Rocky Mountain Land Use Institute
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RECENT LAND USE DEVELOPMENTS IN THE ROCKY MOUNTAIN WEST
UTAH COURT DECISIONS AND LEGISLATION

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Case Law - 2009-2010

Standing

Cedar Mountain Environmental v. Tooele County, 2009 UT 48, 214 P.3d 95**,** affirmed the traditional standing rule and effectively reversed a recent Court of Appeals decision, *Specht v. Big Water Town*, which held that "to have standing to pursue a declaratory judgment a party must 'allege and prove special damages.'" In 1987, Tooele County approved EnergySolutions (ES) request for a conditional use permit to establish a radioactive material disposal site located within the County's hazardous waste corridor. Cedar Mountain Environmental, Inc. (CME) applied for a similar conditional use permit on adjoining property which was opposed by ES. After the County denied CME's request, CME sold most of the property to ES. Subsequently, Tooele County reduced the size of the hazardous waste corridor, but approved ES's request to amend its 1987 conditional use permit to include the property purchased from CME. After CME filed a lawsuit, ES moved for summary judgment arguing, in part, that CME did not have standing to sue.

Under the County Land Use, Development, and Management Act (CLUDMA), any person "adversely affected" by a final land use decision may file a petition for review within thirty days. CLUDMA incorporates the traditional standing test which requires a party to (1) assert that it has been or will be adversely affected by the challenged action; (2) allege a causal relationship between the injury to the party, the challenged actions and the relief requested; and (3) request relief that is substantially likely to redress the injury claimed. A party may also gain standing under an alternative standing test by showing it is an appropriate party raising issues of significant public importance. To obtain standing under CLUDMA, a party must show it is "adversely affected." This requires a "sufficiently particularized" stake in the outcome of the dispute. To have a personal stake in the outcome of a land use decision requires only that the party own or occupy property within the jurisdiction of the decision-making body.

Relying on *Specht v. Big Water Town*, ES argued that while CME alleged a particularized injury, it failed to prove any potential harm. Under the *Specht* decision, to have standing in a declaratory

judgment action a party must "allege and prove special damages." This is an incorrect requirement. None of the cases cited in *Specht* stand for this proposition. The Court rarely requires a party to prove harm to establish standing. Here, the Court found CME had standing because it alleged particularized injury resulting from the County's decision to reduce the size of the hazardous waste corridor.

The Court also held CME had standing under the alternative standing test because it was an "appropriate party" in a dispute raising an issue of significant public importance. To establish appropriateness requires showing an "interest necessary to effectively assist the Court in developing and reviewing all relevant legal and factual questions and that the issues are unlikely to be raised if the party is denied standing." CME had standing because it had the necessary interest and expertise, notwithstanding it was a self-interested competitor, and because CME's claims raised issues of public importance.

Finally, the Court determined CME's claims were not moot even though CME's interest in the property terminated during the pendency of the appeal. The Court remanded the case to determine whether the County's land use decisions were valid.

Zoning Ordinance Validity

Gillmor v. Summit County, 2010 UT 69, held that a timely petition for review under the County Land Use, Development, and Management Act (CLUDMA), allows a plaintiff to assert all claims relating to the alleged arbitrary, capricious, or illegal nature of a county decision, including a facial challenge. Gillmor, who owns over 300 acres of land in Summit County, filed a lawsuit in 1998 against the County arguing the County's general plan and development code violated due process and equal protection. The suit was later dismissed without prejudice. In 2004, after several failed attempts to sell her property, Gillmor filed an application asking that the development code be amended and that the changes be applied to her property. The County Commission denied the application because it did not meet the 1998 code requirements. Gillmor then timely filed an appeal in the district court raising numerous constitutional claims, including a claim that the 1997 plan and 1998 development code were "void ab initio" and unenforceable. She also claimed the County's action was arbitrary, capricious, and illegal under CLUDMA.

Five months later, Gillmor submitted a subdivision plat application which did not meet development code requirements. Instead Gillmor argued the County's development code was "so vague, defective, undefined, discriminatory, and overreaching" that it violated her state and federal Constitutional rights and CLUDMA procedural rules. The application contended it could not be processed under the 1997 plan and 1998 code, but the County nevertheless was required to approve the application because it complied with other relevant provisions of state law. One day after the application was received, the County Director of Community Development sent Gillmor a letter denying her request. The letter notified Gillmor that the plan and code requirements would have to be followed and explained how to properly file a subdivision plat application.

Gillmor filed a petition for review with the District Court. In response the County argued, among other things, that Gillmor's claims were barred by the statute of limitations. The District Court concluded that the only land use decision at issue was the County's decision to enact the 1997 plan and 1998 development code and held Gillmor's appeal was a facial attack on their validity. Because no appeal was filed within thirty days of enactment, as required by CLUDMA, the petition was time-barred. Gillmor appealed.

The Supreme Court held that under the plain language of CLUMDA's thirty day statute of limitations, Gillmor's claims were timely. CLUDMA provides that any person adversely affected by a final decision applying CLUDMA's provisions is entitled to judicial review if the decision affects that person's interests, applies (or violates) CLUDMA's rules, and the party files a petition for review in thirty days. Here, Gillmor filed an appeal within thirty days after the County denied her subdivision application. Thus she was entitled to judicial review of "any and all claims related to the alleged arbitrary, capricious, or illegal nature" of the County's land use decision, including a facial claim that the ordinance was unconstitutional. In this case the facial claim was not ripe until the County denied Gillmor's application. The Court reversed the District Court and remanded the case to the District Court for further consideration.

Nonconforming Use

Thompson v. Logan City, 2009 UT App 335, 221 P.3d 907, held that a board of adjustment need not find a building permit was issued to conclude a particular use was legally established. In making a nonconforming use determination, other evidence may be considered. In 1960, the Watsons built a home in a zone that allowed single-family, two-family, three-family, and four-family dwellings. In 1970, the zone was changed to single-family residential. When Lucherini purchased the home in 1978, it had a basement apartment that appeared to be a legitimate two-family dwelling. After the City discovered the basement apartment, Lucherini submitted an application to establish a legally existing nonconforming use, which was denied by the Community Development Director.

Lucherini appealed to the City's Board of Adjustment, which reversed the Director's decision. Neighbors presented evidence that the home did not legally exist as a two- family dwelling and that it had not been continuously occupied as such. However, based on an inspection and other evidence, the Board concluded the home probably was originally constructed as a two-family dwelling with a permit, although no permit record was found. Dissatisfied with the Board's decision, the neighbors appealed to the District Court which held that Section 10-9a-802(2((b) of the Utah Code required the Board to base its legality finding exclusively on issuance of a building permit.

The Utah Court of Appeals reversed, finding that the District Court's misinterpreted Section 10-9a-802(2((b). This section states, "It is unlawful to . . . construct . . . or change the use of any building . . . without approval of a building permit." It is part of the Municipal Land Use, Development, and Management Act pertaining to district court review of land use decisions, the enforcement of land use ordinances, and remedies for land use ordinance violations. It is entirely separate from the sections governing municipal appeal authorities, such as a board of adjustment, and does not

mention appeal boards or the evidence needed to make findings that a particular use is lawful. Since no applicable ordinance or statute impose such a requirement, the Board had discretion to consider other evidence pertaining to the use's legality.

Vial v. Provo City, 2009 UT App 122, 210 P.3d 947, confirmed that a nonconforming use may not be restored after it is abandoned. Vial purchased a single-family dwelling with a basement apartment intending to rent it while she attended law school at Brigham Young University. After purchasing the property, Vial received a zoning verification letter from Provo City classifying the home as a single-family dwelling and deeming rental of the apartment an illegal use.

Following an appeal to the City's Board of Adjustment, Vial presented evidence that the area was zoned for two-family dwellings when the apartment was established in 1949-50 and had been occupied as such. In 1954, the zoning was changed to allow only single-family dwellings. Responding to a complaint in 1983, the City inspected the premises. Thereafter City staff put a note in the City's case file summarizing the inspection results and concluding that the case status was "closed conformed-nonconforming." Vial claimed this was evidence that the City recognized the basement apartment as a legal nonconforming use. Vial also claimed the City should be estopped from asserting otherwise. There was conflicting evidence concerning whether the apartment had been abandoned or used continuously. The Board of Adjustment found the use of the basement apartment "can only be established back to 1961" and that, "although it may have been built legally . . . it could not be determined based on a preponderance of evidence that the use had been continued." On appeal, the District Court upheld the Board's decision.

Under LUDMA, a person who is adversely affected by a land use authority's decision administering or interpreting a land use ordinance has the burden of proving the land use authority erred. Thus the Court of Appeals analyzed the Board's decision in light of applicable City ordinance requirements. The Court concluded that Vial proved, by a preponderance of evidence, that the basement apartment had been legally established as required under the City's ordinance. Particularly relevant was the note in the City's case file.

Another provision of the City's ordinance allowed a legally existing nonconforming use to be continued unless abandoned. A presumption of abandonment arises if a use is discontinued for six months, or if the property owner in writing or by public statement indicates an intent to abandon the use. This presumption can be rebutted by evidence showing the owner maintained the structure or use in accordance with applicable codes or has actively and continually attempted to sell or lease the property.

A neighbor testified that in 2001 she knew the apartment had not been rented for six months. She also testified about a conversation she had with the property owner where the owner expressed no concern about the possible loss of the nonconforming use because the apartment was unoccupied. Although Vial presented evidence showing the apartment had been occupied at times, she was unable to prove by a preponderance of evidence that it had been continuously occupied. Thus the use had been abandoned and could not be restored.

Finally, the Court determined that Vial failed to meet the high standard of proof necessary for applying equitable estoppel against the government because she failed to prove either the facts of her case with certainty or the existence of a grave injustice.

Constitutionality of Municipal Inspection Fee

Tooele Associates Ltd. Partnership v. Tooele City Corp., 2011 UT 04, held that the proper basis for determining the constitutionality of a municipal inspection fee is to examine the cost of conducting inspections rather than the process used to set the fee. Prior to 1996, Tooele City experienced very little development. That changed in 1996 when the City began to experience tremendous growth. Tooele Associates intended to build a planned community with about 7,500-8,000 dwelling units. The total bonded cost of the improvements was estimated at $2,362,000. The City charged the Associates a civil inspection fee of $94,500, 4% of the bonded improvement costs. Associates protested the fee amount and asked that a study be conducted to determine the City's actual cost of civil inspections. The study found the City's costs equaled 3.9% of bonded improvement costs. Unhappy with this result, Associates filed suit, claiming, among other things, that the City's fees were unconstitutional.

At trial, the City's expert analyzed all of the City's costs and revenues associated with civil inspections over a five-year period and presented evidence showing the City's inspection costs exceeded revenues. Associates expert analyzed fees and costs for only two years and concluded that revenues exceeded costs. After analyzing the evidence, the District Court concluded the City's fee was unconstitutional because the City had followed improper procedure in establishing the fee.

On appeal, the Supreme Court held the District Court misapplied the constitutional test for analyzing the City's inspection fee. The lower court based its decision on the City's fee setting procedure. However, the correct test is whether the amount of the fee bears a reasonable relationship to the cost of regulating the industry, and not whether the procedure for enacting the fee is reasonable.

The threshold question is to determine whether a municipal charge is a fee or a tax. In Utah, there are two broad types of fees: (i) a specific charge in return for a specific benefit and (ii) a regulatory fee which defrays governmental costs in regulating and monitoring the class of entities paying the fee. Here, both parties agreed the City's inspection charge was a regulatory fee.

To determine whether a regulatory fee is constitutional, a municipality must first disclose the basis of the fee. The burden then falls on the challenger to show "failure to comply with the constitutional standard of reasonableness." A fee is reasonable if it bears a reasonable relationship to the cost of regulating the industry. A fee is unreasonable if it is so "disproportionate to the services rendered as to attack the good faith of the law."

Here, the City met its initial burden by using a five year data set to analyze the fee, a process not prohibited by the Uniform Fiscal Procedures Act for Utah Cities. Associates failed to meet its burden of showing the fee was unreasonable. To do so, it had to show the City's civil inspection

costs exceeded its revenues for the five-year period analyzed. The Court found Associates analysis was unreliable and it did not present evidence showing how application of a different fee would have led to a more reasonable result. Hence the City's fee was constitutional.

Rezoning Standard of Review

Petersen v. Riverton City, 2010 UT 58, 243 P.3d 1261, rejected a claim that rezoning decisions should be subject to the substantial evidence standard of review instead of the more discretionary reasonably debatable standard. The Petersen's contracted with a developer to sell 20 acres of land contingent on rezoning of the property. After hearing objections from neighbors, the City Council denied the rezoning request. On appeal, the District Court applied the highly deferential reasonably debatable standard of review and upheld the Council's decision. On further appeal to the Supreme Court, the Petersons argued the District Court should have applied the substantial evidence standard because the Council's decision was quasi-judicial in nature.

The Supreme Court disagreed. Since a decision to rezone property is essentially a political, policymaking act, the Court has consistently held that enactment and amendment of a zoning ordinance is a fundamentally a legislative act. As a result, the Court has been hesitant to substitute its judgment for that of a municipality and has found the more deferential reasonably debatable standard appropriate for review of a rezoning decision.

The Court also rejected a "class of one" equal protection claim because the Petesen's failed to present any evidence of malice or bad faith by the Council. The Court also noted that denial of a rezoning request can often be justified by the same reasons that prompted the original enactment. By contrast, imposition of a new ordinance might be the result of an improper motive. Here, the Council simply affirmed an existing ordinance.

Importance of the Record

Morra v. Grand County, 2010 UT 21, 230 P.3d 1022, held that the County's failure to transmit the administrative record of proceedings below violated the County Land Use, Development, and Management Act (CLUDMA), thus precluding court review. In 2002, the County Council approved a 2000 acre planned unit development above an aquifer that serves as the main source of culinary water for Moab, Utah. Approval was conditioned upon terms in a development agreement. A group of citizens appealed the decision to the Board of Adjustment which upheld the Council's decision.

In 2006, upon request of a new developer, Cloudrock, the County Council adopted an ordinance approving an amended plan, subject to changes in the development agreement. The citizens group again appealed the decision to the Board of Adjustment. This time, however, the Board took no action because the County Attorney opined the Board did not have jurisdiction because adoption of the ordinance was a legislative, rather than an administrative, act.

The citizens sought declaratory relief deeming the ordinance invalid and voiding the amended development agreement. They claimed the District Court lacked jurisdiction because the ordinance was administrative in nature and because the County failed to provide the District Court

with a record of the proceedings before the Council. Cloudrock intervened and asserted no record was necessary. Since the ordinance was legislative, the court could uphold the County's decision so long as it was "reasonably debatable" that the ordinance served a legitimate land use purpose.

The District Court ruled it had jurisdiction because the ordinance was a legislative act, that was presumptively legal, and that the citizens failed to prove the ordinance did not serve a legitimate land use purpose or was otherwise illegal. It also determined that because the ordinance was a legislative act, the Court did not require a record in reviewing the Council's action.

On appeal, the Supreme Court determined the citizens had standing to challenge the Council's passage of the ordinance. CLUDMA provides appeal rights to any person adversely affected by a land use authority's decision. This language gives statutory standing equivalent to the traditional judicial test for standing as explained in the *Cedar Mountain* case (summarized above). In this case, the citizens had standing because approval of the amended development agreement could impact them directly and could affect the quality of water they use daily.

Cloudrock again asserted that because the development agreement ordinance was a legislative act, the Court had to uphold the decision because it was "reasonably debatable" that the ordinance served a legitimate land use purpose. Nevertheless, the Court held that the plain language of CLUDMA requires transmittal of the record to a reviewing court. Moreover, a record is useful even under the deferential "reasonably debatable" standard of review. It is also clearly helpful with respect to whether a legislative land use decision is "illegal." If a record exists, CLUDMA reflects a clear legislative intent that it must be submitted to the court. Since the County did not do so, the Court remanded the case to the District Court with instructions to order the County to transmit the complete record in order to resolve the case on its merits.

Pacific West Communities, Inc. v. Grantsville City, 2009 UT App 291, 221 P.3d 280, held that district court review of a city council land use decision is limited to the record provided by the council. Pacific West acquired a planned unit development (PUD) after Phase 1 of the project was completed by another developer. The Grantsville City Council voted to deny Pacific West's application for Phase 2 because in the Council's opinion the proposed development plan was significantly different than the originally approved plan. After the Council hearing, but before the Council issued its findings and decisions, Pacific West submitted additional evidence to the Council supporting its contention that the plan should have been approved. The Council referenced that evidence in its written decision.

After an appeal, the District Court found Pacific West was a bona fide purchaser and as such the previously approved plan did not apply to Phase 2. The District Court also found Phase 2 was invalid because construction had not been diligently pursued as required under the City code.

On appeal to the Court of Appeals, the City argued that since Pacific West's bona fide purchaser and PUD termination claims had not been raised before the City Council, they could not be considered by the Court. The Land Use, Development, and Management Act specifically requires a district court to limit its review to the record of the land use authority or appeal authority unless

evidence is offered and improperly excluded. The District Court improperly considered the bona fide purchaser and PUD termination claims because they were not raised in the City Council meeting. The Court also found there was substantial evidence to support the City Council's decision. The Council had reviewed Planning Commission and Council minutes approving the original plan, Pacific West's Phase 2 application, and public hearing comments. In addition, the Council identified the evidence it relied on in finding the proposed plan for Phase 2 was a major and improper adjustment to the approved development plan. The Court of Appeals overruled the District Court because the City Council's decision was supported by a "vast amount" of evidence.

Pen & Ink, LLC v. Alpine City, 2010 UT App 203, 238 P.3d 63, held at the City properly interpreted provisions of an annexation agreement governing lot size. In 1995, several property owners annexed their subdivision to Alpine pursuant to an annexation agreement. The agreement required that a portion of each subdivision lot be preserved as natural open space. Alpine's Planning Commission and City Council both disputed Pen & Ink's (Lynton's) interpretation of the agreement regarding how much of his lot had to be preserved as open space. Lynton appealed to the District Court.

The Land Use, Development, and Management Act (LUDMA) limits District Court review to the record before the Council. Since there was a record below, the Court lacked authority to resolve any claimed factual disputes by taking additional evidence. Moreover, once a district court obtains jurisdiction, a reviewing court must presume that a decision made under LUDMA is valid and can overrule it only if it finds the decision is not supported by substantial evidence in the record or is arbitrary, capricious, or illegal. The District Court granted Alpine's motion for summary judgment, concluding the City's interpretation of the agreement was based on substantial evidence and was not arbitrary or capricious.

Although the agreement, particularly its attachments, was not a model of clarity, the Court of Appeals agreed. The Court found that the agreement taken as a whole could be reasonably interpreted to limit the developed area on Lynton's lot as determined by the City, particularly since the City had interpreted the agreement similarly all other cases, except one involving the Van Leeuwens. Nevertheless, the Court found that even as compared to the Van Leeuwens, Lynton had received equal, not arbitrary and capricious, treatment from the City.

Enforcement of Development Agreement

Tooele Associates Ltd. v. Tooele City, 2011 UT App 36, held that specific performance of a development agreement obligation cannot be granted unless the agreement contains a clear provision imposing a specific performance duty. Tooele Associates and the City had entered into a development agreement but it not include such a provision. As a result, the Court found the City did not have a duty to maintain seventeen wastewater storage lakes. Moreover, courts have traditionally been reluctant to apply equitable doctrines against municipal bodies and governmental subdivisions.

Ombudsman's Scope of Authority

Selman v. Box Elder County, 2009 UT App 99, 208 P.3d 535, held that quiet title action does not fall under the statutory responsibilities of the Property Rights Ombudsman. Box Elder County attempted to build a road crossing the Selman's property. The Selman's sued and filed a request for arbitration with the Office of the Property Rights Ombudsman. The County filed a counterclaim in District Court to quiet title in the property. The District Court found that a quiet title action is not within the jurisdiction of the Ombudsman. As a result, the Court bifurcated the ownership and takings claims, and stayed arbitration by the Ombudsman pending resolution of the quiet title action. The Selman's appealed.

The Utah Code establishes and defines the Office of the Property Rights Ombudsman. Among other things, the Ombudsman is authorized to mediate or arbitrate disputes between property owners and governments regarding "takings or eminent domain issues." A fundamental and threshold question in a taking or eminent domain lawsuit is whether the plaintiff owns the property at issue. A claimant must possess some protectable interest in property before the recovering compensation under the takings clause. Here, since there was a dispute between the Selman's and the County about ownership of the property, the court was the proper forum for resolving the matter.

Referendum

Friends of Maple Mountain v. Mapleton City, 2010 UT 11, gave Mapleton residents a victory in a long-running dispute between the city and Wendell Gibby. The Utah Supreme Court ruled that rezoning of Gibby's property was a legislative act, thus giving residents the right to proceed with a referendum that, if successful, would revert the rezone. The Court reversed a trial court ruling that found the rezoning was an administrative act not subject to a referendum.

Utah citizens have a constitutionally guaranteed right to legislate directly, through referenda, to challenge and overrule action taken by a legislative body. Administrative matters, however, are not referable. While this black letter law is easy to state, determining whether a particular act is legislative or administrative has proven difficult, particularly given the confused state of case law on the subject. The Court admitted as much saying, "In our effort to facilitate appropriate citizen action while not unduly fettering the activities of municipal government, we continue to adjust our approach to the legislative/administrative determination based on the concerns brought before us in the cases."

If the nature of an ordinance is not "readily discernable," then "courts must look to the substance of the city council's action to determine if it is legislative or administrative." The 1994 case of Citizens Awareness Now v. Marakis, established a four-part test to make this determination: (1) whether the threshold requirement of proper notice to affected citizens is satisfied, (2) whether the new zoning ordinance is consistent with the general purpose and policy of the original zoning ordinance, (3) whether the new zoning ordinance is a material variation from the basic zoning law of the governmental unit, and (4) the appropriateness of citizen participation in the matter.

Relying on this test the trial court held that the Gibby property rezoning was administrative. The Supreme Court reversed and announced a new rule: adoption of a new zoning classification is per se legislative action. "Such action requires a balancing of policy and public interest factors which is the essence of legislating."

The Court adopted this bright line rule "contemplating that it will reduce confusion in this area of law and put municipalities on clearer notice of when they are choosing to act legislatively as opposed to administratively." However, the Marakis analysis still will be required because "when a municipality acts to adjust an existing zone it more likely acts administratively." In explaining what it meant by "adjusting an existing zone" the Court said: "Adjustment of the existing zone includes routine changes such as variances, conditional use, and density changes. Action within the framework of the existing zone may still require some Marakis analysis, primarily in cases where the city is attempting to affect a change outside of the routine." Later, the Court said this adjustment also includes "tinker[ing] with an existing zoning classification beyond what is common and ordinary." No further analysis is provided to explain these statements.

The Court also concluded that the Marakis test does not discriminate against smaller cities whose city councils typically possess both legislative and administrative power. By contrast, all acts of a council in a city with a council-mayor form of government are per se legislative, and thus referable, as the Court decided in *Mouty v. Sandy*. (Apparently, this would include an administrative appeal of a zoning action to the council, such as a conditional use permit decision. Thus, in a council-mayor government, what is usually regarded as an administrative/ quasi-judicial act would be converted to a legislative one, at least for purposes of a referendum.)

***BRAVE v. Beaver County*,** 203 P.3d 937 (Utah 2009), held that a development agreement adopted by ordinance is a legislative matter subject to referendum. This case concerns a dispute between Beaver County and a group of citizens opposed to the proposed Mount Holly resort. In 2006, the County approved a concept plan for the resort subject to adoption of a development agreement. The resort includes an 18 hole golf course, a private ski resort, and up to 1,204 residential units. As part of its approval, the County enacted an ordinance which adopted a development agreement as a "Land Use Ordinance of Beaver County." Thereafter a group of citizens (BRAVE) filed an administrative appeal to adoption of the ordinance and also submitted a referendum petition. The County rejected BRAVE's administrative appeal based on lack of jurisdiction and indicated the matter should be resolved in District Court.

In response to BRAVE's complaint against the County, the Court issued a temporary restraining order enjoining implementation of the ordinance until a referendum vote could take place. The parties also stipulated to an expedited trial to determine, among other things, whether the ordinance was subject to a referendum vote. Following the trial, the Court ruled that since the County had denied jurisdiction to hear BRAVE's administrative appeal, on the grounds that it had acted legislatively in adopting the ordinance, it was now judicially estopped from taking the position that it had acted administratively. However, the Court held there was no basis for applying judicial estoppel to the developer, who intervened in the case. Instead, the Court held

that as to the developer, the County's action was administrative and therefore not referable. BRAVE appealed.

The Utah Supreme Court first rejected the developer's argument that the referabilty issue was moot under Section 20A-7-401(2) of the Utah Code (which limits citizens rights to initiatives and referenda regarding land use ordinances) because the Court found the statute was unconstitutional in *Sevier Power Company, LLC, v. Sevier County*.

Since Utah citizens have a constitutionally guaranteed right to challenge legislation, the next question before the Court was whether approval of the development agreement was a legislative or administrative act. After finding that public hearing notice was adequate, the Court easily determined the County acted legislatively and intended to do so. A number of provisions in the ordinance itself referred to legislative action by the Board of County Commissioners. Moreover, the County had denied BRAVE's administrative appeal, citing lack of jurisdiction. "By closing the door to administrative review, Beaver County affirmed that it had acted legislatively." Thus the County was bound by its own characterization of the ordinance and could not reverse itself to the detriment of the constitutionally protected rights of its citizens.

Legislation - 2011 Session

HB 78 - Developer Fees

This bill addresses a development community concern that development fees may exceed the cost of the providing service for which the fee was levied. The bill:

- clarifies that the definition of “identical plans” means “identical floor plans,” to allow developers to vary housing facades without incurring additional plan check fees (the Municipal and County Land Use, Development, and Management Acts prohibit additional fees on identical plans);
- creates a process by which a fee payer can promptly receive pertinent information about how any development fee was calculated, spent and derived;
- requires a jurisdiction to create a development fee appeal process;
- establishes standards for district court review of fees to assure that the fee paid will not exceed the cost of providing the service or regulation; and
- applies these standards to any culinary or secondary water provider, regardless of whether it is a general purpose local government, local district or a private entity.

SB 126 - Local District Service Amendments

This bill imposes requires local districts to follow development rules already applicable to municipalities and counties:

- improvement bond standards and appeal processes;
- exaction standards; and
- “rip cord” right for acceptance of infrastructure improvements performed for local district services. If applicant believes an administrative process is not being conducted with reasonable diligence, an applicant can “pull a rip cord” to require a decision by a time certain.

Impact Fee Amendments

SB 146 reorganizes the Impact Fees Act into a more user-friendly format. This bill:

- revises the definition of "development activity" to include local districts fall within the Act;
- verifies that all terms of art are clear and consistently defined;
- clarifies that a jurisdiction may not collect more impact fee money for a public facility than it actually spends;
- clarifies that all notice under the Act can be provided on the Utah public notice website;
- allows for easier repeal of an outdated impact fee;
- makes it easier to waive affordable housing projects impact fees by removing the obligation to "identify" another revenue source to replace the waived fees;
- tolls the statute of limitations for appealing an impact fee in district court if a challenge is pending before the Property Rights Ombudsman;
- tolls the statute of limitations for filing in district court if an administrative appeal is pending;
- adds the Ombudsman third party opinion process to the Act;
- clarifies that the sole remedy for challenging an impact fee is a refund of the difference between the fee that was charged, and the fee that should have been charged.

SB 178 Substitute - Nonconforming Rental Dwellings

This bill modifies rules adopted in the 2010 Legislature limiting local government authority to impose safety requirements on nonconforming rental dwellings. Among other things, this bill authorizes municipalities to require the following in a nonconforming rental dwelling:

- smoke detectors;
- GFI outlets; and
- bedroom windows large enough to permit egress (typically in a basement apartment).

SB 243 - Historic Sites

During the last year, preservationists and property rights advocates in Salt Lake City's Yalecrest neighborhood have been embroiled in a proposal to create a historic district. This bill imposes a statewide, year-long moratorium on municipal historic preservation activities. Under the bill, municipalities may not:

- designate historic sites or areas;
- expend public funds to preserve, protect, or enhance an historical area or site;
- acquire an historical area or site;
- obtain a public or private easement related to a historic area or site;
- protect a historic area or site;
- ensure proper development and utilization of land or an area adjacent to a historic area or site; and
- enter into an agreement with a private individual for the right to purchase a historic area or site.

TDR Programs Performance Audit

TDR programs exist in five Utah counties and municipalities. Four operate within a structured TDR program framework. Summit County, however, has operated a discretionary program. TDR's were negotiated on a case-by-case basis during the rezoning process, leading to controversial and unpredictable outcomes. As a result, the Office of the Legislative Auditor General conducted a performance audit of county and municipal TDR use in Utah.

The audit found that "TDR use within an administrative program structure enables predictable results and helps ensure that participants are treated equitably and fairly." The Auditor General recommended legislation requiring that local TDR ordinances include provisions which:

- establish program purposes and goals;
- identify the TDR transfer process;
- include a method for tracking density transfers and recording transfers in county property records;
- designate sending and receiving zones;
- include administrative procedures for cash-in-lieu options; and
- require conservation easements or deed restrictions on sending property to ensure no future development.

The audit was published in December 2010. No TDR legislation was proposed in the 2011 legislative session.