

## Utah Land Use Decisions – 2012

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***B.A.M. Development, L.L.C., V. Salt Lake County***, 2012 UT 26, 282 P.3d 41, used the “rough proportionality” test to judge the exaction of a highway dedication as a condition of development approval. See *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Under the county’s highway dedication ordinance, developers were required to dedicate additional street width necessary for adjoining roads to conform with county road-width standards. In earlier appeals of the case, the Utah Supreme Court had directed the lower court to apply the rough proportionality test to the developer’s takings claim and to compare the government’s cost of alleviating the development’s impact on infrastructure with the cost to the developer of the exaction. *B.A.M. Dev., L.L.C. v. Salt Lake County (B.A.M. II)*, 2008 UT 74, 196 P.3d 601. At trial, the lower court found that the total cost of a necessary road widening project in the development area was \$6,748,700, that the portion of this cost directly attributable to the developer’s subdivision was \$337,500, and that the developer’s total cost for the dedication was \$84,000. Based on these numbers, the lower court ruled that the county had satisfied the rough proportionality test. The Utah Supreme Court affirmed and held that the lower court properly considered the entire community’s cost of road widening, not just the county’s out-of-pocket costs. These additional costs included federal highway funding, state transportation agency costs, and financing costs.

<http://www.utcourts.gov/opinions/supopin/BAM1226050412.pdf>

***Carlsen v. Board of Adjustment of the City of Smithfield***, 2012 UT App 260, 287 P.3d 440 involved a challenge to a local zoning board’s decision to recognize non-conforming use status for the keeping of livestock on property zoned for residential use. The court reviewed the board’s decision under the “substantial evidence test” which requires affirmance if there is evidence in the record that would allow a “reasonable mind [to] reach the same conclusion as the Board.”

The court affirmed on two separate grounds. First the court held that the petitioners had failed to properly “marshal the evidence.” Under this rule, a petitioner must “marshal all of the evidence in support [of the board’s decision] and show that despite the supporting facts, and in light of conflicting or contradictory evidence, the ... decision [is] not supported by substantial evidence.” The court criticized the petitioner for repeatedly emphasizing evidence that supported his position, and leaving it to the court to sort out what evidence actually supported the board’s conclusion. This failure alone would have been enough to affirm the board’s decision. But the court also found, independently, that substantial evidence existed in the record to support the board’s decision.

<http://www.utcourts.gov/opinions/appopin/carlsen14209202012.pdf>

*Carter v. Lehi City*, 2012 UT 2, 269 P.3d 141 is not a land use case, but it is important because it sets a new standard that will govern citizen initiatives and referenda on local land use matters. *Carter* addresses the legislative/administrative distinction that often arises in these cases. Previously, under *Citizens Awareness Now v. Marakis*, 873 P.2d 1117 (Utah 1994) a legislative matter such as an amendment to the zoning ordinance could be the subject of a referendum, whereas an administrative matter such as the granting of a condition use permit could not. *Marakis* used following test to distinguish between legislative and administrative matters in the zoning and land use arena:

- a. Does the new law fall within the general purpose of the original zoning enactment. If it does, the change amounts to an administrative action and is not subject to referendum. If it does not, the court presumes the action is legislative – but it then looks the following two factors to see if the legislative presumption is rebutted.
  - i. Does the change represents a material variance from the basic zoning law of the jurisdiction? If does not, and the new law merely implements the comprehensive plan and adjusts it to current conditions, then the action is administrative.
  - ii. Does the zoning change implicate a policy-making decision amenable to voter control? If it does not, and the action is of such complexity that that it is not practical for the public to give it sufficient time and attention to make a proper determination of the matter, then the action is administrative.

*Carter* replaced the *Marakis* test with a new, more general standard:

“a ballot initiative should be deemed an appropriate legislative act where it proposes a **law of general applicability**. Laws that prescribe rules of conduct for the general population are squarely within the ambit of generally applicable rules, and ballot initiatives proposing such laws are per se legislative.

The court emphasized, however, that it did not intend a major change in how zoning and land use cases will be decided under this new test. In particular, the court reaffirmed the continuing validity of its past zoning decisions:

“The bright-line rules... are sensible ones, and we hereby reaffirm them. ...a site-specific zoning decision is legislative (and thus referable) if it is made by a city council that possesses only legislative authority. ...a site-specific zoning decision is legislative if it involves the adoption of a new zoning classification.”

<http://www.utcourts.gov/opinions/supopin/Carter011012.pdf>

*Suarez v. Grand County*, 2012 UT 72, --- P.3d ----, 2012 WL 5233510 (Utah) involved a citizen challenge to a county ordinance approving amendments to a planned unit development. The first issue was whether the county’s adoption for the ordinance was an administrative action to be reviewed by the Board of Adjustment, or a legislative action appealable directly to the district court. Under *Carter v. Lehi City* (see above) the Supreme Court concluded that the county’s action was legislative in nature because “the ordinance is a new law of general applicability

adopted after the Council weighed various policy considerations, and because the ordinance has the formal nature of a legislative act.” In reaching this conclusion, the court relied on the following factors:

1. The ordinance created new law by replacing the original PUD agreement with an amended PUD agreement;
2. The amended PUD agreement runs with the land;
3. The county adopted the ordinance after weighing broad policy considerations;
4. The county characterized its action as legislative;
5. The ordinance involved several actions that the state land use code reserves for legislative bodies; and
6. The county adopted the ordinance through a formal process consistent with legislative action.

Accordingly, the court rejected the petitioners’ request to remand the case to the county’s zoning board.

The court also held that the county’s actions in approving the PUD amendments did not violate its zoning ordinances. The court rejected petitioners’ arguments that the ordinance was illegal because 1) the approval period for the original preliminary plat had lapsed; 2) the ordinance was not in conformity with the general plan; and 3) notice of the adoption of the ordinance was inadequate.

<http://www.utcourts.gov/opinions/supopin/Suarez1272102312.pdf>

***Stern v. Metropolitan Water District of Salt Lake & Sandy***, 2012 UT 16, 274 P.3d 935 involved a landowner’s challenge to a municipal water district’s plan to construct a culinary water pipeline along the route of an old irrigation canal. The primary issues in the case were:

When an easement or deed is restricted to “canal purposes only” and is originally granted to one who uses the property for an irrigation canal --

is the use limited to irrigation water, or can it be converted to culinary water?

is the use limited to an open canal, or does it include an enclosed pipeline?

The court ruled that the irrigation canal could be converted to a culinary water pipeline. The court found that community attitudes at the time of the original grant (1914) would have understood that canals were a source of culinary as well as irrigation water. The court also found that parties to a canal conveyance would have understood that the canal could eventually be enclosed.

A secondary issue involved the claim that the canal had been abandoned when for many years it had ceased carrying irrigation water. The court ruled that abandonment of a public easement cannot be established by evidence of mere non-use. The party asserting abandonment must show by clear and convincing evidence that the owner intended to abandon the property right.

<http://www.utcourts.gov/opinions/supopin/Stern1216032012.pdf>

***Moab Local Green Party, v. Moab City***, 2012 UT App 113, 276 P.3d 1230 involved a review of a zoning board's approval of a preliminary development plan. The petitioners claimed that the plan was illegal because lacked certain elements required by the city's development code. The court held that the preliminary nature of the plan, and the fact that the missing elements could be added in the final plan, precluded a finding of illegality.

<http://www.utcourts.gov/opinions/appopin/moab041212.pdf>

***Daines v. Logan City***, 2012 UT App 108, 276 P.3d 1200 involved a petition to recognize a non-conforming use. The court upheld the local board's decision not to recognize the use. In particular, the court held that 1) the property owner bears the burden of proof in establishing a non-conforming use, and 2) the property owner must show that his use was "legally established" under prior ordinances or regulations.

<http://www.utcourts.gov/opinions/appopin/daines041212.pdf>