Specific Legislative Issues and How They are Resolved

CHAPTER 5

The first actions taken in land use regulation are legislative. Before the specific provisions of rule and ordinance are adopted, a community must first think "big picture" and set some overall goals and objectives. Then official "land use regulations" as defined in statute[1], are adopted. The most common land use regulations are discussed below, including the general plan, the land use ordinances, annexation, the zoning map, and temporary land use ordinances (moratoria).

As time goes by, there will be a repeated need for the county or municipality to fine tune the plan, adjust and supplement the ordinances, and consider other legislation.

1. Adopting or Amending the General Plan

Nature of the decision

Broad policy-making function, where local officials set the vision of what they hope the community will become.

Who makes the decision?

These are legislative matters, so the final decision is always made by the legislative body—the city council, county council, or county commission.[2] The planning commission *must* propose the original plan and hear any proposed amendments to the plan and make recommendation before the legislative body can enact the plan or an amendment.[3]

What notice is required?

There is no duty to provide each property owner with individual notice of city-wide general plan changes and amendments because to do so would be very cumbersome. However, the city or county must provide three different types of notice in the process of preparing and approving a general plan.

These include notices of (1) the intent to prepare a plan or to comprehensively amend the plan; (2) *hearings* where the public may comment on the proposal, and (iii) *meetings* to consider the general plan where the public may or may not be allowed to speak.

Note the difference between a public *hearing* and a public *meeting*. A public meeting is any gathering of a council, board, or commission. A public hearing is also a meeting, but a hearing is unique in that involves an official chance for the public to comment on an issue. The public does not always have the right to comment at every meeting, so while every hearing is a meeting, every meeting is not a hearing.[4]

No less than ten days before preparing a general plan or comprehensive amendment to a general plan, the county or municipality must notify "affected entities"[5] as defined in statute as well as the public and other entities that have a stake in what the community is planning.[6] Public notice is provided by means of the Public Information Website, a truly remarkable resource for citizens to find out what government entities are up to.[7] Found at *pmn.utah.gov*, it is a treasure trove of minutes, agenda, and audio recordings. Every public body in the state must use the website to provide public notices and other specified public documents.[8]

The local government entity must also, ten calendar days before the first *hearing* to be held by the planning commission:

1. give specific notice to each "affected entity" as defined in statute;[9] *and*
2. provide public notice at *www.pmn.utah.gov*; *and*
3. post a notice on the government entity's website (if the entity has a budget that exceeds $250,000); *and*
4. post a physical public notice in the area affected by the proposed general plan or amendment.

This advance notice is not required for subsequent hearings after the first hearing held.

Once the general notice of intent to enact or amend the general plan is provided, notice before all of the *meetings* held to consider the general plan or amendments to the plan need only be provided 24-hours before the meeting by:

1. providing public notice at *www.pmn.utah.gov; and*
2. publish the notice on the government entity's website, *and*
3. post a physical public notice in the area affected by the proposed general plan or amendment.

Each body typically meets the notice requirements for meetings when it posts an agenda as required by the Open and Public Meetings Act.[10] When the planning commission or legislative body discusses these issues, the required 24-hour notice will allow someone who checks the local agenda on a regular basis to be aware of proposed changes (if the agenda is specific enough to describe what the amendments are). Any citizen can receive notification of notices and agenda for the meetings of any government entity by creating an online account and filing a request for email notification on the pmn website.

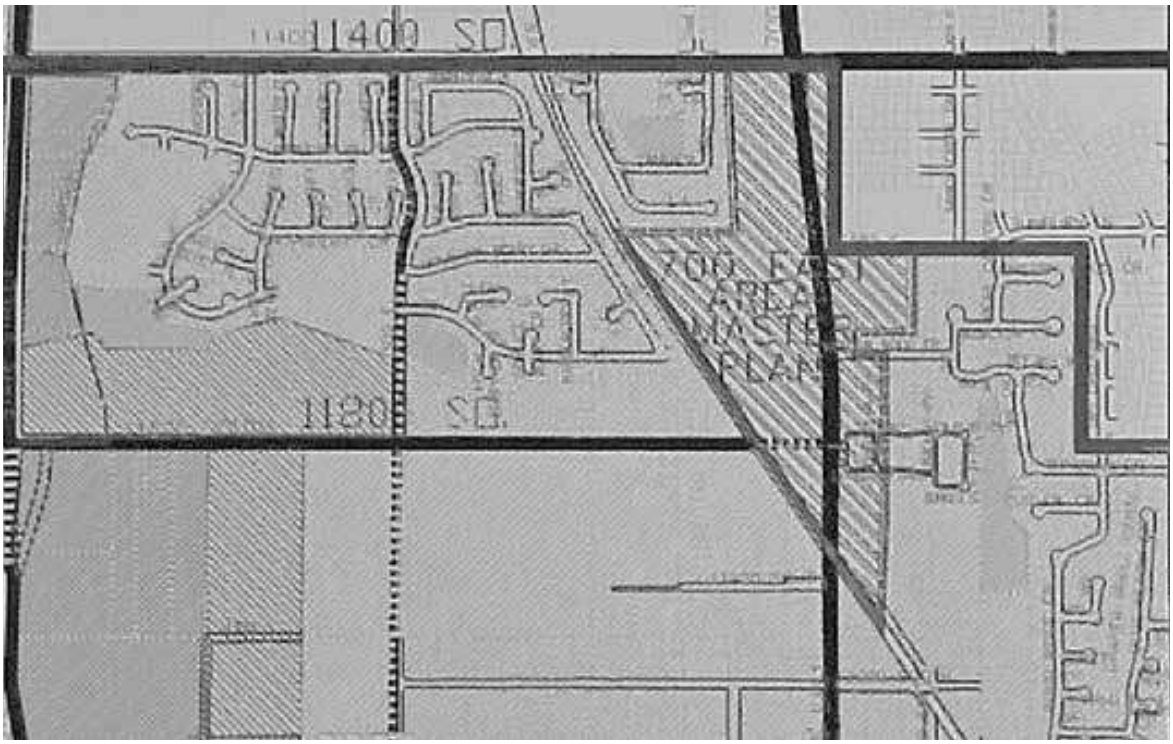
Any citizen can attend and observe any such meeting, but the public may only participate by invitation, unless the meeting is an official hearing. Outside of such meetings and hearings there are few methods for communicating the proposed and adopted changes to property owners and citizens, unless the local media decides that the issues are significant enough to warrant news coverage or engaged citizens use social media to broadcast information and commentary on issues and events.

If the proposed change in the general plan was proposed in a land use application, the local government must also provide three days advance notice to the applicant of every hearing and every meeting to consider the application.[11] This requirement may be waived by the applicant if desired by the applicant.[12]

What public input is required?

At least one public hearing must be held—by the planning commission—before a change in the general plan is adopted.[13] Note that there is no duty for a legislative body to conduct a hearing on the general plan or an amendment to the plan.[14] It need only consider the advice of the planning commission and make its decision in a public meeting.

While such a process represents the minimum required by state law, it would be unusual for a legislative body to adopt a final general plan or amendment without hearing from the public, even if such a hearing is not required by state law. Public



The zoning map (above) and an aerial photograph of the existing land uses compare the anticipated uses in the general plan for Draper, Utah. This area is the location of the Harmon's grocery store discussed in Chapter 3. Photos courtesy of City of Draper.

officials should always check local ordinances to determine if they require a public hearing before the legislative body adopts or amends the general plan.

What are the issues?

Those making the decision must decide if the proposed plan or change to the plan promotes the general welfare of the community.

As they are legislative acts, public clamor and informal opinions are acceptable considerations in enacting local land use regulations. Opposition by citizens may be noted by the council members or commissioners, and they may base their decision on public support and comment.[15]

How is the decision appealed?

Unless otherwise provided by local ordinance, the general plan is advisory only so any decision related to it would be almost impossible to challenge legally. The adoption of the plan is really a conversation about what direction the community wants to go in its land use, traffic, housing, and other goals. If there is no ordinance mandating that local land use decisions be consistent with the general plan, there is

Whether the city is small or large, the same land use formalities and rules are required. Both the hamlet and the metropolis must justify its decisions with the same level of formality.

usually no need to worry about appealing a general plan decision because it has no ultimate legal effect until some other decision is made to carry out the general plan in an ordinance.

Tips for participants

If participants wish to better influence the process, they should (1) make arguments related to the public good, (2) try to build political coalitions to influence elected officials, (3) try to involve the media if appropriate, and (4) generally comment on all the noble-sounding community values that support your side of the argument. It's all relevant in this context. Remember that the real issue is whether the proposed plan is desirable. The decision is typically one of preference and there is no legally "right" or "wrong" answer.

2. Adopting or Amending Local Land Use Ordinances, Rules and Codes

Nature of the decision

Policy-driven legislative regulations set the legal framework to promote the general welfare of the community. The result includes comprehensive building, fire and health codes, landmark controls, standards for streets and traffic controls, subdivision ordinances, and a host of others. Decisions involving a land use regulation trigger special procedures mandated by state statute. Keep in mind that not every ordinance affecting land is a land use regulation. Business license ordinances, for example, are often found in a separate chapter of the local code. Land use regulations as defined by statute are enacted by the legislative body that governs the use or development of land (including zoning maps).[16]

Who makes the decision?

Any change to an ordinance, code, zoning map, or rule is a legislative decision, so it is always made by (1) a legislative body – the city council, county council or commission, or (2) the voters through a ballot box citizen initiative.[17] If the regulation is to be adopted by the council or county commission, the planning commission *must* hear any proposed land use ordinance or amendments to land use ordinances and make a recommendation before the legislative body can enact such an ordinance or amend it.[18]

What notice is required?

Both the planning commission and city council or county commission must be involved in adopting or amending a land use ordinance.

Notice must be given for both hearings and meetings. The local government entity must, at least ten calendar days before the first public *hearing* to be held by the planning commission:

1. mail specific notice to "affected entities" as defined in statute;[19] *and*
2. post a notice at *www.pmn.utah.gov; and*
3. post a notice on the government entity's website (if the entity has a budget that exceeds $250,000); *and*
4. post a physical public notice in the area affected by the proposed land use ordinance change; *and*
5. if local ordinance requires it, send notices to specific persons who are to receive written notice of the hearing.

Note there is no requirement in state statute that any landowners be notified of changes in ordinances which will alter how their land is regulated if a publication is made at *www.pmn.utah.gov*. Landowners who are designated as "affected entities" because they provided a notice to the municipality or county at the beginning of each calendar year that they wish to receive such notices are legally entitled to notification of changes in the regulations that apply to their property.[20]

Notice before *meetings* (which as described in this section, are not necessarily *hearings*) held by the planning commission or the city council or county commission to consider an ordinance or change to an ordinance need only be given by:

1. providing public notice at *www.pmn.utah.gov* 24 hours before the meeting;[21] *and*
2. post a notice on the government entity's website (if the entity has a budget that exceeds $250,000); *and*
3. the post a physical public notice in the area affected by the proposed land use ordinance change.

If the proposed change in the land use regulation was proposed in a land use application, the local government must also provide three days advance notice to the applicant of every hearing and every meeting to consider the application.[22] This requirement may be waived by applicants if they desire.[23]

It is common for a community to consider broad rezoning decisions and dramatic changes to the zoning ordinances, such as the creation of overlay zones, changes in densities, adjustment of minimum lot sizes, elimination of agricultural and commercial uses, and other such significant amendments to plans, ordinances, and maps without any mailed notice to anyone. This is not always illegal, but care must be taken when amending the zoning map. In that case, the owners of property whose zoning classification is to be considered for change must be notified.[24] This provision may not include every change in the regulations governing that zone, however.

Absentee landowners and concerned citizens must maintain "eternal vigilance" to ensure that changes to their expectations for use of their land do not go unnoticed. There is nothing unusual about this – citizen planners could hardly notify everyone who might be concerned about a change, and we as citizens need to be constantly involved in community decisions if we expect to have our influence felt.

What public input is required?

At least one public hearing must be held by the planning commission before a change is made to a land use ordinance. The city council or county commission can then take action without a public hearing but they do need to do so in a public meeting.[25]

What are the issues?

Local government entities have broad discretion to adopt and amend land use ordinances. The issues involved are simple: is there a legitimate government interest in advancing the goal that prompts consideration of the ordinance? It is reasonably debatable that the land use regulation is consistent with the Utah State Land Use, Development, and Management Act?[26] The decision will be completely legal and enforceable if it meets these tests, unless it violates a state or federal statute.

There are constitutional issues involved in local land use decisions, but they are relatively rare.

This means that these decisions are more political than legal, and the preferences and opinions of local leaders will be given broad deference by the courts. It is usually a waste of time to argue the law or claim a violation of fundamental rights unless there are significant issues of free speech (as with sign ordinances or sexually oriented businesses), unless the proposal clearly has no public benefit at all, or unless the purpose of the decision is an illegal one.

Public clamor can be considered in decisions adopting and amending the ordinances. The background knowledge of decision makers and their opinions as to what is appropriate and not, what is compatible and not, and the general preferences of the community can legitimately be the basis for legislative decisions.[27]

How is the decision appealed?

The decision is not ripe for appeal until the council or county commission has voted. At that time, the only appeal is to the district court.[28] Or, if an unconstitutional taking of private property has occurred, to the Property Rights Ombudsman. Be wary of details and deadlines as discussed in Chapter 13. Local legislative decisions may also be made subject to citizen vote if the requirements to force the matter to referendum are met. See Chapter 17.

Tips for participants

Influencing legislative decisions such as the enactment of ordinances can be as frustrating as any part of land use regulation. Decision makers need not explain their votes, need not provide any evidence to support their decisions and will be afforded extraordinary deference by the courts.

Much of the time, applicants and concerned neighbors do a lot of talking about rights and mandates when discussing amendments to the law, but such discussion is not likely beneficial. While those on the council or commission are likely to be sympathetic to the discussion of burdens and rights, they are not forced into making legislative decisions based on objective evidence and law. These are subjective judgment calls.

The message to be understood here is that it is better to attempt to work out compromises, seek common ground and strike a proper balance in these discussions. No one attempting to influence legislative decisions is going to gain much ground by

pretending to be able to force local government officials to decide one way or the other using potential lawsuits or constitutional claims as a hammer. The better option is to appeal to the decision-makers' sense of what is fair, what is reasonable, and what is in the common interest.

An exception to this general advice would involve specific areas of state and federal preemption as described in Chapters 9 and 10 (billboards, religious uses, group homes, sexually oriented businesses, etc.) and constitutional issues (takings of private property, equal protection and free speech) as outlined in Chapter 15.

3. Annexing Land into a Municipality

Nature of the decision

This is a legislative decision that is made in two phases: First, a municipality that is willing to grow (some are not) must adopt an annexation policy plan.[29]

Second, once the plan is adopted, individual annexation requests can be considered as legislative acts. The proposal usually begins with a petition by the owners of the property in the proposed annexation area.[30] The issue on a specific annexation request is whether the community wishes to make the annexation. The municipality usually has no duty to do so and has virtually complete discretion in making an annexation or not.[31] In some cases, if enough landowners or residents within the proposed annexation area protest the annexation, the annexation cannot occur.[32]

Who makes the decision?

The city council or town board, by majority vote, adopts the annexation policy plan based on recommendations from the planning commission.[33] The legislative body decides whether to approve a specific annexation petition.[34]

What notice is required?

For an annexation policy plan, there are several stages of public hearings that must be held before both the planning commission and the legislative body. Public notices are provided for, but no specific notice to a particular property owner is required.[35] When a particular property or area is slated for annexation, there is yet another set of public notice requirements. These include a requirement that affected property owners be notified directly. A notice must also be mailed to each residence. See the statute for specifics as it is a little more detailed than we have room to cover here.[36]

What public input is required?

There are relatively extensive notice periods, public meetings, and public hearings required in the preparation of an annexation policy plan.[37] Once the petition for a specific annexation is received, it cannot be approved until after a public hearing is held by the legislative body.[38]

What are the issues?

The question involved in annexation is simple: If the proposed annexation meets the technical requirements of the code, is this addition a good thing for the community?[39] Annexations can be refused unless those proposing to join the community donate water shares or make other dedications to offset the burdens that newly annexed territories will add to the community's public services. The Utah Supreme Court stated:

> The determination of the boundaries of a city and what may or may not be encompassed therein, including annexation or severance, is a legislative function to be performed by the governing body of the city. The courts are and should be reluctant to intrude into the prerogative of the legislative branch and will interfere with such action only if it plainly appears that it is so lacking in propriety and reason that it must be deemed capricious and arbitrary or is in excess of the authority of the legislative body.[40]

> [The trial court] called attention to the fact that it was the responsibility of the City Council to consider the total circumstances, including the fact that if new territory is annexed to the City, without making provision for the added burdens, there may result a dilution of municipal services and an increase in tax burdens upon the present citizenry. He expressed what we regard as the sensible view that to require the plaintiffs to convey the amount of water mentioned, in reciprocity for annexation, represented prudence in planning for the City's needs; and he further observed that he was not persuaded that such action was inconsistent with or in excess of the Council's powers, or in any degree unreasonable or arbitrary. To those thoughts we give our approval . . .[41]

How is the decision appealed?

Property owners can protest the petition to annex and refer it to a local appeals body called the boundary commission. This also can be done by the local school district, special service district (a government utility provider), the county itself, or a neighboring town.[42] Once the boundary commission has spoken, the local city council is to follow the commission's directive and annex the land or deny the request as instructed.[43]

Those persons who disagree with the boundary commission's decision, must file a petition with the district court within 20 days or their challenge will be too late.[44]

Tips for participants

Annexation can be controversial, complicated, and about as political as anything you will encounter in the public arena. Those opposing annexations have a smorgasbord of choices about where to start their protests. If some of the property owners included do not officially oppose the annexation, then the local school board, sewer district, township, next-door municipality, or even the county itself can trigger a boundary commission review.[45] Large industrial, commercial and agricultural property owners can individually require that the annexation boundaries exclude their property.[46] There are numerous ways to get the issue into a larger arena for review.

Property owners opposing the annexation must remember to read the statute to be sure they protest the way the statute requires them to protest. It may not be enough to simply go to a meeting and complain. There are specific ways official protests are to be filed and places they are to be delivered.

If your protest is in the wrong form, in the wrong place, or late, it will not meet the criteria and your protest will fail.[47]

4. Changing the Zoning of a Particular Parcel of Land

Nature of the Decision

A rezone occurs when parcels of land are assigned a new zoning district classification on the official land use map. To change the designated zone from residential to commercial would constitution a rezone. Rezoning has long-term effects and is often necessary to manage specific development proposals or fine-tune the ordinance as the vision of a community's needs evolves. While an application for rezoning is legislative

by nature, it is often combined with administrative decisions such as conditional use permits, site plan review, or subdivision plat approvals related to the same parcel. When combined, these decisions are still distinct, and care should be taken to analyze each category of decision under the standards and requirements set by law for resolving that particular land use issue, whether legislative or administrative.

Who makes the decision?

Any change to the zoning map involves a land use regulation, so the final decision is always made by the legislative body—the city council or county commission.[48] As with any amendment to an ordinance, the rezoning of any property in the community can only be enacted after the proposed change has been submitted to the planning commission for its recommendations.[49]

What notice is required?

Both the planning commission and city council or county commission must be involved in adopting or amending a zoning map. Specific notices and hearings must be provided for.

The local government entity must, 10 calendar days before the first required *hearing* to be held by the planning commission:

1. mail specific notice to "affected entities" as defined in statute;[50] *and*
2. post a notice at *www.pmn.utah.gov*; *and*
3. post a notice on the government entity's website (if the entity has a budget that exceeds $250,000); *and*
4. post a physical public notice in the area affected by the proposed change in the zoning map; *and*
5. provide a courtesy notice to each landowner whose property is located entirely or partially within a proposed zoning map enactment or amendment at least ten days before the scheduled day of the first public hearing. This notice must include specific information:
    a. the name of the owner of record (that is, the name of the owner as it appears in the local property tax records at the county recorder's office) of each affected parcel of land;
    b. the current zone of the property;

c. the proposed new zone;

d. outline what uses will be allowed for the property if the zone change occurs;

e. inform the property owner that a written protest may be filed within ten days of the date of the first hearing on the change;

f. provide the address where the protest should be filed;

g. state that any protest will be provided to the council or county commission.

h. give the date, time, and location of the first public hearing.[51]

For example, there is no requirement in state statute that any neighboring landowners be notified of proposed zone changes if a publication is made on the state public meeting notice website. In this circumstance, any mandatory notice to neighbors will only be required by local ordinance. If no notice is required locally then the neighbors will not know of a proposed zone change unless they check the agenda posted in advance either at city hall, on the municipal website, or at *pmn.utah.gov*.

If local ordinances do provide for notice to neighbors or other "third parties," this optional opportunity for notice can be accomplished by requiring a mailing to those property owners who own land within a certain distance of the property which is the subject of a proposed zone change or by requiring that a sign giving notice of the rezone be physically posted on the property involved. The size, durability, print quality, and location of the sign must be reasonably calculated to give notice to passers-by.[52]

Notice before meetings (which are not necessarily hearings) as well as any subsequent hearings held after the first hearing held by the planning commission, city council or county council or commission to consider a change to the zoning map need only be given by:

1. providing public notice at *www.pmn.utah.gov* 24 hours before the meeting;[53] *and*
2. Publish the notice on the government entity's website (if the entity has a budget that exceeds $250,000); *and*

3. post a physical public notice in the area affected by the proposed change in the zoning map.

Again, if there are no requirements in local ordinance to notify the neighbors, then the neighbors will not be legally entitled to any notice of a proposed rezoning other than the notice provided to the general public.

If the proposed change in the zoning map was proposed in a land use application, the local government must also provide three days advance notice to the applicant of every hearing and every meeting to consider the application.[54] This requirement may be waived by applicants if they desire.[55]

What public input is required?

At least one public hearing must be held—by the planning commission—before a change in the zoning map is adopted.[56] The public hearing held by the planning commission on the matter includes an opportunity for public input. The city council or county commission also may hold a public hearing, although this is not required by state law. However, their decision must still be made in a public meeting. Check the local ordinance for specific requirements.

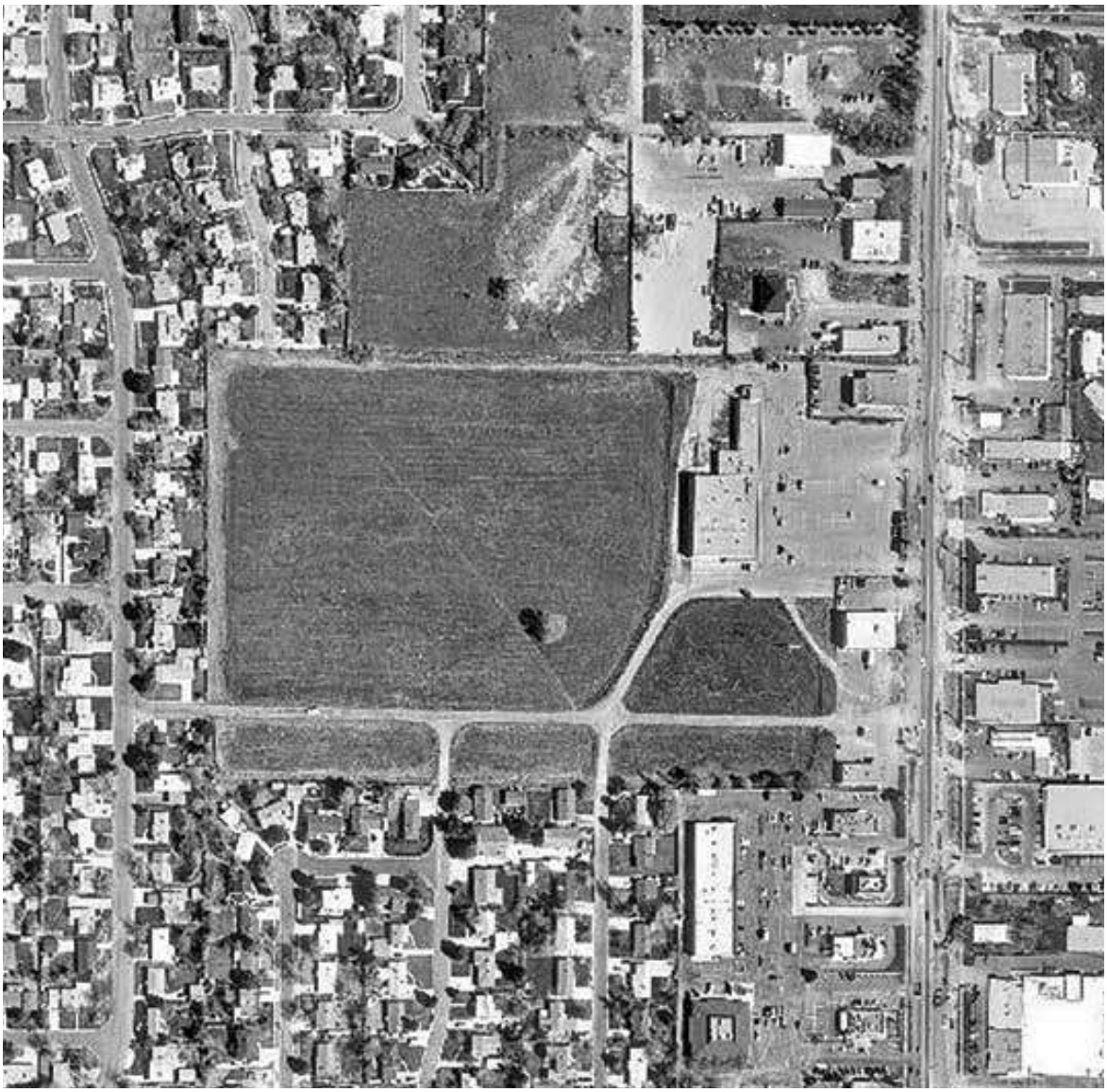
What are the issues?

The issues in all legislative decisions are similar. The question is "what is desirable?" While the decision must advance some public interest consistent with the state Land Use, Development, and Management Act, public interests are very broadly defined.[57]

Public clamor is acceptable as a factor in local decisions involving a zoning change.[58] The opposition of a majority may be noted by the council members or commissioners, and they may base their decision on public support or opposition. Simply stated, zoning decisions are based on compatibility. If it is reasonably debatable that the proposed uses are compatible with other uses in the zoning district or in the adjoining districts, the council or commission may approve the change. If it is reasonably debatable that they are not compatible or the change in zoning does or does not advance the purposes of the state Land Use, Development, and Management Act, then the proposed change may be denied. With rare exception, it is reasonably debatable.[59]

How is the decision appealed?

The decision is not ripe for appeal until the council or county commission has voted. At that time, the only appeal is to the district court or, if an unconstitutional taking of private property has occurred, to the Property Rights Ombudsman. See Chapter 13.



Zoning ordinances must determine what uses are compatible next to other uses; local legislative bodies will be given broad discretion to decide such issues. The field in this photo was "downzoned" from commercial to residential. That decision was upheld in the case of Smith Investment c. Sandy City in 1998. Photo courtesy of Sandy City.

How Can a Zoning Decision be Challenged?

Case Law — Bradley v. Payson City

In a recent case, the City of Payson considered whether to allow moderate-density residential units near an industrial park. The general plan anticipated moderate densities in the area. The applicant made a good case for the change. The staff recommended approval, and the planning commission also endorsed the plan. Neighboring industrial landowners, however, objected because of a concern that late night deliveries to a 24-hour trucking terminal operated by a nearby Associated Foods would disrupt those living in the proposed rental units at night. Furthermore, operators of a nearby fruit-processing plant were worried about the noise and smell they generate so close to housing uses. The Payson City Council noted the concern and denied the change in zone.

Utah's Supreme Court later upheld the city's decision, stating clearly what the standard is for rezoning:

> We have long recognized that zoning decisions that are made as an exercise of legislative powers are entitled to particular deference. . . 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 . . . that it will avoid substituting its judgment for that of the legislative body of the municipality.[60]
>
> Though a municipality may have a myriad of competing choices before it, [t]he 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 itself evidence an abuse of discretion.[61]

In the Bradley case, the Supreme Court said that the city council did not need to base its decision on substantial evidence but could consider public input and the experience of the council members. The general concerns expressed about trucking noises, fruit smells, and a desire to have agricultural amenities preserved were each endorsed by the court as "a legitimate ground for denying the Plaintiff's proposed zoning change. Payson City has the right to deny a zoning change if it

Industrial neighbors of some proposed multi-family housing in Payson, Utah complained that their 24-hour operations were not compatible with housing. In a 2003 case, the Utah Supreme Court affirmed the Payson City Council's decision to deny the rezone to residential uses.

has a 'reasonable basis to believe that it will conserve the values of other properties and encourage the most appropriate use thereof.'"[62]

Bradley argued that the testimony of an expert witness about the desirability of affordable housing should have trumped the compatibility talk. The court simply did not want to weigh what uses are most important to the community. "The city council's decision to give greater weight to [the opponents] and deny the rezoning simply reflects the exercise of legislative policy preferences that are entirely within its discretion."[63]

Tips for participants

The notice requirement for zoning changes is an important point to understand. There are no vested rights to existing zoning, nor any guarantees that your property or the neighbor's land will remain in the zone that it had when originally acquired or that it has now.[64]

While the zoning district where your property is located cannot be changed without notice to you[65], your neighbor's land can be rezoned without notice to you, unless local ordinance provides otherwise. If you miss the chance to protest or comment, the decision will be very difficult to challenge since it is a legislative decision that will be upheld if it is debatable that it could promote the general welfare.

The rules for the zoning district assigned to your property may be changed without specific notice to you. If you are counting on your property being worth a certain value or being able to be used for the purpose you intended when you purchased it, you must keep up with local land use decisions. Wise investors will condition the purchase of property on necessary land use approvals or use options to purchase instead of outright acquisition as a means of securing a right to ownership before local approvals are in place.

When you communicate with citizen planners to discuss proposed zone changes, remember that much of the time, applicants and concerned neighbors do a lot of talking about rights and mandates, but this is really not very helpful legally. While those on the council or commission are likely to be sympathetic to the discussion of burdens and rights, they are not forced into making legislative decisions based on objective evidence. These are subjective judgment calls.

Any time the decision-maker has the broad discretion afforded by a rezoning request, you have the option of participating and providing factual data to support your opinion. You may also simply make general objections to the same. Although the legislative body can make a rezoning decision on opinion alone, this does not mean they are prohibited from considering relevant factual information as well.

At a recent meeting a concerned neighbor stood before our local city council and demanded to know how many people she needed on her side to stop the rezoning of a nearby piece of land for a convenience store. The council did not know how to respond—obviously wondering what size horde she could summon to descend on them—but the answer is simple. If there are five on the council, then she needs three. It does not matter how many townspeople object—it is not a referendum or a pure democracy. In a representative democracy, the matter turns completely on how a majority of the legislative body votes. She needs to somehow figure out what is going on in the five or so inches of gray matter between the ears of three council members and get them to agree with her.[66]

5. Temporary Land Use Ordinances (aka moratoria)

Nature of the Decision

Sometimes when development pressure is intense enough or the local leaders are particularly concerned about loopholes in the law or the lack of an adequate ordinance to protect the public interest, a moratorium stopping all development is desired. This is a land use "time-out" and can be imposed very quickly if the political will is there to do so.

Who makes the decision?

Implementing a temporary land use ordinance is a legislative decision, so again only the council or county commission can adopt a temporary land use ordinance. The planning commission need not comment beforehand.[67]

What notice is required?

The only notice required is that which must be posted 24-hours in advance under the Open and Public Meetings Act.[68]

What public input is required?

None is required. The decision must be made in a public meeting, but a public hearing is not required by state statute.[69]

What are the issues?

There are some specific findings that the local council or commission must enter as a finding on the record—that there is a "compelling, countervailing public interest" that justifies the quick imposition of the ordinance or that the area affected is "unregulated."[70]

This requirement that the legislative body find a "compelling, countervailing public interest" to justify a temporary regulation is a much higher requirement than it is for more permanent regulations, which can be justified by a reasonably debatable claim that they advance the interests of the community.

The legislative body also must establish the period of time the temporary zoning ordinance will be in effect, which is usually limited to six months.[71] A temporary land use regulation may not be used in conjunction with the pending ordinance

exception to the vested rights doctrine (see "pending ordinances" at p. 78) to delay processing an application more than six months.[72]

Tips for participants

These maneuvers can sneak up on you. If you didn't see a "T.O." coming, it's probably already too late to figure out what to do about it. There is not much room for influencing the short-run decision when no public hearing is allowed and only 24 hours' notice is given. Of course, the local officials can give notice if they choose to and can allow input if they consider it appropriate— but they are not required by law to provide such.

The pristine waters of Lake Tahoe on the California/Nevada state line were a "natural treasure" that justified a building moratorium lasting almost three years according to a 2002 case before the U.S. Supreme Court. Photo courtesy the American Planning Association.

Moratoria have been declared legal. The temporary loss of use involved would rarely be found to be a "taking" of property for which compensation must be paid.[73] Of course the decision must advance some legitimate public purpose and can be challenged if it does not.

The statutory requirement that the legislative body find a "compelling" public interest raises the bar of discretion. For example, in a landmark case related to vested property rights, the Utah Supreme Court stated that the definition of a compelling, countervailing interest would not include the desire of current city officials to substitute their planning preferences for those of their predecessors. "Compelling, countervailing interests" are defined as serious threats to public health, safety, or welfare.[74]

If challenged, a temporary land use ordinance would be the toughest type of legislative decision to defend. It is usually not very productive to challenge temporary land use ordinances, because the process of appeal usually takes more time than the temporary ordinance will likely be in effect.

On the other hand, if development that would otherwise proceed could be permanently hindered if the ordinance is enacted, a challenge should be brought as soon as it is ripe for review, which is generally within 30 days of a written decision.[75] Since the legislative body is making the decision and the impact is immediate, those seeking to overturn the temporary land use ordinance can probably go directly to court or seek arbitration for a taking of property rights without seeking any other local appeal.[76]

Despite this instant access to court, it is likely that your best efforts should be directed to influencing the decision that must occur six months later—when the temporary ordinance is made permanent. During that process a full hearing will be required under the traditional method of adopting land use ordinances and amendments to the ordinance.[77]

How is the decision appealed?

The decision is not ripe for appeal until the council or county commission has voted. At that time, the only appeal is to the district court or, if an unconstitutional taking of private property has occurred, to the Property Rights Ombudsman. See Chapter 13.

If you think you have a good chance to overturn such a decision, remember you only have 30 days to make an appeal.[78]

6. 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.[79] 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.[80] 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.[81] 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.[82]

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.[83]

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.[84]

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[85]), 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.[86]

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.[87] If approving the agreement is a legislative act, only the elected legislative body can approve it.

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.[88]

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.[89]

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.[90]

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.[91] 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.[92] 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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1 Utah Code Ann. §10-9a-103(33) (municipalities); Utah Code Ann. §17-27a-103(37) (counties).

2 It must be noted that while almost all land use regulations are adopted by the local city council or county council or commission, another avenue exists via citizen initiative. The Utah Constitution, Article VI, Section 1(2), gives citizens the right to initiate the adoption of legislation by submitting such via petition. The citizenry then votes for the proposed legislation in a city or county-wide election. A law passed in such a manner is deemed equal to any passed by the local council or commission. Citizen initiatives are also governed by Utah Code Ann. §§20A-4 - 6.

3 Utah Code Ann. §10-9a-403(2) (municipalities); Utah Code Ann. §17-27a-403(2) (counties).

4 See, generally, the Utah Open Meetings Act, Utah Code Ann. 52-4-101 et seq.

5 Utah Code Ann 10-9a-103(3) (municipalities) and Utah Code Ann. 17-27a-103(3) (counties) (The term "Affected Entity" includes other governmental agencies such as sewer districts, water districts, school districts, the county (if a city or town is making the general plan changes), and public utilities. Private property owners who have provided notice to the county or municipality that they wish to be notified of proposed changes to the land use regulations are also entitled to notice as affected entities).

6 Utah Code Ann. §10-9a-203 (municipalities); Utah Code Ann. §17-27a-203 (counties).

7 Utah Code Ann. 63A-12-201 (the general authorization for the website).

8 Utah Code Ann. 52-4-202(3)(a)(ii)(B), (The duty of each public body to post documents on the website is contained in the Utah Open and Public Meetings Act at and in other portions of the Utah Code relating to each of those bodies. See Appendix B, Access to Public Records.

9 Supra note No less than ten days before preparing a general plan or comprehensive amendment to a general plan, the county or municipality must notify "affected entities" as defined in statute as well as the public and other entities that have a stake in what the community is planning. Public notice is provided by means of the Public Information Website, a truly remarkable resource for citizens to find out what government entities are up to. Found at pmn.utah.gov, it is a treasure trove of minutes, agenda, and audio recordings. Every public body in the state must use the website to provide public notices and other specified public documents..

10 Utah Code Ann. §52-4-202.

11 Utah Code Ann. §§10-9a-202 (municipalities); §§17-27a-202 (counties).

12 Id.

13 Utah Code Ann. §§10-9a-404(1)(a) (municipalities); §§17-27a-404(1)(a) (counties).

14 Utah Code Ann. §§10-9a-404 (municipalities); §§17-27a-404 (counties).

15 *Bradley v. Payson City*, 2003 UT 16, ¶¶26-28, 55 P. 3d 47 (Utah 2003) (holding that public comments are a legitimate source of information for city council members to base their decisions).

16 Utah Code Ann. §10-9a-103(33) (municipalities); Utah Code Ann. §17-27a-103(37) (counties) (*A "land use regulation" is defined in statute as "a legislative decision enacted by ordinance, law, code, map, resolution, specification, fee, or rule that governs the use or development of land; includes the adoption or amendment of a zoning map or the text of the zoning code; and does not include a land use decision of the legislative body acting as the land use authority, even if the decision is expressed in a resolution or ordinance . . .")* .

17 Utah Code Ann. §10-9a-503(1) (municipalities); Utah Code Ann. §17-27a-503(1) (counties).

18 Utah Code Ann. §10-9a-503(2) (municipalities); Utah Code Ann. §17-27a-503(2) (counties).

19 Utah Code Ann. §10-9a-205(2)(a) requires notice to affected entities (municipalities); Utah Code Ann. §17-27a-205(2)(a) requires notice to affected entities (counties) (see also Supra note No less than ten days before preparing a general plan or comprehensive amendment to a general plan, the county or municipality must notify "affected entities" as defined in statute as well as the public and other entities that have a stake in what the community is planning. Public notice is provided by means of the Public Information Website, a truly remarkable resource for citizens to find out what government entities are up to. Found at pmn.utah.gov, it is a treasure trove of minutes, agenda, and audio recordings. Every public body in the state must use the website to provide public notices and other specified public documents.).

20 Utah Code Ann §10-9a-103(3)(c) (municipalities) and Utah Code Ann. §17-27a-103(3)(c) (counties).

21 Utah Code Ann. §52-4-202(1) (While the land use statute does not specifically require notice at the state website for meetings that discuss changes in land use regulations, the Open and Public Meetings Act requires such notice.)

22 Utah Code Ann. §10-9a-202 (municipalities); §17-27a-202 (counties).

23 Id.

24 Utah Code Ann. §10-9a-205(4) (municipalities); Utah Code Ann. §17-27a-205(4) (counties).

25 Utah Code Ann. §10-9a-502 (municipalities); Utah Code Ann. §17-27a-502 (counties).

26 Utah Code Ann §10-9a-801(3)(a) (municipalities) and Utah Code Ann. §17-27a-801 (3)(a) (counties) (This wording of the standard of review of legislative land use regulations is of recent origin. It has been amended since court cases which stated that a regulation will be upheld if it is "reasonably debatable" that the regulation "is in the interest of the general welfare") (See also *Bradley,* 2003 UT 16, at ¶14).

27 *Id. at* ¶¶26-28.

28 Utah Code Ann §10-9a-801(2) (municipalities) and Utah Code Ann. §17-27a-801 (2) (counties).

29 Utah Code Ann. §10-2-401.5(1).

30 *Utah Code Ann. §10-2-403 and §10-2-418 (The code provides that the annexation of certain islands and peninsulas adjacent to a municipality may be annexed without a petition by the property owners).*

31 See *Bradshaw v. Beaver City*, 27 Utah 2d 135, 493 P.2d 643, (1972) (holding that annexation is a legislative function to be performed by the governing body of a city); See also Child v. Spanish Fork, 538 P.2d 184 (Utah 1975) (holding that when determining city boundaries, a city council is endowed with broad discretion to make such a determination).

32 Utah Code Ann. §10-2-407 (If sufficient protest is received, annexation issues can be referred to a boundary commission created for the purpose of hearing annexation issues under Utah Code Ann. §10-2-409 and other related provisions).

33 Utah Code Ann. §10-2-408.

34 Utah Code Ann. §10-2-408.

35 Utah Code Ann. §10-2-401.5.

36 Utah Code Ann. §10-2-406.
37 Utah Code Ann. §10-2-401.5.
38 Utah Code Ann. §10-2-407(7).
39 Utah Code Ann. §10-2-403(5) (Technical requirements include limitations on proposed annexations that create an island or peninsula or which complicate the delivery of services to the area. School district boundaries are to be considered as well.)
40 *Bradshaw*, 463 P.2d 643 at 643.
41 *Child*, 538 P.2d 184 at 186.
42 Utah Code Ann. §10-2-407(1) (Protests may be filed by property owners as well as by affected entities) (See also Supra note No less than ten days before preparing a general plan or comprehensive amendment to a general plan, the county or municipality must notify "affected entities" as defined in statute as well as the public and other entities that have a stake in what the community is planning. Public notice is provided by means of the Public Information Website, a truly remarkable resource for citizens to find out what government entities are up to. Found at pmn.utah.gov, it is a treasure trove of minutes, agenda, and audio recordings. Every public body in the state must use the website to provide public notices and other specified public documents.).
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43 Utah Code Ann. §10-2-408.
44 Utah Code Ann. §10-2-417.
45 Utah Code Ann. §10-2-407.
46 Utah Code Ann. §10-2-407(1)(b) which provides that the owners of 1,000 or 1,500 contiguous acres of ground within the proposed annexation area can, under certain circumstances, protest the proposed annexation.
47 Utah Code Ann. §10-2-407(2) and other requirements in the annexation code.
48 Utah Code Ann. §10-9a-103(33) (municipalities); Utah Code Ann. §17-27a-103(37) (counties).
49 Utah Code Ann. §10-9a-503(2) (municipalities); Utah Code Ann. §17-27a-503(2) (counties).
50 Utah Code Ann. §10-9a-205(2)(a) (municipalities); Utah Code Ann. §17-27a-205(2)(a) (counties). See also Supra note No less than ten days before preparing a general plan or comprehensive amendment to a general plan, the county or municipality must notify "affected entities" as defined in statute as well as the public and other entities that have a stake in what the community is planning. Public notice is provided by means of the Public Information Website, a truly remarkable resource for citizens to find out what government entities are up to. Found at pmn.utah.gov, it is a treasure trove of minutes, agenda, and audio recordings. Every public body in the state must use the website to provide public notices and other specified public documents..
51 Utah Code Ann. §10-9a-205(4) (municipalities); Utah Code Ann. §17-27a-205(4) (counties).
52 Utah Code Ann. §10-9a-206 (municipalities); Utah Code Ann. §17-27a-206 (counties).
53 Utah Code Ann. §52-4-202(1) (While the land use statute does not specifically require notice at the state website for meetings to discuss changes in land use regulations, the Open and Public Meetings Act requires that notice).
54 Utah Code Ann. §10-9a-202 (municipalities); §17-27a-202 (counties).
55 Id.
56 Utah Code Ann. §10-9a-502(1)(b) (municipalities); Utah Code Ann. §17-27a-502(1)(b) (counties).
57 Utah Code Ann. §10-9a-101 et seq (municipalities); Utah Code Ann. §17-27a-101 et seq (counties). (The purposes of the Land Use, Development, and Management Act, also known as "LUDMA" are outlined at Utah Code Ann. §10-9a-102 (municipalities); Utah Code Ann. §17-27a-102 (counties). Included in the purposes are to provide for the health, safety, and welfare; to promote prosperity; improve morals, peace, good order, comfort, convenience, and aesthetics of the local government entity and its present and future

inhabitants and businesses; protect the tax base; secure economy in governmental expenditures; foster agricultural and other industries; protect urban and nonurban development; protect and ensure sunlight for solar energy devices; provide fundamental fairness in land use regulation; facilitate orderly growth and allow growth in a variety of housing types; and to protect property values. These purposes are identical for both municipalities and counties.)

58 *Bradley*, 2003 UT 16, at ¶¶26-28.

59 *Harmon City v. Draper, 2000 UT App 31, 997 P.2d 321, 327 (Utah App 2000) (holding that the "reasonably debatable" standard applies to legislative actions) (See also narrative regarding the case in Chapter 3).*

60 *Bradley,* 2003 UT 16, at ¶12, citing *Crestview–Holladay Homeowners Ass'n., Inc. v. Engh Floral Co.*, 545 P.2d 1150,1152 (Utah 1976).

61 Id. at ¶24.

62 Id. at ¶29, citing *Smith Investment Co. v. Sandy City*, 958 P.2d 245, 255 (Utah Ct. App. 1998).

63 *Bradley,* 2003 UT 16 at ¶30.

64 *Smith Investment,* 958 P.2d 245 at 255.

65 Utah Code Ann. §10-9a-205(4) (municipalities); Utah Code Ann. §17-27a-205(4) (counties).

66 See also *Harmon City, 997 P.2d 32; Smith Investment,* 958 P.2d 245; and *Bradley*, 2003 UT 16 (These cases are worth reviewing to get a clear picture of just how much discretion the courts are willing to give to local government in legislative matters) (Both cases are also discussed in more detail in this book – Harmon in Chapter 3 and Smith Investment in Chapter 16).

67 Utah Code Ann. §10-9a-504(1)(a) (municipalities); Utah Code Ann. §17-27a-504(1)(a) (counties).

68 Utah Code Ann. §10-9-504(1)(a) (municipalities); Utah Code Ann. §17-27a-504(1)(a) (counties) (Where the statute does not specifically provide for a public hearing, the practice in Utah has been not to require a notice of a hearing (or the proposed temporary land use regulation) be provided to specific landowners as would normally be required under Utah Code Ann. §10-9-205(1)(a) (municipalities); Utah Code Ann. §17-27a-205(1)(a) (counties). On the other hand, Utah Code Ann. §52-4-202(1)(a)(i) of the Open and Public Meetings Act, requires that an agenda be published for all public meetings. The temporary regulation would need to be referenced on that agenda 24 hours before it is adopted. The meeting would not be a public hearing and there would be no requirement to allow public comment before the temporary land use regulation is adopted).

69 Id.

70 Utah Code Ann. §10-9a-504(1) (a) (2) (municipalities); §17-27a-504(1) (a) (i) (counties) (Requiring a "compelling, countervailing public interest" is a much stricter requirement than is needed to justify other land use regulations where there must only be a reasonably debatable argument that the regulation advances the public interest).

71 Utah Code Ann. §10-9a-504(2) (municipalities); §17-27a-504(2) (counties) (The code specifically allows a temporary ordinance relating to a proposed highway corridor to be renewed for up to a total of 18 months in §10-9a-504(3) (6) (2) (municipalities) and §17-27a-504(3) (6) (2) (counties)).

72 Utah Code Ann. § 10-9a-504(2)(b) (2023 General Session)

73 *Tahoe Sierra Preservation Council v.Tahoe Regional Planning Agency*, 535 U.S. 302 (200*2); Town of Alta v. Ben Hame*, 836 P.2d 797 (Utah App. 1992).

74 *Western Land Equities v. Logan, 617 P.2d 388, 396 (Utah 1980).*

75 Utah Code Ann. §10-9a-801(5) (municipalities) and §17-27a-801(5) (counties).

76 Utah Code Ann. §10-9a-103(33) (municipalities) and §17-27a-103(39) (The definition of a "Land Use Regulation" in (counties) does not exclude temporary land use regulations from that definition. As legislative acts, they are not subject to administrative local appeal requirements and may be challenged in district court

without "exhausting local remedies" as required for administrative land use decisions by Utah Code Ann. §§10-9a-701(1)(a) and 10-9a-801(2) (a) (municipalities) and §§17-27a-701(1)(a) and 17-27a-801(2) (a) (counties)).

77 Utah Code Ann. §§10-9a-205, 502 (municipalities); §§17-27a-205, 502 (counties).

78 Utah Code Ann. §10-9a-801(5) (municipalities) and §17-27a-801(5) (counties).

79 Utah Code §10-9a-532 (municipalities) §17-27a-528 (counties).

80 Utah Code §10-9a-532(2)(d) (municipalities) §17-27a-528(2)(d) (counties).

81 Utah Code §10-9a-532(2)(a) (municipalities) §17-27a-528(2)(a) (counties).

82 Utah Code §10-9a-532(2)(b) (municipalities) §17-27a-528(2)(b) (counties).

83 Utah Code §10-9a-532(2)(a)(iii) (municipalities) §17-27a-528(2)(a)(iii) (counties).

84 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).

85 Utah Code §10-9a-604.1(1)(b) (municipalities) §17-27a-604.1(1)(b) (counties).

86 See footnote 83, above.

87 *Baker v. Carlson*, 2018 UT 59. See extended discussion of the case in this volume, at p.217-220

88 See footnote 83, above.

89 See discussion, above.

90 Utah Code §10-9a-532(2)(d) (municipalities) §17-27a-528(2)(d) (counties).

91 See footnote 83, above.

92 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.