at times, the Legislature has worked to limit the ability of the citizens as voters to intervene. The Supreme Court has taken the opposite approach over the last 15 years or so and has jealously guarded the legislative rights of the citizens.[3]

Two Routes to the Ballot Box

There are two ways that members of the public may participate as citizen legislators. The most common is by referendum, where a decision made by the local legislative body is "referred" to the voters.

The other option is for a group of citizens to create their own land use law and petition for a public vote on it. Thus the citizen legislators "initiate" the new law by an "initiative".

Referenda

In Utah, the adoption or amendment of land use regulations by the city or town council or county council or commission are subject to ballot box review. If the number of voters required by state law sign a petition to refer that local decision to a public vote, then such will occur.[4] The number of signatures required to "refer" a land use ordinance to the voters varies by the size of a city or county ranging from 15% of the registered voters in the largest cities and counties to 40% in towns and very small counties. A table of these voter requirements may be found at the end of this chapter.

The signatures gathered must exceed this percentage in at least three quarters of the "voter participation areas" (which we will refer to as "VPAs") of the city or county. The local government is to set boundaries for at least eight VPAs within the boundaries of the municipality or county or determine that city or county council districts are to be considered as the VPAs.[5]

So, for example, if there are 12,000 residents in a city with eight VPAs, and 9,000 registered voters, then 2,610 certified signatures on a petition are required to put any legislative land use decision on the ballot, as long as those signatures represent 29% of the registered voters in each of six separate VPAs. If there are 75,000 residents, and 50,000 voters, then 8,000 certified signatures equally spread over six VPAs would subject the city council's legislative land use decisions to public vote.

Those hoping to gather a certain number of certified signatures must plan to obtain a much larger number of individuals to sign as many signatures will likely be disqualified. Voters might not be registered in the right VPA, some might not be registered at all, or they may be disqualified for one of the various other issues that would make a given signature invalid.

The thresholds needed for number of voter signatures are lower for non-land use laws, but that discussion is beyond the scope of this book.

What land use decisions are subject to a referendum?

By law, an ordinance, resolution, master plan, and any comprehensive zoning regulations adopted by ordinance or resolution are considered "local laws" that are subject to review by the voters.[6]

> "Land use law" means a law of general applicability, enacted based on the weighing of broad, competing policy considerations, that relates to the use of land, including land use regulation, a general plan, a land use development code, an annexation ordinance, the rezoning of a single property or multiple properties, or a comprehensive zoning ordinance or resolution.[7]

It is also important to note that most land use decisions, including subdivision approvals, conditional use permits, variances, appeals from decisions interpreting the ordinances, planned unit development, and similar administrative decisions are never subject to referenda. The definition of a referable "land use law" in the voting code specifically excludes "land use decisions" which are administrative actions.[8]

Only decisions by the legislative body, such as the city council or county commission are candidates for referenda. Of those decisions only the broader policy questions in the general plan, comprehensive rezoning, and amendments to the ordinances or zoning map, including single lot rezones[9], can be referred to the ballot box. Even if the city council is the entity approving an administrative application such as a subdivision, that decision is not subject to referendum.[10]

Subject to Referendum:

When the local city or county council or county commission passes an ordinance that adopts or amends:

1. the general plan.
2. the text of the land use ordinances or development standards. This includes all the detail that is found in the local codes, including the uses allowed in a particular zone and all the various standards and criteria that are codified which are to be considered when reviewing a land use application.
3. the zoning map, including the rezoning of a particular parcel of land.[11]
4. annexation of new areas into the city limits of a municipality.

Not Subject to Referendum:

Clearly non "referable" decisions (a term the court opinions prefer to describe those decisions that can be subject to a referendum) are "executive" or "administrative" decisions.[12] When a developer comes in for a building permit, a subdivision approval, a conditional use permit, or seeks a variance, the resulting action is an administrative decision. The local officials must approve a building permit, subdivision approval, conditional use permit or other administrative application if it meets the requirements of the applicable ordinance. Typically, any subsequent ordinance change would not apply to an administrative application after the application is submitted.[13] This would be true whether the attempted change to the ordinance is by the legislative body of the jurisdiction or by citizen initiative.[14]

As stated, administrative decisions are made by applying the rules already set up in the local land use regulations and ordinances. The state law related to real estate and land use applications is specific and unique to Utah: If an application meets the criteria in the local ordinance at the time the application is filed, then the local officials must approve the application.[15]

The exceptions noted in the statute to this provision, referred to in the Utah land use arena as "early vesting," are limited.[16] As a rule, the only chance the citizens have after a property owner/developer applies for subdivision approval is the right to attend the meetings where that application is reviewed, and speak, if public comment is provided for, on whether or not the application complies with the local law.

If fundamental issues such as land uses, lot sizes and density are a concern, then the opportunity to influence those issues exists long before the application is submitted – for example, when the General Plan, Land Use Code, and Zoning Map are adopted. At the time that the zone was assigned to the property to be subdivided, the citizens had a short window of time in which to file a petition to refer the matter to the voters. If this was not done at the time, the density and lot size issues, for example are locked. While the citizens or the city council had the option to change the land uses, lot sizes, or density before the subdivision application is filed, they do not have that option after the application is filed. At that time, the developer's rights have usually "vested".

Thus, if a citizen does not agree with an administrative decision, his or her option is to challenge the decision to the local appeal authority and demonstrate by substantial

evidence that the application as approved did not conform to the ordinances.[17] There is usually no viable opportunity to amend the ordinances retroactively, or to deny or alter an application that has already been submitted and for which the relevant application fees have been paid. If citizens wish to change the law going forward, then an initiative may be prepared. Otherwise, the elected members of the local council or county commission could make the change, but it would not apply to a project that must be considered under the old law.

As an alternative to an initiative, the citizens could elect new council or county commission members at the next general election who might act in a manner the citizens approve, but that also would still not reverse the previous administrative decision. The law is written to provide some certainty to those who own and develop private property, their financiers, and future occupants of projects they develop.

That being said, and as to our original issue in this section, a consensus in the law provides that some decisions are clearly not subject to voter review:

- Decisions by the staff, the planning commission, the landmarks commission or any other person or body that is not the city or county council or county commission.
- Decisions by the land use appeal authority such as variances and administrative appeals.
- Subdivision approvals – so long as they are basic and straightforward, and not part of a major development plan that also assigns land uses and densities to a project.
- Building permits
- Site plan review – so long as the review considers criteria in the land use ordinances and, again, is not part of a major redevelopment plan where land uses and densities are also considered.

Also not referable is a transit area land use decision if approved by a vote of more than 2/3 of the local legislative body[18]. In 2023 the statute was amended to provide that a land use decision approved unanimously by the local legislative body is not subject to referendum.[19] This provision will likely be challenged at the Supreme Court and may or may not survive that review.

The Gray Area – Maybe Yes, Maybe No

Which brings us to the middle ground. A relatively few decisions, usually of some local significance, might be referable, – subject to voter review – or might not. It depends. These decisions include:

- Some development agreements.
- Some larger "Planned Unit Developments".
- Some larger development plans, including a few of what land use practitioners commonly refer to as a "site plan".

A casual observer might characterize the Supreme Court decisions on the subject as outlining the arguments rather than the law on these matters. The opinions seem quite personal to the Court, although always unanimous, and remind one of the well-worn statement by Justice Potter Stewart of the United States Supreme Court about hardcore pornography: "I know it when I see it."[20]

Put simply, in these few close cases only the Supreme Court can decide what decisions will go to the ballot box.[21] We have been given the framework for the debate, but no clear, bright line guidelines on what the result of any given controversy might be in the context of these limited types of development approvals. This is probably unavoidable, given the Court's stated goal to avoid letting the local council make the ultimate decision about which decisions are referable.[22]

As stated in its *Krejci* decision, "The bright-line rules in *Carter* were aimed at clarifying the grounds for resolving easy cases, not for marking the outer bounds of the people's constitutional power in the hard ones."[23] For better or for worse, the largest and most controversial projects are more likely than the small ones to involve the kinds of issues that the Court has decided the voters may review.

The guidelines for referability

As the Court has stated:

> In *Carter*, this court was tasked with defining the "nature and extent" of the people's power to legislate. In doing so, this court identified two "key hallmarks" of legislative power. Specifically, "Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations."

> This court also noted that this power is distinguishable from the executive—or administrative—power, which involves "applying the law to particular individuals or groups based on individual facts and circumstances." Drawing on this distinction, we noted that enactment of a broad zoning ordinance constitutes a legislative act, while application of that zoning ordinance to individuals through conditional use permits or variances would constitute an executive act.

Baker v. Carlson, 2018 UT 59, PP. 13-14 (citations omitted). Perhaps the best way to illustrate how the Court applies this language is to consider a specific case and the analysis provided by the Court in each instance.

Is a Development Agreement Administrative? Is a Site Plan Legislative?

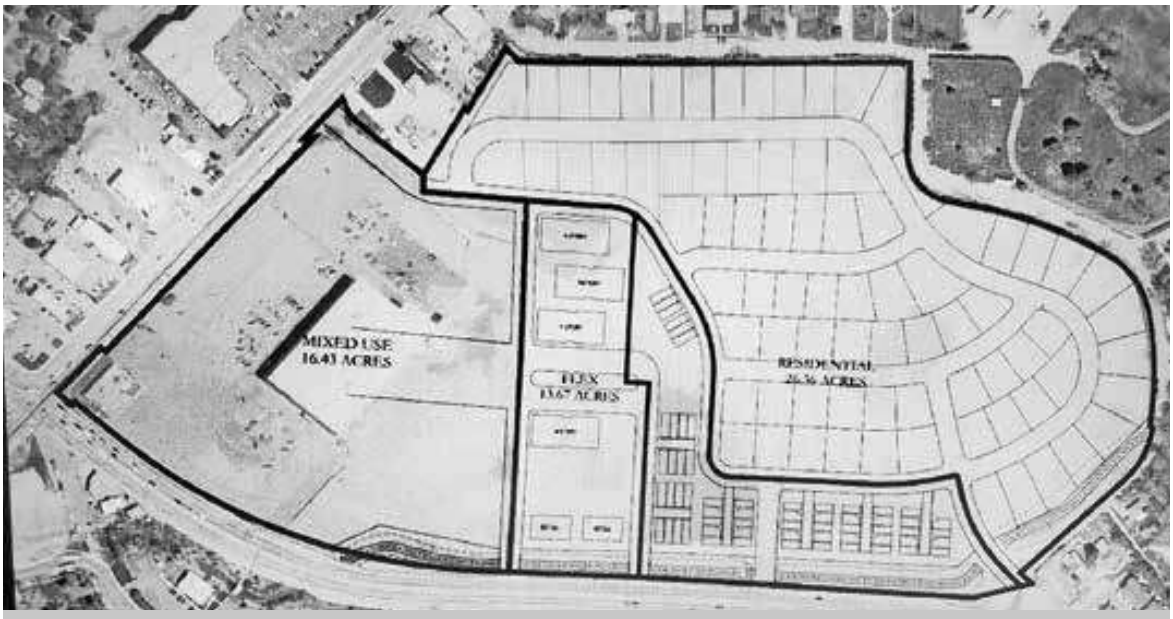
Case Law - Baker v. Carlson

In *Baker* the City of Holladay and the developers involved argued that approval of a large project was purely administrative.

The Cottonwood Mall was the first enclosed shopping mall in Utah – dating back to 1962. By the new millennium it was dated, obsolete and the last major store, Macy's, closed in 2017. The City of Holladay has attempted for more than a decade to encourage renewal, which would appear eminently achievable given the mall site's prime location on Highland Drive in the center of a developed, up-scale residential area. The most recent development plan, estimated to involve more than $500 million in investment, was advanced by a joint venture including Ivory Development and the Woodbury Corporation in 2018.

The site is roughly 57 acres and was zoned for "mixed use" in 2007 as one of the legislative actions taken by the City to advance a former development proposal. According to the City code, in that mixed-use zone, a developer must submit a site development master plan to the City for approval, which is to include plans for overall development and design of the entire site.

Additionally, an agreement for the development of land which confirms specific development rights and duties must be approved. A development plan and a



This drawing shows the proposed land uses which were the subject of a referendum held in Holladay, Utah involving the former site of the Cottonwood Shopping Mall. The variety of uses shown on this plan, including retail, office, single family residential and apartment uses were a basis for the ruling by the Utah Supreme Court that the approval of the plan was a legislative act and thus subject to referendum. Photo courtesy Ivory Development.

development agreement were in place when the Ivory team arrived on the scene. Both the plan and agreement were amended to accommodate changes in the proposed development in 2018. A petition to refer both decisions to the voters quickly followed the City's approvals over spirited protests.

Both the District Court and the Utah Supreme Court reached the same decision as to the administrative/legislative dichotomy – the development plan was legislative in nature, but the development agreement was administrative. Their analysis is illustrative of the Court's current views on the difference. The development plan was legislative, the Court held, because the City determined that:

1. The development plan meets the intended vision for the R/M-U Zone and addresses the technical items required by the Zone Regulations;
2. Submitted traffic studies show that the Project will have a reduced overall impact, when compared to the former development plan, and very little modification or improvement of existing streets and related infrastructure is required;

3. The proposed residential densities, while increased, in respect to the former development plan, are compatible with the existing residential development in the area and are necessary to support the commercial and retail aspects of the Project;
4. The proposed building heights are an integral part of the overall design and function of the Project and are warranted in this area of the City;
5. The proposed residential and commercial development will foster redevelopment and increase property values of surrounding properties; and
6. The proposed commercial/retail development is a needed component of the City's economic stability and represents viable and sustainable development given current economic conditions.

As stated by the Court: "it is difficult to imagine a more broad policy consideration than the economic stability of an entire city".[24]

The Court appears to deem it significant that the Holladay City code states that a development plan in the Mixed-Use Zone is to function like the General Plan functions for the entire City. "In so holding, we do not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature. Indeed, it is entirely possible that many site development plan approvals (and, more generally, land use application approvals) will constitute administrative acts. Such a determination, however, is entirely dependent on how the municipality reaches its decision."[25]

Since the Court determined that the development plan decision was "open-ended" and there were no set criteria guiding the City's approval, the decision did not involve the application of existing law to the facts presented by an individual applicant, and was therefore legislative and referable to the voters. The City code provides that a development plan will comply with the vision and purpose of the Mixed-Use zone and anticipate the development of a "vibrant community" and "allow flexibility and creative expression".

These criteria were not specific enough to avoid the legislative characterization of the development plan decision. It was also persuasive that the City's land use

code showed no permitted, conditional, or disallowed uses for the Mixed-Use zone in its table of land uses. Since such a fundamental aspect of development as the permitted uses was omitted, reasoned the Court, there is no underlying law to apply to the supposed administrative decision.[26]

However, in considering the City's decision to adopt the development agreement, the Court held the opposite and found the decision to be administrative:

1. First because the decision was not "generally applicable". Government decisions to enter into a contract with a specific entity are not legislative.[27]
2. The agreement sets forth the obligations of the parties. It would not govern newcomers to the project unless they were "successors or assigns" of an original party. While a new developer could take advantage of the development plan, that new developer would have to negotiate a new development agreement.[28]
3. The development agreement decision also did not weigh broad, competing policy considerations. Rather, it granted specific rights pursuant to the approval of the development plan.[29]
4. The important considerations the City weighed in negotiating the development agreement were "nonetheless unique to the specific facts of this individual case." This type of action, says the Court, is "fundamentally administrative".[30]

And so, while the Court discusses it's reasoning in detail in *Carter,* the precedents set are not necessarily clear enough that those involved in the next local controversy will find the answer to the administrative/legislative dilemma intuitively.

Technicalities

There is considerable complexity involved in the thicket of regulations controlling ballot box review which are beyond the scope of this summary. The threshold details for purposes of this overview are simpler. Those who wish to challenge the adoption of a local land use regulation must file an application to circulate a petition with the notarized signatures of five local voters who are sponsoring the petition. The strict deadline for this application is at five p.m. on the seventh day after the day on which

the local law was passed.[31] The required number of valid voter signatures must be gathered and submitted within 45 days of the date that the local clerk furnishes approved copies of the referendum petition and signature sheets.[32]

This can be daunting, because 45 days is not a lot of time to get several thousand signatures. On the other hand, this time also frustrates the parties who were satisfied with the local government decision in the first place. They must wait at least 45 days to be sure that no referendum will be held to disturb their approved land use decision. During this period, there is no "vesting" that occurs as a result of the local legislative body's approval of a project.[33] If the effort to force a referendum is successful, then everyone involved must wait a number of months before the election is held before they know if the proposed land use will be allowed.

Initiative

Another question that comes up at times relates to initiatives. What if the desire of the voters is not to review and perhaps overturn a legislative decision, but instead to draft a new ordinance and impose it via the ballot box? This is referred to as initiative, where the vote taken after a decision is made is called a referendum.

To propose an initiative, the notarized signatures of five registered voters file an application which includes a copy of the text and title of the proposed law as well as the source of funding for all costs associated with it.[34] There is a detailed process that the application must go through to be approved for signature-gathering.[35]

After the application is approved, then the sponsors must submit each packet of signatures they gather within 30 days of the date that the first signature is obtained. The longest time that signatures may be gathered is 316 days after the application date, but that time may be shortened because the deadline is also defined as on or before April 15 on even numbered years for a county initiative or April 15 on odd numbered years for cities and towns.[36]

Once the voters propose an initiative, the local council or other legislative body has four choices within 30 days of receiving the completed initiative petition, after the county clerk verifies that the required number of valid signatures have been obtained:

1. adopt the proposed law and refer it to the people to ratify the adoption, or

2. adopt the proposed law without referral to the voters or
3. reject the proposed law or
4. adopt a competing law.[37]

If the proposed law is adopted without referral to the voters, then another petition can force it to the voters just as if it were any other legislative act which could be the subject of a referendum. If the legislative body rejects the proposed law, the county clerk (if a county ordinance is proposed) or the city or town recorder or clerk (if a municipal ordinance is proposed) must submit the initiative to the voters at the next municipal general election. If the legislative body passes a competing law, both the law enacted and the proposed law must be submitted to the voters. If both laws pass, the law receiving the most votes becomes the law of the jurisdiction.[38]

Tips for participants

For local governments who wish to avoid citizen referenda:

- Delegate any administrative decisions that can be delegated to the planning commission, landmarks commission, appeal authority or staff.
- Avoid having the legislative body make administrative decisions such as subdivision approvals and review of development plans. (The legislative body can impose specific standards and guidelines by ordinance that will manage those decisions by others.)
- Create specific criteria in the ordinance that must be followed if the city council decides to make administrative decisions, such as to approve site plans and development agreements. Applying specific criteria to the review of an application increases the chance that the result will be considered an administrative decision, not subject to referendum.
- Assign a list of permitted uses to any mixed-use zones – don't leave the wording of the ordinance open ended with no designation of the types of uses which are to be allowed in the zone. Those uses may not necessarily have to be tied to specific property when the zone is assigned, so long as they are outlined in the land use ordinance and limit the future uses that may be allowed there.
- Small communities with a Mayor-Council form of government may consider changing the form of government to another form so the City Council

can continue to handle administrative items it wishes to be exempt from voter review.

For developers and property owners who wish to avoid referenda:

- Keep your ear to the ground. At any time prior to the filing of a complete application, not only the city council but also the voters may propose a "pending ordinance" that might apply to your project.[39]
- File your administrative application and pay the fees early. This locks in the provisions of the local ordinance that apply to your project. You can discuss aspects of the proposal after filing, but you will be subject to proposed changes in the laws restricting what is allowed if your application is not filed and paid for before a pending ordinance is proposed by the council or the citizens.
- If you need an amendment to the General Plan, the land use ordinances, or the zoning map, build community support. Anticipate objections and deal with them fairly and honestly as early in the process as it makes sense to do that. Don't expect to be able to resolve significant concerns at a public hearing. It is the setting least conducive to solving problems.
- Expect and allow for a reasonable approval time. To ask for approval at the first public hearing is often counter-productive in trying to minimize time.
- Participate fully in a public hearing. Even if you may have the council's support, if the citizens are opposed and the issue is legislative, consider asking the council to make the decision at another meeting and not at the first hearing. This allows for the consideration of legitimate feedback on your proposals and may provide for some "cooling off" time before forcing anyone's hand.
- Seek the input and support of the neighboring property owners and residents. Find common ground and prepare to make accommodations.
- If there is potential for a referendum or initiative, ensure that your land option and financing agreements allow for long-term extensions. It has been specifically held by the Utah Supreme Court that there is no entitlement to proceed with a project, and construction is simply on hold, until after the election date when the voters are to speak on a ballot question.[40] According

to the Court, no one owes the developer any compensation for the cost of the delay occasioned by a referendum.

- Where the scale of the project warrants it, consult with a seasoned land use attorney early and often. Attempt to structure the proposal to separate administrative from legislative issues. Use a carefully negotiated and drafted development agreement to get your arms around uncertainties.
- Consider seeking county approval before annexing a project into a municipality. Development within the city is subject to an initiative or referendum in the city with a smaller number of voters required to change the rules or challenge an approval. Development in the county can only be second guessed by a vote of all the voters in the county, which is a much higher hurdle for citizen challenges than a city-based referendum or initiative would be.

For citizens who may wish to petition for a referendum or an initiative:

- The biggest issue here is deadlines. If an issue is to go to the ballot box, those who are behind the proposal must meet every one of myriads of deadlines and procedural hurdles. If there ever was a land use issue where citizens need a skilled land use attorney working with them from the onset, this is it.
- Be open to resolution of issues, both with the city or county council or the developers/property owners. A solution must not only be politically popular, but it must also be wise and qualify for long-term effectiveness. Remember that whatever the voters do can be amended or reversed by the local city or county council or commission at any time.
- There is no assurance of success in a process that has so many moving parts. There are aspects of land use law that have never been heard by the courts so we are not sure what the result will be when they are. There will be plenty of work involved and quite a lot of expense. Many months will pass before an election is held.

This is an example of why the land use arena is so engaging and serendipitous. It is a wild ride, not for the faint of heart.

Signatures Required for Referendum:

Any legislation except for a "land use law"[41]:

First Class Cities	100,000 population	7.5% of the voters
Second Class Cities	65,000 – 99,999	8.25% of the voters
Third Class Cities	30,000 – 64,999	10% of the voters
Fourth Class Cities	10,000 – 29,999	11.5% of the voters
Fifth Class Cities	1,000 – 9,999	25% of the voters
Towns	less than 1,000	35% of the voters

For a Metro Township, the requirements are the same so for the city of equivalent size.

First Class Counties	1,000,000 population	7.75% of the voters
Second Class Counties	175,000-999,999	8% of the voters
Third Class Counties	40,000-174,999	9.5% of the voters
Fourth Class Counties	11,000-39,999	11.5% of the voters
Fifth Class Counties	4,000-10,999	25% of the voters
Sixth Class Counties	0-3,999	35% of the voters

If the decision is a "land use law" which means a legislative land use (zoning) regulation, including the general plan, annexation ordinance, amendment to the text of a regulation or zoning map, including a single lot rezone[42], the number of signatures needed to make the decision subject to referendum is:

In each of 75% of the "voter participation areas" (such as a council district)		16% of the voters
First Class Cities	100,000 population	15% of the voters
Second Class Cities	65,000 – 99,999	16% of the voters
Third Class Cities	30,000 – 64,999	27.5% of the voters
Fourth Class Cities	10,000 – 29,999	29% of the voters
Fifth Class Cities	1,000 – 9,999	35% of the voters
Towns	less than 1,000	40% of the voters

Note that there are higher signature requirements[43] for a referendum involving approval of a transit area land use law.

Signatures Required for Initiative:[44]

First Class Cities	100,000 population	7.5% of the voters
Second Class Cities	65,000 – 99,999	8.25% of the voters
Third Class Cities	30,000 – 64,999	10% of the voters
Fourth Class Cities	10,000 – 29,999	11.5% of the voters
Fifth Class Cities	1,000 – 9,999	25% of the voters
Towns	less than 1,000	35% of the voters

For a Metro Township, the requirements are the same so for the city of equivalent size:

First Class Counties	1,000,000 population	7.75% of the voters
Second Class Counties	175,000-999,999	8% of the voters
Third Class Counties	40,000-174,999	9.5% of the voters
Fourth Class Counties	11,000-39,999	11.5% of the voters
Fifth Class Counties	4,000-10,999	25% of the voters
Sixth Class Counties	0-3,999	35% of the voters

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1 Article VI, Section 1.

2 See, e.g., *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent. . . . (internal quotation marks omitted)), cited in *Carter v. Lehi*, 2012 UT 2, f7.

3 In an eloquent summary, the Court refers to the power of the people to initiate legislation as a "fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, ¶3. As an example of the Court's stance, consider *Sevier Power v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72 ¶7; 196 P.3rd 583, where the Court struck down the Legislatures limitations in state statute that had provided that the voters could not initiate "a land use ordinance or a change in a land use ordinance", and also struck a state statute that had provided that the voters could not require "the implementation of a land use ordinance adopted by the local legislative body to be submitted to the voters".

4 See table of petition signature requirements at the end of this chapter.

5 Utah Code Ann. §20A-4-401.3.

6 Utah Code Ann. §20A-7-101(9)(a).

7 Id.

8 Utah Code Ann. §20A-7-101(9)(b). See definition of "land use decision" at Utah Code Ann. §10-9a-103(31) (municipalities) and §17-27a-103(35) (counties).

9 Prior to 2013, single lot rezones were not subject to referenda. The prior statute which barred referenda on single lot rezones, as well as two prior Utah Supreme Court cases, *Citizen's Awareness Now v. Marakis*, 873 P.2d 1117 (Utah 1994) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982), were overturned in *Krejci v. Saratoga Springs*, 2013 UT 74.

10 With the possible exception of cities and counties with a Mayor-Council form of government. In

Mouty v. Sandy, 2005 UT 41 ¶36, the Utah Supreme Court determined that approval of a development was subject to referendum because Sandy has a Mayor-Council form of government which vests all legislative powers in the city council and all administrative powers in the mayor. According to the court, all actions of the council in such a city would be legislative and thus subject to referendum. Taken literally, this case stands for the conclusion that every decision made by the city or county council in thirteen Utah municipalities and two Utah counties is referable. There has been a lot of discussion of what is referable and what is not by the Supreme Court since *Mouty*. Those knowledgeable about the law doubt that the simple rule of *Mouty* would apply these days when an otherwise administrative decision (such as a subdivision approval) by one of these few cities or counties is made subject to a potential referendum. The counties involved are Cache or Salt Lake Counties. According to the Utah League of Cities and Towns Directory, the cities with the mayor-council form of government include Hooper, Laketown, Logan, Ogden, Marriott-Slaterville, Murray, Provo, Sandy, Salt Lake City, Saratoga, South Salt Lake, Taylorsville and Tooele. Even if the narrow exception to the administrative/legislative determination applied to those local governments, it would not apply to all the others, so this issue is, for the most part, academic.

11 *Krejci v. Saratoga Springs*, 2013 UT 74.

12 *Carter*, ¶17.

13 Utah Code Ann. §10-9a-509 (municipalities) and §17-27a-508 (counties).

14 *Sevier Power Co. v. Sevier County*, 2008 UT 72; 196 P.3d 583.

15 Utah Code Ann. §10-9a-509 (municipalities) and §17-27a-508 (counties).

16 The exceptions, as included in the statue cited here, are "pending ordinances" and "compelling, countervailing public interest". It is not rare for local government to consider pending ordinances, and for those pending ordinances to affect applications filed during the pendency, but we have no case law on what specifically is a "pending ordinance". Likewise, we have little case law on what constitutes a "compelling, countervailing public interest" although similar words have been used to set quite high thresholds for a challenge to free speech and other protected constitutional rights. The vested rights doctrine in land use arises from the landmark case of *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980), which was rooted in an interpretation of issues involving private property rights and the common law doctrine of estoppel. The Utah Supreme Court has held that the opportunity for citizens to exercise their referendum rights is a compelling, countervailing public interest in *Mouty v. Sandy*, 2005 UT 41 ¶ 15. Other than that, all we know about the exceptions is expressed in the language of the statute, quoted above.

17 A full discussion of administrative appeals is beyond the scope of this discussion. That appeal right is provided for in Utah Code Ann. §10-9a-701 et. seq. (Municipalities) and §17-27a-701 et. seq. (Counties). Such an appeal is mandated by the provision that before seeking judicial review, a person challenging an administrative decision must first exhaust these administrative remedies. U.C.A. §10-9a-801 (municipalities) and §17-27a-801 (counties).

18 Utah Code Ann. §20A-7-602.8(2)(b)

19 Utah Code Ann. § 20A-7-602.8(2)(b)(i)

20 "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hardcore pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, at 197.

21 Fortunately, the Court has responded to the urgencies of the calendar by quickly scheduling argument for elections issues to facilitate the opportunity for the public to speak at the next general election, on schedule. The summary proceedings in its rules allow the Court to grant an expedited review when election issues are at

stake. For example, any voter may bring a petition for an extraordinary writ when a local clerk refuses to accept and file any referendum petition. U.C.A. §20A-7-607(4)(a).

22 For example, in a recent case, the Court stated that to give too much credence to the form of the decision, as an ordinance or as an administrative decision, gives too much power to the local legislative body and is akin to having the "fox guard the henhouse". *Baker v. Carlson*, 2018 UT 59, f7.

23 2013 UT 74, ¶29.

24 *Baker*, ¶21.

25 *Baker*, ¶25.

26 *Baker*, f.5.

27 *Baker*, citing *Carter* at 2012 UT 2, ¶67.

28 It is to be noted that *Baker* discusses the Court's previous holding in *Suarez v. Grand County,* 2012 UT 72, ¶ 39, 296 P.3d 688. A development agreement in *Suarez* was held to be legislatively adopted. The Court distinguished that case by noting that the Grand County agreement in *Suarez* included by reference the development code for the 2000-acre site and that the context of the challenge to Grand County's actions did not differentiate between the different land uses.

29 The Court noted that any need to consult the law of contracts to determine the effect of a local decision would stand in stark contrast to what would normally be characterized as legislative acts. *Baker*, f10.

30 *Baker*, ¶38, citing *Krejci*, ¶ 34.

31 Utah Code Ann. §20A-7-601(5). The date the law was passed is defined by the Utah Supreme Court as the date that the city or county council or county commission voted to approve it. *Bissland v. Bankhead*, 2007 UT 86 ¶¶9-11.

32 Utah Code Ann. §20A-7-605(1)(a)(ii). Each separate bundle of signatures must be submitted within thirty days of the date of the first signature in that bundle.

33 *Mouty*, ¶¶13-16.

34 Utah Code Ann. §20A-7-502(2).

35 See, generally, Utah Code Ann. §20A-7-501 et.seq.

36 Utah Code Ann. §20A-7-506(1).

37 Utah Code Ann. §20A-7-501(4).

38 Id.

39 Utah Code Ann. §10-9a-509(municipalities) Utah Code Ann. §17-27a-508 (counties).

40 *Mouty*, ¶¶13-16.

41 Utah Code Ann. §20A-7-601. "Land Use Law" is defined at Utah Code Ann. §20A-1-101(9).

42 Utah Code Ann. §20A-1-101(9).

43 Utah Code Ann. §20A-7-601(5)

44 Utah Code Ann. §20A-7-501.