RECENT UTAH LAND USE DECISIONS

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CASES

Tolman v. Logan City, 167 P.3d 489 (Utah App. 2007), reaffirms that local governments have a great deal of legislative discretion to determine what zoning is appropriate. A downzoning based on a general plan is not a taking as long as the property owner has "economically viable" use of the property which may not be the "highest and best" use. In 1983 the Tolman's bought a single-family home in a multiple-family zone. Six years later, at the request of neighbors, Tolman's neighborhood was downzoned to single-family residential. In 1995 and 1996 the City adopted, respectively, a revised general plan and zoning ordinance which maintained the single-family residential designation. In 2002 the Tolman's bought another home. They attempted to sell their first home, but then rejected two offers and decided to rent it. Dissatisfied with low rents, because the zoning ordinance limited occupancy to three unrelated persons, they applied in 2004 for multiple-family zoning of their property and many surrounding properties. The City denied the Tolman's application because it was inconsistent with the City's general plan. The Tolman's sued, alleging a regulatory taking based on the enactment of the 1989 zone change and denial of the 2004 rezone request. They also alleged that denial of the rezoning application was arbitrary and capricious and a substantive due process violation. The trial court granted the City's motion for summary judgment and dismissed the complaint. The Utah Court of Appeals held the trial court properly dismissed the takings claims. The claim based on the 1989 downzoning was barred by a four-year statute of limitations and the claim based on the 2004 denial of their rezoning application failed as a matter of law. Compensation is due under a takings claim if the regulation deprives the owner of "all economically viable use of the land." The court previously clarified that "economically viable use" does not mean "highest and best use." Moreover, "mere diminution in property value is insufficient to meet the burden of demonstrating a taking by regulation." The takings claim was property dismissed because City denial of the rezoning application did not cause the Tolman's to lose any property value. The trial court also correctly determined that the City's denial of the rezoning application did not result in arbitrary and capricious "reverse spot zoning" or a violation of their substantive due process rights because the denial was based on the City's general plan.

To read the opinion see: http://www.utcourts.gov/opinions/appopin/tolman072707.pdf

Bluffdale Mountain Homes, LC v. Bluffdale City, 167 P.3d 1016 (Utah 2007), broadly applied, suggests that local government legislative decisions not made in good faith within a reasonable time will be seen by the courts as inequitable. Developers owned about 7,800 acres of property; about one-half located in an unincorporated area of Salt Lake County and the remainder in Bluffdale. Developers obtained approval for a 2,000 unit mixed-use project on the unincorporated Salt Lake

County portion of the property which was later annexed into the neighboring city of Herriman, The 3,900 acres in Bluffdale was devoid of development and represented about one-third of the City's territory. Bluffdale, located on the urbanizing fringe of southern Salt Lake County, has long sought to maintain low-density one to five acre lot development. Developers and the City wrangled for several years over the proper planning and development of the Bluffdale property. In 2002, the City needed an easement for a critical waterline needed to service other new development. Developers provided the easement at no cost to the City and in return the City adopted a resolution stating its support for developer's proposed project which was similar to the development annexed into Herriman. Developers then hired a consultant to produce a Quality Growth Plan and ultimately spent almost one million dollars producing various long-range and other plans for the property. Within a few months, however, the City began to withdraw its support for the plan and in 2003 rejected it despite recommendations for approval from the consultant and the City's planning commission. Frustrated with the City's slow planning process and refusal to approve their requested project, developers filed a request to disconnect (deannex) the property from Bluffdale so it could be annexed into Herriman. The trial court, in a lengthy and factually detailed opinion, methodically analyzed the statutory disconnection criteria and held developers had shown by a preponderance of evidence that the disconnection was viable and required by justice and equity. On appeal, the Utah Supreme affirmed the decision of the trial court. Importantly, in describing the area proposed for disconnection, the Supreme Court found it was essentially undeveloped and separated from the rest of Bluffdale by a man-made barrier (a 35-foot wide canal). Among other things, the City failed to marshal any evidence showing that justice and equity required denial of the disconnection petition.

To read the opinion see: http://www.utcourts.gov/opinions/supopin/Bluffdale072007.pdf

M&S Cox Investments, LLC v. Provo City, 169 P.3d 789 (Utah App. 2007), a case begun eight years ago, upholds a Provo City ordinance requiring amortization of non-owner occupied accessory apartments. The ordinance authorized accessory apartment only when a dwelling unit is owner-occupied. The ordinance gave non-resident owners a minimum of three years to comply with this new rule. It also allowed property owners to request more time to achieve compliance, pursuant to a formula in the ordinance, if necessary to recover the owner's investment in the property. Not long before the ordinance was adopted, M&S spent over $500,000 to remodel its property. After neighborhood complaints and a long process of administrative review, the City determined that under the ordinance formula M&S should be given 22.5 years to achieve compliance. M&S, which was charging below market rents to family members, argued that the lack of rental income meant the ordinance, as applied to M&S, did not require any amortization. After an losing appeal to the City's Board of Adjustment, M&S appealed to the district court which ruled against M&S's claim that the ordinance was arbitrary and illegal. M&S also asserted that the district court erred in granting summary judgment to the City because the court did not consider all of M&S's claims, particularly a takings claim. The Court held that M&S had ample opportunity to present all of its claims to the district court and could only blame itself for not carefully reading the City's motion for summary judgment and for not making it clear that other issues remained to be considered. After reviewing the rules of statutory construction, the Court held the City's interpretation of its ordinance was legal and that M&S's interpretation would be counter to the purpose of the ordinance. Finally, the Court determined that the City's decision to grant M&S 22.5 years to come into compliance was supported

by substantial evidence.

To read the opinion see: http://www.utcourts.gov/opinions/appopin/m&scox092707.pdf

Bissland v. Providence City, 171 P.3d 430 (Utah 2007), clarifies that "passage" of an ordinance means the day when a legislative body votes to adopt it. Subsequent ministerial formalities, such as obtaining the Mayor's signature or publication of the ordinance, are not included in determining when an ordinance is passed. Petitioners in this case sought by referendum to overturn an annexation ordinance. The City Council passed the ordinance subject to having the City Attorney make corrections to an annexation agreement which was part of the ordinance. Utah law requires a referendum petition to include "one copy of the law" to be challenged. Since the annexation ordinance was passed subject to a correction, petitioners were unsure which version should be included. They decided to wait and use the corrected copy. The City Recorder subsequently rejected their petition as untimely because it was filed more than 45 days after the date the Council voted to adopt the ordinance. Petitioners argued the 45 day petition clock did not begin to tick until the ordinance was published in its final form. Citing a number of cases, the Court agreed with the City, concluding that the commonly understood meaning of "passage" is the event where a legislative body votes favorably on proposed legislation. "Passage" does not include subsequent ministerial actions which may be required. Petitioners argued that the time to submit the referendum petition was unreasonably short and that their due process rights were violated because of inadequate notice. The Court reiterated that due process is a flexible concept whose mandates may vary depending on the circumstances. Indeed, the Court said "notions of fundamental fairness justify our insistence that the concept of due process be flexible. However, facts are the levers that cause due process to bend." In this case no facts were in the record showing petitioners were unable to comply with the 45 deadline. Moreover, the sequence of events did not suggest "the presence of a presumptive due process violation."

To read the opinion see: http://www.utcourts.gov/opinions/supopin/Bissland102607.pdf

Specht v. Big Water Town, 172 P.3d 306 (Utah App. 2007), concludes a citizen does not have standing to complain about a land use ordinance or enforce an alleged zoning violation unless that person has suffered special damages. Mr. and Mrs. Pyle built a 2000 square foot home in a residential zone and began to construct a large garage on a separate adjoining residentially zoned parcel. Because they did not get a building permit, a Town inspector issued a red tag to stop construction. The Pyles' then applied for a building permit and appealed to the Board of Adjustment. The Board reversed the red tag decision because the Board is empowered to grant variances and because the Board found the setback requirement was ambiguous. Within a month the Town Council amended the setback requirement after first posting, in three locations, notice of the Council meeting. The notice was not published in a newspaper. Mr. Specht, a Town resident and property owner, challenged the Board of Adjustment decision and sought a declaration that the amended setback requirement was invalid because notice of the Council meeting was not published in a newspaper. He also requested a writ of mandamus to require Big Water to enforce the Pyles' violation of the original setback requirement. Mr. Specht claimed his status as a Big Water resident

and property owner gave him standing to challenge the town's actions. After the District Court ruled in favor of Big Water, Mr. Specht appealed. The Court of Appeals held he did not have standing to challenge the Town's land use decisions because he did not suffer any particularized injury. The Court noted that under the municipal version of Land Use, Development, and Management Act "only municipalities and adversely affected owners of real estate within the municipality" may institute proceedings to enjoin a zoning violation. The Court reaffirmed a long-standing rule that "a private individual must both allege and prove special damages peculiar to himself in order to entitle him to maintain an action to enjoin a violation of a zoning ordinance. His damage must be over and above the public injury that may be caused by the violation." Indeed, the Court said the injury must be substantially more than the injury to the general community. Mr. Specht argued that as the result of a 2001 Salt Lake County case, Culbertson v. Board of County Commissioners, standing was not a prerequisite to obtaining declaratory (as opposed to injunctive) relief in zoning cases. The Court ruled that Culbertson did not eliminate the long-established standing requirement in order to obtain a declaratory judgment. It thus dismissed Mr. Specht's appeal because, having neither alleged nor proved special damages, he did not have standing to pursue either injunctive or declaratory relief.

To read the opinion see: http://www.utcourts.gov/opinions/appopin/specht101807.pdf

McCowin v. Salt Lake City, 2008 UT App 12, affirms that notice of a land use application is adequate if it uses ordinary and commonly understood terms. Property owners Rasmussen and Hammond submitted a proper application to the Salt Lake City Historic Landmark Commission for a permit to construct a new two-story garage structure. As required by the ordinance, notice was given to the owners of property located within 85 feet of the property. The Salt Lake City Code requires that "[t]he notice for mailing . . . shall state the substance of the application and the date, time[,] and place of the public hearing, and the place where such application may be inspected by the public." Although McCowin received notice, he argued it was inadequate and deceptive because the notice used the term "garage" rather than describing a 2-story building. The Court of Appeals concluded a plain reading of the notice in light of applicable City Code requirements, the term "garage" gave the notice required by law and was not deceptive or misleading. The City Code defines "garage" as "a building, or portion thereof, used to store or keep a motor vehicle." While people might argue about what a garage consists of or its acceptable size, no one in this case contended the garage would not be "used to store or keep a motor vehicle." Importantly, the actual dimensions of the garage were within City Code requirements. The notice did not need to disclose the particulars of the garage such as its square footage or height. As noted by the City, it would be impossible for City staff to identify every relevant detail of every building application in every notice. Moreover, the notice in this case also included the name and phone number of a City planning staff member who could address any questions about it as well as the proposed site plan and preliminary construction drawings which were on file at the City. All of this information was available to McCowin before construction began. Indeed, the Court noted, one of the very purposes of requiring notice to nearby landowners is to prevent disputes after construction has begun.

To read the opinion see: http://www.utcourts.gov/opinions/appopin/mccowin_FORPUB011008.pdf

Culbertson v. Salt Lake County, 2008 UT App 22, summarizes the basis for awarding attorney fees under the private attorney general doctrine. In Utah, attorney fees are generally recoverable only if authorized by statute or contract. However, under its inherent equitable power, a court may award attorney fees based on the private attorney general doctrine. This doctrine provides for attorney fees in extraordinary cases when a plaintiff successfully vindicates an important public policy and the costs of doing so transcend the plaintiff's pecuniary interest. Here, the trial court held Salt Lake County willfully failed to abide by its own ordinances, allowing an exception to a road requirement, even though Culbertson had notified the County that the exception was illegal. The Utah Court of Appeals agreed. It held Culbertson was primarily attempting to get the County to follow its own rules and found this case was extraordinary because the County continued to violate its ordinance even after being put on notice by Culbertson. Twice Culbertson tried to resolve the case without litigation but was rebuffed by the County. The County defended by arguing Culbertson failed to follow a notice of claim, required when a claim is based on a government function as here (issuance of a conditional use permit). The Court rejected this contention, noting that neither lack of notice or governmental immunity apply to a case where the court exercises its inherent equitable powers.

To read the opinion see: http://www.utcourts.gov/opinions/appopin/culbertson012508.pdf

Gardner v. Wasatch County, 2008 UT 6, concerns the enactment of a temporary zoning regulation (a "moratorium") under the County Land Use, Development, and Management Act (CLUDMA). Following approval of a subdivision in Provo Canyon, developers acquired unsold lots and proposed a large residential project on adjoining property. In 1994, following a geological study undertaken for a road project, the Utah Department of Transportation (UDOT) warned the County Planner that land in the area was unstable and could affect septic systems in the area. Developers admitted the area was "ecologically sensitive" and neighbors opposed the proposed project expressing concern about potential catastrophic failure of septic systems. In 1997, as a result of geologic studies, the County enacted a moratorium ordinance prohibiting acceptance or approval of building permits in the area until a comprehensive study could be completed to resolve the suitability of continued development using septic systems. The ordinance included an exception allowing property owners to obtain a building permit subject to conducting a private slope stability studies which showed the lot in question suitable for a septic system. Several lawsuits ensued which were eventually consolidated in this case. Plaintiffs claimed, among other things, that the moratorium was invalidly enacted, that the ordinance was not reviewed by the County Planning Commission, that the cost of conducting private slope stability studies constituted an illegal impact fee, that a taking had occurred, and that the County had violated their equal protection rights resulting from the County's allegedly disparate treatment of various landowners. Following a motion for summary judgment by the County, plaintiffs' attorney, at the beginning of the hearing, unexpectedly requested the district court to grant the County's motion. The court granted the request and a subsequent request by the County for an award of attorney fees. On appeal, the Utah Supreme Court held plaintiffs' challenge to the moratorium ordinance was untimely, that CLUDMA expressly did not require the Planning Commission to review a moratorium ordinance, that the ordinance was not arbitrary or capricious, and that no illegal impact fee was created. The Court also held the takings claim was unripe under *Williamson County* and that plaintiffs had waived a physical takings claim because that issue was

not raised in district court. However, the Court remanded the equal protection claim to determine its validity. Finally, the Court granted the County's request for attorney fees since it had to defend the case. Plaintiffs counsel conceded he did not have sufficient facts to adequately defend against the County's summary judgment motion and apparently believed, wrongly, that dismissal by the district court would enable him to revive these issues on appeal when he was better prepared. However, one who acquiesces in a judgment cannot later attack it. Except for the equal protection remand, the district court decision was affirmed.

To read the opinion see: http://www.utcourts.gov/opinions/supopin/Gardner8020108.pdf

Wasatch County v. Okelberry, 2008 UT 10, **Leeds v. Prisbrey**, 2008 UT 11, and **Utah County v. Butler**, 2008 UT 12, all decided the same day, involve the application of Utah Code section 72-5-104(1) which provides that "[a] highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years." As decided by prior cases, "continuously used as a public thoroughfare" occurs when the public, "even though not consisting of a great many persons" make "continuous and uninterrupted use" of a road "as often as the public finds convenient or necessary." However, what constitutes a sufficient interruption to restart the running of the ten-year period has been problematic. Although public use need not be constant, mere "intermission" of use is not interruption. To resolve this problem the Court, in *Wasatch County,* announced a bright-line rule: an "overt act" intended by a property owner to interrupt the use of a road as a public thoroughfare is sufficient to restart the running of the ten-year period. The Court remanded the case to determine the application of this new rule. In *Utah County,* the Utah Supreme Court analyzed whether public use of the road was "continuous." The property owners asserted it was not continuous because use was interrupted by weather conditions, irrigation water and locked gates. The Court rejected the property owner's assertions because, under the rule announced in *Wasatch County,* none of road use interruptions was intended to assert the property owner's rights and restart the running of the ten-year period. The *Butler* case also held (i) the plain language of the statute does not exclude trespassers but includes them as members of the "public;" (ii) no specific ten-year period must be identified if public use occurs for a longer period; and (iii) although the statute includes a range of remedies, including monetary damages, the district court has discretion to determine the amount of such damages. Finally, in *Leeds* the Court held for the property owner since she erected a road barrier and no trespassing signs with the intent to exclude the public. Although her barrier and signs did not block the public's actual use of the road at the time, her actions were sufficient to restart the ten-year period.

To read the opinions see: http://www.utcourts.gov/opinions/supopin/Okelberry021208.pdf
http://www.utcourts.gov/opinions/supopin/Prisbrey2021208.pdf
http://www.utcourts.gov/opinions/supopin/Butler3021208.pdf