THE UTAH LAND USE INSTITUTE

APPEAL AUTHORITY – BEST PRACTICES

Utah Land Use Regulation Topical Series

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The Office of the Property Rights Ombudsman has also provided funding for this training program from the 1% surcharge on all building permits in the State of Utah.

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The opinions expressed here are those of the author, and not those of the Utah Land Use Institute nor the Office of the Property Rights Ombudsman

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NOTE: Code references to the Utah Land Use, Development, and Management Act (LUDMA) are made to the municipal version of the Act. In each case, there is an identical section of the county version of the Act, which can usually be found by substituting “17-27a” for “10-9a” in the municipal citation.

What is the Goal in Resolving Land Use Disputes?

- Use a process that is fair and neutral
- Use a process that appears to be fair and neutral – preserves community support and credibility
- Achieve results which are wise and sustainable
- Protect due process rights of all involved
- Avoid unneeded technicalities and delay
- Resolve issues on the merits, consistent with the law
- Avoid actions at the district court
- Achieve results in a form that the District Court can affirm
    - Adequate findings of fact and conclusions of law in the record.
    - Process consistent with relevant law.
- Achieve results that the District Court will want to affirm

How shall we resolve land use disputes?

There are various options beyond negotiation, mediation, and other forms of dispute resolution.

- Ask the legislative body to change the land use regulation involved so as to avoid the dispute.
- Alternative dispute resolution, including inviting the assistance of the Property Rights Ombudsman – www.propertyrights.utah.gov.
- Appeal Authority – for administrative disputes only.
- District Court – for disputes about legislative enactments[1], or to appeal the decision of the appeal authority.

[1] We refer to legislative acts here as "enactments" rather than "decisions". The Utah Code at 10-9a-103 defines legislative acts as "land use regulations" and does not refer to legislative acts as "decisions". That term is reserved for administrative acts. While this is not intuitive, we respect the nuance here.

Challenging Legislative Regulations - District Court or Referendum

If one challenges the creation or amendment of a land use regulation, the dispute must be filed with the district court or the signature-gathering process involved in a ballot referendum must be initiate – one CANNOT use the local appeal authority to resolve a legislative dispute. UCA 10-9a-707(6)

What is a legislative act/local land use regulation? Local legislative acts are ALWAYS performed by the local city council or county commission. No other entity has legislative powers. Examples of legislative acts include:

- Creating or amending land use regulations
- Enacting ordinances and amendments to ordinances
- Changes to the zoning map
- Amendments to general plan
- Annexation
- Enacting local development standards. UCA 10-9a-509(1)(g).
- Some development agreements, such as for large projects *Baker v. Carlson*, 2018 Utah 59, holding approval of a large development plan to be a legislative act subject to referendum.

Standard of Review – Legislative Acts

Current Standard: Is it reasonably debatable that the act is consistent with the Land Use, Development, and Management Act (LUDMA)? UCA 10-9a-801(3)(a). This standard of review replaced the old common law standard first articulated by the Utah Supreme Court: to survive a challenge, it must be shown to be "reasonably debatable that the regulation advances the general welfare" *Bradley v. Payson City Corp*, 2003 UT 16. The "consistency with LUDMA" standard is thus a different standard.

It is worth noting that this standard of review is a high threshold to reach for potential challengers to local land use regulations. We have no case law examples of local land use regulations being overturned on this "reasonably debatable" standard. It is more common for local regulations to fall to challenges based on preemptive or contrary state and federal law.

That said, how is a legislative decision reviewed with regard to a potential conflicting statute or case law? Local application of the law is not entitled to "Chevron-style" deference – legal issues reviewed for correctness without any deference to the local decision-makers. *Outfront Media v. Salt Lake City,* 2017 UT 74, f. 13.

In determining whether a decision is "consistent" with LUDMA, the purposes of the state statute may be considered:

a) provide for the health, safety, and welfare;
b) promote the prosperity;
c) improve the morals, peace, good order, comfort, convenience, and aesthetics of each municipality and each municipality's present and future inhabitants and businesses;
d) protect the tax base;
e) secure economy in governmental expenditures;
f) foster the state's agricultural and other industries;
g) protect both urban and nonurban development;
h) protect and ensure access to sunlight for solar energy devices;
i) provide fundamental fairness in land use regulation;
j) facilitate orderly growth and allow growth in a variety of housing types; and
k) protect property values. UCA 10-9a-102

It may be worth noting that a 2023 legislative performance audit of Utah housing policies made several recommendations, including Recommendation 1.2:

> "We recommend that the Legislature consider amending the land use, development, and management acts at both the county and

city level to clearly emphasize housing production and affordability as primary goals of land use regulations."[2]

Challenging Administrative Decisions - Local Appeal Authority

On all administrative matters – that is every decision that is not legislative in nature – a person seeking to appeal MUST exhaust local remedies before legal action – using the local appeal authority UCA 10-9a-801(1); UCA 10-9a-701(1)(a); *Patterson v. American Fork City*, 2003 Utah 7

What is an administrative land use decision?

An administrative decision is any decision which is not legislative, including some decisions by the city council or county council or county commission when not acting in their legislative capacity. For example:

- Subdivision approvals
- Conditional use permits
- Site plan review
- Project approvals where no zone change is involved
- Applying the land use regulations to any given question
- Building permits
- Some development agreements – smaller projects. This includes all development agreements not approved by the legislative body and some which are. This distinction can be complicated and should be considered with advice of legal counsel.

Administrative Appeals - Minimum Requirements of State Law

An administrative act in LUDMA is referred to as a "Land Use Decision" which is defined to mean "an administrative decision of a

[2] A Performance Audit of Utah Housing Policy--A Case for Statewide Strategic Planning and Accountability (Report #2023-16)

land use authority or appeal authority regarding (a) a land use permit; or (b) a land use application." UCA 10-9a-103

This definition was amended in 2022 to exclude language included in the definition before that year which also included "(c) the enforcement of a land use regulation, land use permit, or development agreement" UCA 10-9a-103 (2021)

Some have wondered if this means that local enforcement actions cannot be appealed to the appeal authority. However, the code also provides "Only a decision in which a land use authority has applied a land use regulation to a particular land use application, person, or parcel can be appealed to an appeal authority" UCA 10-91-707(6). This language would seem to clearly provide for appeal of enforcement actions to the appeal authority and is consistent with the broad decision by the Utah Supreme Court in *Patterson v. American Fork City*, 2003 Utah 7, which held that each and every administrative act must be appealed locally before filing action in district court.

Who Should Be the Appeal Authority?

The local planning commission may recommend, and the legislative body approve, one of several options for an appeal authority. There may, in fact, be more than one appeal authority so long as the ordinance outlines the types of issues that would go before each. These include:

- A board of adjustment (that term is no longer mentioned in state code)
- A single person hearing officer or administrative law judge
- Other appeal authority panel, with a title assigned by the ordinance such as "Appeals Board" or "Appeal Authority". UCA 10-91-701(1).

Best Practices – Choosing the Appeal Authority

- Not the legislative body. Appeal authority review is quasi-judicial and not legislative or policy driven. It may be difficult for elected officials to take off their legislative hats and act as quasi-judicial officers in the face of public clamor and strident but inappropriate policy arguments.
- Does not need to include local residents. Can involve expertise of anyone without regard to residency.
- One appeal authority could be shared by several communities who could appoint a panel of impartial board members representing several communities.
- Must have extensive experience as land use attorney or planning professional is essential.

Pros and Cons - Board of Adjustment or Appeals Board

- On a positive note, a panel involves local community members in the land use process.
- A local panel is more likely to defer to the original decision-making land use authority, so may be preferred by the planning commission and legislative body.
- However, on the other hand, decisions are more likely to be based upon policy – public clamor – instead of upon the facts and law.
- Decisions are less likely to be legally correct
- It requires more training and staff support for proper functioning of a board, for example:
    - Notices of meetings and publishing agenda
    - Establishing the record
    - Training the board on legal standards and quasi-judicial procedures – this is particularly difficult when the board does not meet often and board members change between hearings.
    - Keeping minutes

- Slower – staff would prepare final decisions for later review and approval by the body. More difficult to coordinate meeting times with individual calendars
- Triggers the open and public meetings act and requires notice, public meetings (not necessarily hearings) and formal minutes and audio or video recording.

Pros and Cons - Hearing Officer

- Local officials may be less pleased with results – more independent and not as attuned to preferred policies and politics as a panel might be.
- Decisions more likely to be legally correct.
- Can prepare decisions more quickly and correctly.
- Less risk of district court reversal.
- Can cover all functions of appeal authority – arrange for notices to parties, calendaring hearings, conduct of hearings, and preparation of decisions.
- Less training and staff support would be needed.
- More flexible hearing arrangements.
- Hearings are not public meetings. No required notice beyond the parties.

Standard of Review for Local Appeals

The planning commission may recommend and the legislative body approve the standard of review for local appeals. There are two choices:

- **De novo review.** The appeal authority may either hear the application or other issue which is the basis for the appeal all over again, as if the appeal authority were the original land use authority assigned to make the decision, or
- **Record review.** The appeal authority simply reviews the evidence, law, and reasoning of the original land use authority

which made the decision to determine if the decision was legally correct.

De novo – this is the default standard in state statute. If the local jurisdiction does not designate a record review in its ordinance, then all appeals are considered de novo. UCA 10-9a-707(2). In this option, the appeal authority creates its own new record and can hear new evidence and argument.

Record – this review is based on substantial evidence and legal reasoning in the record of the decision below. If on the record, no new evidence can be provided by any party or the appeal authority after the original decision by the land use authority. UCA 10-9a-707(3), *Northern Monticello Alliance v. San Juan County (NMA II)*, 2023 UT App 18. The appeal authority may hear new argument that the original decision did not correctly apply the relevant law.

Best Practices – Drafting the Ordinance Provision Providing a Standard of Review for Local Appeals

Not this way: "The Hearing Officer shall, on appeal, presume that the decision applying the land use ordinance is valid and determine only whether or not the decision is arbitrary, capricious, or illegal. The burden of proof on appeal is on the appellant."

Better - If De Novo Review: "The Appeal Authority shall review the matter de novo, without deference to the land use authority's determination of factual matters. It shall correctly apply the relevant law." See Utah Code Ann. 10-9a-707; *Outfront Media v. Salt Lake City,* 2017 UT 74, f. 13.

Better - If Record Review: "The Appeal Authority shall uphold the decision if substantial evidence in the record of the decision supports every essential finding of fact and if the decision is consistent with relevant law. Issues of law shall be reviewed for correctness." See Utah Code Ann. 10-9a-707

Best Practices – Pros and Cons of Record Review Option

- Defers to the elected or appointed officials who constituted the land use authority which made the decision from which the appeal is brought. The review is thus more politically palatable because it defers to those officials.
- Provides more insulation for local government from district court reversal – includes a second opportunity to validate the record before legal action.
- Not intuitive for a citizen appeals board.
- Avoids further public hearings (but must allow those with protected property interests to participate in the appeal hearing).
- If decision is not upheld on appeal based on the lack of substantial evidence, the remedy is remand the matter back to the land use authority for further review, not to reverse the decision. *McElhaney v. Moab City*, 2017 UT 65.

Best Practices – Pros and Cons of De Novo Review

- This option involves an opportunity to create a new record entirely.
- It may allow for a public hearing, if desired and provided by ordinance, and new information can be considered after the original review is complete. This can, however, perpetuate public clamor.
- Provides a complete opportunity for appeal authority to manage the record and better insulate the local entity from losing the case if it goes to court.
- However, the new decision is not made by an entity with the particular view or expertise of the planning commission or other land use authority.
- If decision made by the original land use authority is overturned, the remedy is reversal not remand. The appeal authority imposes a new decision with immediate effect.
- The process is thus more efficient with fewer reconsiderations.

Who Has Standing to Appeal?

According to the Utah Code – a person bringing a land use appeal must be an "adversely affected party" or a "land use applicant". Utah Code Ann. 10-9a-802(2)(a).

A "Land Use Applicant" is defined in the code to be "a property owner, or the property owner's designee, who submits a land use application regarding the property owner's land." Utah Code Ann. 10-9a-103.

An "Adversely Affected Party" is defined in the code to be "a person other than a land use applicant who: (a) owns real property adjoining the property that is the subject of a land use application or land use decision; or (b) will suffer a damage different in kind than, or an injury distinct from, the general community as a result of the land use decision." Utah Code Ann. 10-9a-103.

The state code is supplemented and applied by the courts. According to the Utah Supreme Court, in order to have standing, an appellant must show some distinct and palpable injury that gives a personal stake in the outcome of the legal dispute. Specht v. Big Water Town, 2017 UT App 75 p. 52-53.

For example, a property owner whose property abutted a cul-de-sac had no standing to appeal a decision vacating part of the cul-de-sac because he had not established any special injury from the decision which was different in kind from the public in general. He did not demonstrate that his access to the cul-de-sac was substantially impaired. Specht v. Big Water Town, 2017 UT App 75 p. 54.

If one challenges a legal defect in the process of making a land use decision, one must be able to establish proof of prejudice from the legal defect and "that there is a reasonable likelihood that the legal defect in the city's process changed the outcome of the proceeding."

Potter v. South Salt Lake City, 2018 UT 21 p. 33, f. 5; modifying *Springville Citizens v. Springville*, 1999 UT 25, p. 31.

Standing may otherwise flow from local ordinance, so it is essential check the exact relevant wording of the city or county code.

Who Has Due Process Rights in an Appeal?

The issue of who is entitled to due process is not the same issue as who can initiate an appeal. In fact, the person who files the appeal may have standing, but not the right to appear, present evidence, and respond to the evidence provided by other parties. *Northern Monticello Alliance v. San Juan County (NMA I)*, 2022 UT 10.

Due process rights must involve a "protected interest" in the outcome of the appeal. *NMA I, holding that even though a local neighbor group had standing to file an appeal of a decision not to revoke a conditional use permit, it had no protected property interest in the matter and thus was not entitled to present evidence at a hearing held on its own appeal.*

The essential difference, then, is that a person must show "personal injury" to initiate an appeal, but that injury may not involve the necessary "protected property or liberty interest" to trigger the rights to common law due process. If this may be an issue with an appeal, the NMA case should be reviewed carefully.

Best Practices – Standing and Due Process

- Those involved in an appeal should be sure to provide notice to all potential third parties who may have standing or are entitled to due process. This would head off future challenges by those who had protected interests but were not included in the process of the appeal.
- For example, when considering variances. If the issue involves building heights, setbacks, or other issues which may "injure"

the interests of neighbors and neighboring property owners, provide notice, even if not required by local ordinance. They are the individuals whose interests may be protected by the ordinance which is sought to be varied.

- The appeal authority may properly determine whether the appellant has standing to bring the appeal before commencing the review. A party to the appeal may find it appropriate to challenge the standing or due process rights of other parties and thus, if successful, avoid the appeal process entirely.
- The appeal authority should allow those who would have had standing to initiate an appeal to participate in the appeal: to be notified, to be heard, to provide evidence, and to respond to the evidence provided by other parties.
- These individuals are not "the public" and may be entitled to participate even when no public hearing is required.
- Appellants and local officials should consider standing and due process issues as they defend their positions against third parties. The matter may be resolved outside its merits.
- Dealing with third party issues at the local appeal level can save difficulties at the district court.
- If in doubt, an appeal authority should usually allow due process to third parties who may have standing to initiate litigation that may follow. This may avoid permanent errors in the process and which might trigger legal action and perhaps a later remand.

Deadline to File Administrative Appeals

There is always a filing deadline, setting the amount of time to initiate an appeal, usually set by local ordinance. The deadline must be at least 10 days after decision is reduced to writing. UCA 10-91-704

The appeal deadline is jurisdictional and cannot be waived except by stipulation of all parties. Even the city cannot unilaterally avoid the deadline if it finds it necessary to appeal decisions of its own

land use authorities. *Brendle v. Draper City*, 937 P.2d 1044 (Utah Ct. App. 1997).

Efforts to negotiate or mediate disputes do not toll the deadline – if the time runs out, the issues are moot, even if the city engages in extensive discussions and encourages other ways to work things out to avoid an appeal. Such actions by the city, even if the staff assures the potential appellant that they need not be concerned about the filing deadline, do not avoid the deadline. Ignorance of the deadline is irrelevant – even if by the city staff.

There is one exception in state law. When appealing a decision by an historic preservation authority, the applicant may appeal within 30 days after the date of a written decision regarding a land use application. The statute is narrowly written to give only the applicant more time. This extra time may not apply to anyone except the applicant. This particular exception applies to municipalities only, not counties. UCA 10-9a-704(3).

Ignorance of a Decision. If a person has standing to file an appeal but had no way to know of the existence of a land use decision affecting them, then the time to file the appeal would commence after that person has actual or constructive knowledge of the decision.

Example – A neighbor sued after noticing that the framing of a new structure revealed that it exceeded the maximum height allowed by local ordinance. The Utah Supreme Court held that the neighbor was too late and missed the deadline to appeal. The time for the appeal did not start for the neighbor when the building permit was issued, but when there was actual or constructive notice of the existence of the building permit. The neighbor should have reviewed the building plans within ten days of knowing about the existence of the building permit and determined at that time if there was a height violation. *Fox v. Park City, 2008 UT 85.*

The court noted that a person obtaining a building permit can avoid the problem of delayed appeal rights by notifying the neighbors that the permit had been issued at the time the land use decision was made. *Fox v. Park City.*

Best Practices – Setting the Deadline to File

- A ten-day deadline advances the interest of predictability and more quickly cuts off potential challenges.
- However, a longer time allows for more thorough consideration of an appeal but delays the process of obtaining finality.
- The shorter deadline means the time allowed to appeal would often occur before the final record of the decision is prepared.
- If a potential appellant is in doubt about the sufficiency of the record, and the review is on the record, the appellant must appeal anyway.
- If the record is later determined to be flawed, and the appeal deadline has nonetheless passed, the issues with the record are moot and the decision is final. It would be preferred for this reason that land use decisions be deemed written and final only when the record of the decision is also written and final.

Best Practices – What is a "Written" Decision?

The right to appeal a decision does not arise until it is determined that the decision is "written". UCA 10-9a-704(1).

- Set up a routine procedure to create a "written" decision in the land use ordinance, particularly for land use authorities which involve a commission or panel.
- A written notice of decision could be prepared by staff soon after a land use authority decision is made and provided to the applicant and public. This would initiate the running of time to appeal, even before the record of the decision is final.

- The appeal authority or staff should provide a copy of the decision to all parties with potential standing to appeal.
- Provide the decision on the day it becomes final – perhaps via email.
- Place information on the decision document or in the transmittal regarding the deadline to appeal. Perhaps even identify a date certain as the deadline.
- If the minutes of a meeting is considered to be the final written decision, then the decision is arguably not "written" until the minutes are approved in final form. This is often not a good option if the minutes are the only record of the findings of fact and conclusions of law required in a defendable decision. If a motion is approved taking action on an application in a meeting, and formal approval of the form of the decision is desired, the decision document can be prepared for review in a meeting subsequent to the meeting where the original motion to approve or deny was passed. The subsequent meeting minutes can then relate that the decision document was approved as the final decision, effective on the date of the second meeting.
- Decisions by any land use authority, including the building official and the zoning enforcement officer or zoning administrator are clearly appealable, but they must be in writing to be appealed. A letter giving notice of the decision is usually adequate to constitute a final written decision.
- What if the local land use authority refuses to issue a decision? Is that a "decision"? When can it be appealed? This is a matter of contention that is not fully resolved by court decisions.
- Applicants should watch out for documents and letters which include decisions applying the land use ordinances. They may be final written decisions which must be appealed within a limited time.
- Local government officials should act with clarity and state on the surface of written communications which are intended to

act as final written decisions that they are indeed subject to an appeal before a given deadline.

Best Practices – Deadlines for Appeals

- A potential appellant must hedge its bets and avoid errors with filing deadlines.
- Example – if challenging a development agreement and it is not clear whether the decision to be appealed is legislative or administrative, file both the local administrative appeal and an appeal with the district court. You do not need to serve the court appeal for some time, so the administrative appeal may be finalized before the court proceeds.
- File the appeal, notify the other parties that you wish to avoid formal hearings on the appeal, and then negotiate.
- Note that you must file the appeal whether the record is final or not. Take care to preserve claims involving the record in such an instance.
- Be certain the appeal documents are complete and fees paid before the deadline.
- Some model ordinances provide that the appellant must provide a written statement of all causes of action upon which the appellant will rely at some date in advance of a hearing. This is a trap for the unwary – beware and comply strictly with the deadline.

The Record of the Decision – Essential

Remember that neither the appeal authority (in a record review) nor the district court can supplement the record. There is only one chance to create the record. That is at the land use authority level. Period. *Northern Monticello Alliance v. San Juan County (NMA II)* 2023 UT App 18.

If there is no record, the appeal authority or the district court will remand the matter back to the land use authority to provide

substantial evidence and legal reasoning to support its decision. *McElhaney v. Moab City* 2017 UT 65.

The record of a decision by an appeal authority includes the record of the land use authority which originally made the record, if the standard of review was a record review.

The record of a decision by an appeal authority does not necessarily include the record of the land use authority if the standard of review is de novo. Appellants and government officials must make sure the record of the lower decision is submitted for the record of the de novo appeal, if that is desired.

Appeal Authority Process - Quasi-Judicial

The decision of the appeal authority is a quasi-Judicial act. UCA 10-9a-707(5).

The appeal authority may place witnesses under oath. UCA 78b-1-142

There should be no ex-parte communication between any party and the appeal authority on any substantive issue. Note: The local government jurisdiction is a party.

As a quasi-judicial body, once the evidence is gathered and all parties heard, the appeal authority may deliberate in private. This is an exception to the Open and Public Meetings Act which is not referred to in the statute. *Dairy Products v. Wellsville*, 2000 UT 81

Issues on Appeal – Either De Novo Review or Record Review

In reviewing a land use application, the central issue is whether or not the application complies with the relevant provisions of the local ordinance. If it does, it must be approved. If it does not, it cannot

be approved and must be denied. UCA 10-9a-509, 509.5 (municipalities) UCA 17-27a-508, 509.5 (counties).

The appellant bears the burden of proof. UCA 10-91-705

Issues on Appeal – De Novo Review

Factual issues – appellant provides substantial evidence to support every essential finding of fact necessary to the desired decision. If appellant fails to do so, the appeal cannot be granted. A short decision can be entered finding that the appellant failed to meet this burden.

Legal issues – appellant provides argument and authority to convince the appeal authority that appellant's position is consistent with relevant law.

Issues on Appeal – If Record Review

Factual issues – appellant may provide no new evidence, but "marshals" the essential evidence which the land use authorioty relied upon in the record and demonstrates that the evidence is not substantial or otherwise inadequate to support the decision. Appellant identifies substantial evidence or lack of substantial evidence in the record to support the appellant's position that the other evidence relied upon by the land use authority is not substantial evidence.

Legal issues – appellant provides argument that the application of the law in the record is not correct and/or that there is other relevant law that the decision violates.

As to the facts relied upon, it is not sufficient to show that there was other evidence that could have been relied upon for a different result. An appeal on the record is not a policy discussion – it is a review of the record for legal sufficiency.

If the land use authority had substantial evidence to support all essential elements of its decision, the decision must be affirmed so long as it is legally correct.

As to the application of the law, if the law was interpreted correctly, without deference to the land use authority, the decision must be affirmed.

It is not the role of the appeal authority in a record review to substitute its judgment for that of the land use authority. If that were the jurisdiction's intent, the review would have been de novo, not on the record.

If the decision below cannot be affirmed, the appeal authority vacates the decision or remands the matter back to the land use authority for further consideration. *McElhaney v. Moab City* 2017 UT 65.

In some circumstances a remand may preserve the application so it need not be filed again. To vacate the decision below may not have that same effect.

Review of Legal Issues on Appeal

From the Utah Code:

Questions of law – there is to be no deference to the interpretation or application of the relevant law in the decision below. The appeal authority is to determine on its own if the decision is "correct" as to the law. UCA 10-91-707(4); *Outfront Media v. Salt Lake City 2017 UT 74.*

The appeal authority is to interpret and apply a land use regulation to favor a land use application unless it plainly restricts the application. UCA 10-91-707(4).

From the Utah Supreme Court. These are the factors which the court has stated should be takin into account when interpreting a statute or ordinance:

- Our primary goal is to evince the true intent and purpose of the legislature.
- The best evidence of the legislature's intent is the plain language of the statute itself.
- We presume that the legislature was deliberate in its choice of words and used each term advisedly and in accordance with its ordinary meaning.
- Where a statute's language is unambiguous and provides a workable result, we need not resort to other interpretive tools, and our analysis ends.
- Each part or section be construed in connection with every other part or section so as to produce a harmonious whole.
- When interpreting statutory text, we presume that the expression of one term should be interpreted as the exclusion of another.
- We will not infer substantive terms into the text that are not already there.
- We assume, absent a contrary indication, that the legislature used each term advisedly and seek to give effect to omissions in statutory language by presuming all omissions to be purposeful.

Interpretation of the Law – Best Practices

The record of any land use decision must include an analysis of how the relevant law is interpreted and applied to the facts of the case. Citation to the relevant authority is essential.

The decision need not be extended analysis – just cite the law and enter a summary of how the law was applied in the given case.

Review of Factual Issues on Appeal – Substantial Evidence

A land use decision can only be upheld if there is substantial evidence in the record to support that decision.

"Substantial evidence" means evidence that: (a) is beyond a scintilla; and (b) a reasonable mind would accept as adequate to support a conclusion. Utah Code Ann. 10-9a-103.

"Substantial" is defined to mean "not imaginary or illusory" - "considerable in quantity – significantly great". Merriam Webster Dictionary

"Evidence" is defined to mean "something legally submitted to a tribunal to ascertain the truth of a matter". Merriam Webster Dictionary

Substantial evidence must be both relevant and credible. Examples of substantial evidence include:

- Expert testimony and written materials, provided by engineers, planners, attorneys, appraisers, fire and police officials and other professions with expertise in the subject.
- Engineered subdivision plats and building drawings.
- Expert reports on geologic issues, traffic, etc.
- Planners staff reports
- Photographs and objective descriptions of physical, observable facts.

Substantial evidence need not be independent or unbiased. An applicant may provide information based on its own expertise which constitutes substantial evidence, especially when uncontradicted by other evidence. *Kilgore Companies v, Utah County Board of Adjustment,* 2019 UT App 20.

These are NOT substantial evidence –

- Public clamor and opinion. *Davis County v. Clearfield City*, 756 P.2d 704.
- Opinions of the members of the planning commission or city council who do not have particular expertise in a subject which requires particular expertise. *Davis County v. Clearfield City*

If substantial evidence is presented to support a fact, and there is no evidence provided to the contrary, the decision must agree with the evidence which has been provided.

Example – Credible expert geotechnical study concludes, without contradiction by another credible expert, that land is stable and can be built upon. That conclusion must be accepted if not contradicted by other substantial expert evidence.

Example – The only traffic study concludes that existing streets can adequately handle new development. Opposing public clamor insisting that the streets are overloaded now must be ignored and the traffic study relied upon.

If substantial evidence is presented on both sides of an issue, the appeal authority may decide either way. This is true even though there may be more substantial evidence on one side as compared to the other. This is not a balancing or preponderance standard - this is basic deference to the local finder-of-fact.

The record must include findings of fact which identify the substantial evidence upon which the decision is made. *McElhaney v. Moab City*, 2017 UT 65.

Fact-Finding and Substantial Evidence – Best Practices

- Ideally, if more time is needed to assemble the required evidence, the appeals process should allow for additional opportunity to gather evidence beyond an initial hearing.
- Often these matters involve lay citizens and property owners who are not familiar with rigid legal rules. Reasonable accommodation can be made to allow for a fair opportunity to provide substantial evidence, even after an initial hearing on the matter, so as to not prejudice the process against lay individuals.
- The record can be left open without reconvening a physical hearing – the final decision may follow a subsequent email exchange or a conference call.
- But all the parties must be allowed to respond to any new evidence before it is relied. This is essential to protect the due process rights of the parties involved.

Best Practices – Procedure for Appeal Authority Hearing

Opening statement:

1. Introduce the appeals body.
2. Explain that no ex-parte communications have been received and that the decision must be based only on the ordinances, relevant law and evidence presented through the hearing process.
3. Explain that the issues are not policy questions in the main, but only relate to whether the application involved complies with the relevant ordinances and codes.
4. If a record review, explain that the only issue is whether the record adequately supports the decision. If a de novo review, explain that the application must be approved if the evidence and legal analysis provided demonstrates that the application complies with the relevant ordinances and other law.
5. Outline the procedure to be followed:

a. The appellant bears the burden of proof and therefore goes first, unless by consent of the parties, the local staff is allowed to explain the situation first.
b. The local entity to respond to the appellant.
c. Third parties, if appropriate, my comment.
d. The appellant may then respond to the local entity and the third parties.
e. Repeat the process until all the information is complete.

6. Explain that the process can be conversational and without unneeded formality.
7. Explain that a decision may be made at the hearing or the matter taken under advisement.
8. Mention that the hearing is being recorded and will be a public record unless specifically designated as a private or protected record as provided in the Government Records Access and Management Act (GRAMA).

If desired, all who may wish to provide testimony at the hearing may be sworn at the same time.

"Do you solemnly swear that the testimony you are to give in this matter will be the truth, the whole truth, and nothing but the truth?"

Make sure there is an allowance made in the process for objections by parties with standing to participate.

Most of the time, parties involved in the process will not have attorneys. There is a fine line the appeal authority must walk between attempting to ensure that the rights of each party are protected and they are fully informed of the process while not inappropriately coaching a party or making their case for them.

The response to some difficult issues or surprises can be to continue the hearing or to leave the record open to more evidence and argument.

The parties could be asked to fully brief the law on a given question or otherwise provide more analysis.

The parties could be asked to provide more evidence and analysis of the evidence.

Best Practices – Appeal Authority Decision

The final decision should be written like a concise court decision.

- State the details of the dispute
    - Property address
    - Owners
    - Appellant
    - Date of the hearing
- Identity of the appeal authority
- State the names of those who participated in the hearing.
- List the documents included in the record, such as:
    - The document filed by the appellant to initiate the appeal.
    - The staff report, if any
    - Documents which were provided and included in evidence (perhaps with exhibit numbers if appropriate)
    - Audio recording
    - Email exchange
- Findings of fact.
    - Each finding should refer to the evidence upon which the finding is made.
    - Ensure that each finding that the ordinance deems essential is entered.
    - Example – a variance requires a finding that the issue involves a hardship related to the property and not the preferences of the property owner.
    - While this review may be extensive, it should be no longer than necessary in a given situation.

- Conclusions of Law.
    - Each conclusion should refer to the relevant legal requirement and cite the statute, ordinance, or case where the requirement is found.
    - Example – variance – a conclusion that the matter involves a "substantial property right".
- Analysis and Conclusion. This can be simple and direct, or more extended as appropriate.
- The decision must be signed and dated.
- The decision may include reference to the thirty-day deadline before which an appeal may be filed with the district court.

The decision can adopt by reference specific information found in the staff report or even documents provided by a party – so long as it is clear to the district court what the basis for the decision is.

A complete and thorough decision does not just preserve the conclusion if reviewed by the district court – it avoids district court because it will likely be upheld.

The decision should be conveyed by email to all parties on the same date that it is signed.

The city or county should preserve the record of the matter as well as the decision as public documents.

Best Practices – the Appeal Process in General

Those concerned with local appeals need the assistance of experienced legal counsel before, not after, commencing an appeal.

It is essential that a potential appellant read the ordinance before initiating the appeal.

It is essential that the appeal deadline be met with a timely and complete submittal consistent with the local ordinance.

There is only one chance to create a record and preserve all causes of action. The Utah appellate courts have pounded on this issue lately, repeating that if the record is insufficient it cannot survive an appeal.

The applicant for a land use decision must protect his or her interests. If the record is not complete, make it complete. If you succeed in getting approval make sure it is supported by a record that will allow the district court to affirm the decision. You must do this even if the appeal authority or city staff does not perfect the record.

Argument is not evidence. Support your argument with substantial evidence for every essential finding of fact.

If production of evidence is cumbersome, the appeal authority may ask the parties to stipulate to proffered facts on the record.

It is not sufficient to argue policy questions before an administrative hearing. The policy is set by the relevant land use regulation – the issue in an administrative session is simple: Does this application comply with the ordinance? If so, it must be approved. If not, it must be denied. Utah Code Ann. 10-9a-509, 509.5 (municipalities); 17-27a-508, 509.5. (counties).

Oddly enough, it is sometimes wise to appeal a decision in your favor. It may not be the bottom-line approval which is at issue, but the conditions imposed or other details that need further review. Once the deadline to appeal passes, such as with a disproportionate exaction imposed on development, the issue is final and resolved.

When the decision-maker is given substantial evidence that the application does not comply with the ordinances, the applicant must respond with substantial evidence. *Staker v. Springdale*, 2020 UT App 174, dissent by Pohlman, J.

Once a decision is made in your favor, it is in your interest to be sure that anyone who may oppose the decision is aware of the decision, so the appeal deadline applies to them. – *Fox v. Park City, 2008 UT 85.*

The appeal authority must be neutral and fair. If there are potential conflicts of interest associated with the individual(s) hearing the matter, fully disclose the conflict on the record and determine if there is an objection to proceeding. This can be done before holding a hearing, for example via email or written notice provided to all parties with standing to object.

With consent of the parties, an appeal authority can conduct its business in a variety of ways – public meeting, private hearing, public hearing, electronic conference, email exchange or other means, so long as it is consistent with the ordinance and the requirements of due process. When initiating an alternative procedure, obtain the consent of the parties in writing (such as by email response) so that the procedures are not challenged later.

If email is used, the appeal authority should notify all involved at the beginning that any response to an email should be "reply all" to those receiving the initial email which would have been sent to all parties simultaneously.

The decision should make note that the email exchange is part of the record.

The city or county is normally a party to the appeal. The role of the city or county attorney is therefore limited. In some cases, the appeal authority should retain separate outside counsel, or someone in the city attorney's office should "firewall" away from others in the office to solely represent the appeal authority.

There should be no ex-parte communication between the city and the appeal authority except as needed to arrange for the details of the process, such as notice to the parties.

A one-person hearing officer is not a public body and thus the open and public meetings act does not apply. No public notice or public meeting is required.

An appeal panel is a public body and must comply with open meeting requirements. UCA 52-4-101 et seq

But an appeal authority may deliberate in private. *Dairy Products v. Wellsville*, 2000 UT 81

What is the Goal in Resolving Land Use Disputes?

- Use a process that is fair and neutral
- Use a process that <u>appears to be</u> fair and neutral – preserves community support
- Protect due process rights of all involved
- Avoid unneeded technicalities and delay
- Resolve issues on the merits, consistent with the law
- Achieve results which are wise and sustainable
- Avoid actions at the District Court
- Achieve results in a form that the District Court <u>can</u> affirm
- Adequate findings of fact and conclusions of law in the record.
- Process consistent with relevant law.
- Achieve results that the District Court <u>will</u> want to affirm.

Other materials and streaming video on this and other subjects can also be found in the Utah Land Use Library found at www.utahlanduse.org.

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