Utah Land Use Decisions - 2008

By Neil A. Lindberg
Municipal Council Attorney
City of Provo, Utah
(801) 553-6416
nlindberg@provo.utah.gov

McCowin v. Salt Lake City, 176 P.3d 492 (Utah App. 2008), 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 Salt Lake City Code, notice was given to the owners of property located within 85 feet of the garage property. The 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 that under a plain reading of the notice, in light of applicable code requirements, the term "garage" gave the notice required by law and was not deceptive or misleading. The code defines "garage" as "a building, or portion thereof, used to store or keep a motor vehicle." While people might argue about what constitutes a garage or what size it should be, 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 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 included the name and phone number of a City planning staff member who could address questions about the application. The proposed site plan and preliminary construction drawings were on file at the City office. All of this information was available to McCowin before construction began. Indeed, the Court noted, one purpose 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

http://www.utcourts.gov/opinions/appopin/mccowin_FORPUB011008.pdf

Culbertson v. Salt Lake County,177 P.3d 621 (Utah App. 2008), 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 district court held that 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 Court of Appeals agreed. It held Culbertson was primarily attempting to get the County to follow its own rules. The case was extraordinary because the County continued to violate its ordinance even after being put on notice by Culbertson. Culbertson twice tried to

resolve the case without litigation, but was rebuffed by the County. The County defended by arguing Culbertson failed to file 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 a district court exercises its inherent equitable powers.

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

Gardner v. Wasatch County, 178 P.3d 893 (Utah 2008), 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 warned the County's planner that land in the area was unstable and could affect septic systems in the area. The 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 study which showed the lot in question suitable for a septic system.

Several lawsuits ensued which were eventually consolidated into 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 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 before the 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

Leeds v. Prisbrey, 179 P.3d 757, (Utah 2008), **Wasatch County v. Okelberry,** 179 P.3d 768 (Utah 2008), and **Utah County v. Butler**, 179 P.3d 775, (Utah 2008), all decided the same day, involve the application of Section 72-5-104(1) of the Utah Code 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 *Okelberry,* 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 *Butler,* the Court analyzed whether public use of a 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 *Okelberry,* none of the road use interruptions was intended to assert the property owner's rights and restart the running of the ten-year period. *Butler* also held that (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 *Prisbrey,* 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/Butler3021208.pdf
http://www.utcourts.gov/opinions/supopin/Prisbrey2021208.pdf

R.T. & R.H., LLC v. Lehi City, 2008 UT App 72, reaffirmed the broad scope of local government authority in making a land use decision which involves the exercise of legislative discretion. If the decision is "reasonably debatable" a court will not substitute its judgment for that of the municipality. In this case the plaintiff claimed the City's record of decision disclosed "no comprehensible basis for the decision" and thus did not meet the reasonably debatable standard. Since several requests for zoning amendments had been received, the City decided to determine the most appropriate land use for the entire area. Following public meetings before the Planning Commission and City Council, where public support and opposition was considered, the Council adopted the Planning Commission's recommendation to designate the entire area as medium density residential instead of high density residential as requested by the plaintiff. The public debates before the Planning Commission and City Council convinced the Court that the decision met the reasonably

debatable standard. Accordingly, the district court's grant of summary judgment in favor of Lehi was upheld.

To read the opinion see: http://www.utcourts.gov/opinions/mds/rt-rh030608.pdf

Salt Lake City Mission v. Salt Lake City, 184 P.3d 599 (Utah 2008), upheld dismissal of claims by the Salt Lake City Mission because (i) it failed to exhaust its administrative remedies and (ii) it's federal constitutional claims were not ripe. The Mission, which provides religious services and temporal resources to homeless and needy persons suffering from addiction, sought to move from its original location. It considered five alternative properties, each of which required a conditional use permit. The Mission did not apply for conditional use permits at four of the locations because it claimed the City prevented it from doing so. It did apply for a CUP at the fifth location which was denied by the Planning Commission. The Mission did not appeal the Planning Commission's decision but subsequently filed a suit against the City alleging violation of the Mission's right to free exercise of religion.

The Municipal Land Use, Development and Management Act requires a person to exhaust administrative remedies before a land use decision may be appealed in district court. The Mission attempted to bypass the exhaustion requirement via exceptions to the rule based on futility and irreparable injury. The Court determined those exceptions did not apply in this case. Absent some extraordinary circumstance, a person who does not even attempt to file an application or appeal a planning commission decision cannot claim that possible administrative remedies have been exhausted. In order for a land use decision to be ripe for court review, a final definitive decision from the land use authority must be obtained. Because there was no such decision in this case, dismissal of the appeal was upheld.

To read the opinion see: http://www.utcourts.gov/opinions/supopin/SLCMission042208.pdf

Citizens for Responsible Transportation v. Draper City, 190 P.3d 1245 (Utah 2008), upheld a district court decision denying a request from Citizens for Responsible Transportation (CRT) that Draper City be compelled to put on the ballot a City Council resolution endorsing the TRAX commuter rail alignment through the City. While the Utah Constitution grants the people power to refer "any law or ordinance passed by the lawmaking body," administrative actions are not referable. "The determinative test in deciding whether an action is legislative or administrative in nature is whether it creates new law on the one hand, or merely executes or implements existing law on the other."

The district court's dismissal of CRT's claim was upheld because the resolution was an administrative act which simply expressed Draper City's preference for a particular alignment. The resolution did not constitute a law or ordinance, had no legal effect and was not legally enforceable. Thus Draper City was correct in refusing to subject the Council resolution to a referendum vote. Citizens who are unhappy with the execution or implementation of a law cannot use the referendum process to change things. Their remedy lies in the political arena and at the ballot box.

To read the opinion see: http://www.utcourts.gov/opinions/supopin/CRT071108.pdf

B.A.M. Development v. Salt Lake County, 196 P.3d 601 (Utah 2008), clarifies the application of the Dolan "rough proportionality" rule. In a long-awaited opinion, the Court held the district court incorrectly applied the "rough proportionality" analysis set forth in *Dolan v. City of Tigard,* 512 U.S. 374 (1994).

In 1997, B.A.M. obtained County approval for a residential development subject to a condition that B.A.M. expand the half-width of 3500 South, a major road bordering the development, from 17 to 40 feet. The County later increased the road expansion condition to 53 feet. B.A.M. claimed the required additional 13 feet was an unconstitutional taking of its property. Among other things, *Dolan* held that a government entity imposing an exaction "must make some sort of individualized determination that the required dedication is related both in nature and extent to the proposed development's impact." Although no precise mathematical calculation is necessary, under the County Land Use, Development, and Management Act an exaction must be "roughly proportionate" to the impact caused by a development.

B.A.M. and Salt Lake County agreed that the impact of B.A.M.'s development would be a 3.04% increase in traffic along 3500 South. They did not agree, however, that the exaction was roughly proportionate. The County said it was proportionate because the exaction represented, alternatively, 1.89% of the total land being developed, 2.22% of B.A.M.'s available lots, 1.38% of the total area of the road after widening, or 2.01% of the total expanded area of the road. B.A.M., on the other hand, argued the exaction was grossly disproportionate because, alternatively, the road improvement exaction would result in a 300% increase in road carrying capacity, a 300% increase in road width, or a payment of 100% of the road improvement costs.

The Court found *Dolan's* use of the term "rough proportionality" to be an unfortunate misnomer which "has engendered vast confusion about just what the municipalities and courts are expected to evaluate when extracting action or value from a land owner trying to improve real property." Apparently intending to limit further confusion, the Court assumed "rough proportionality" really means "rough equivalence." To determine whether the "rough equivalence" rule has been achieved requires analysis of two questions. First, the nature of an exaction must be related to the impact of development which requires the exaction. As explained by the Court, the question to be answered is whether "the solution (the exaction) directly addresses the specific problem (the impact)." If it does, then both the exaction and the impact should be measured by the same standard. The most appropriate standard is cost. Thus the second question to be answered is whether the government's cost of dealing with the impact, absent the exaction, is roughly equivalent to the developer's cost of mitigating it. Having articulated the correct application of the *Dolan* requirement, the Court held the rough equivalence rule was not met and remanded the case for further proceedings consistent with its opinion.

To read the opinion see: http://www.utcourts.gov/opinions/supopin/B102408.pdf

Conatser v. Johnson, 194 P.3d 897 (Utah 2008), held that the public easement which allows the public to engage in recreational activities in state waters, also allows the public the right to touch privately owned beds below those waters. By statute, all state waters, whether above or under the ground, are public property regardless of private ownership of the underlying water bed. In granting the public this easement, "state policy recognizes an interest of the public in the use of state waters

for recreational purposes." This includes the "right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water." Navigability is the standard used to determine title to the beds of state waters. If a body of water is navigable then the state owns the water's bed. If it is non-navigable, then its bed may be privately owned. The public's easement to use the water, however, exists regardless of navigability and who owns the water bed. Within publicly owned waters the public not only has the right to float, hunt, fish and participate in all lawful activities that utilize the water. It also has the right to touch privately owned beds of state waters in ways incidental to all recreational rights provided for in the easement, so long as it is done reasonably and causes no unnecessary injury to the landowner.

To read the opinion see: http://www.utcourts.gov/opinions/supopin/Conatser071808.pdf

Holladay Towne Center v. Holladay City, 192 P.3d 302 (Utah App. 2008), held that specific statutory requirements to exhaust administrative remedies will be strictly enforced. In January 2006, Holladay Towne Center (HTC) filed an application to build a drugstore in the HVC zone. Apparently because HTC's application was incomplete, the City sent HTC a letter requesting additional information about its proposal. The parties continued to discuss the proposal until March 30 when the City officially rejected HTC's application and enacted a six-month moratorium on new land use applications in the HVC zone. HTC did not administratively appeal the rejection, but instead continued working with City officials to get its project approved. When the moratorium ended, the City's ordinance had been amended in a manner that precluded HTC's project.

Following a lawsuit by HTC, the City argued HTC failed to exhaust its administrative remedies as required by the Municipal Land Use, Management and Development Act (MLUDMA). Under MLUDMA a person cannot challenge a municipal land use decision in district court until the person's administrative remedies have been exhausted as provided by local ordinance. The Court rejected HTC's claim that it had informally appealed by continuing discussions with the City, and that a formal appeal would have been futile. HTC also claimed that its initial application was complete and that it had thus obtained a vested right to proceed notwithstanding the ordinance amendment. The Court responded that HTC could have made that argument had a proper appeal been filed. But because HTC did not, the Court did not reach that question. Instead the Court rejected HTC's claims saying HTC could not "sit by and wait" for the City to act and then raise underlying questions it might have raised in a properly filed appeal. To do otherwise would turn an offense against the law into a triumph.

To read the opinion see: http://www.utcourts.gov/opinions/appopin/holladay081408.pdf

Davis v. Provo City, 93 P.3d 86 (Utah 2008), affirmed that the four year general statute of limitations, contained in Section 78B- 2-307(3) of the Utah Code, governs the time for bringing a challenge to an annexation. The Court also held that Section 10-2-422 does not control when an annexation challenge may be brought. Section 10-2-422 provides that an area annexed to a municipality is conclusively presumed to be annexed if (i) the municipality has levied, and taxpayers in the area have paid, taxes for more than one year after annexation, and (ii) no resident of the area contests the annexation during the following year.

In 1998 Davis acquired property in Rock Canyon. He challenged the validity of the property's 1978

annexation to Provo City because, due to an erroneous assessment by Utah County, he never received a property tax notice from the City. The Court held Section 10-2-422 is a not a statute of limitation but rather is a "conclusive presumption" which establishes proof of certain facts which cannot be rebutted. A conclusive presumption gives finality to a government decision, thus enabling the government to provide city services without fear that spending decisions will be overturned. Because Mr. Davis's cause of action was untimely, the Court upheld dismissal of his claim against Provo City.

To read the opinion see: http://www.utcourts.gov/opinions/supopin/Davis3082608.pdf

Friends of Mapleton Mountain, Inc. v. Mapleton City, Civ. No. 070403029 (2008), is another district court decision in a long running dispute. Fourth District Judge Darold McDade ruled against the Friends of Mapleton Mountain, a group that initiated a referendum petition to overturn a City Council decision to rezone Dr. Wendell Gibby's property in order to settle the controversy. The court held Mapleton's rezoning ordinance (i) was not a "land use law" as defined in the referendum statute, and (ii) is not a legislative act under the four-factor test set forth in *Citizens Awareness Now v. Marakis*, a 1994 case. Rather, it was an administrative decision, at least for referendum purposes, and thus not a matter that could be placed on the ballot.

The district court's analysis illustrates on-going conceptual problems with the "administrative/ legislative" dichotomy and the unfairness that can result. The Utah Supreme Court discussed this issue eighteen months ago in *Mouty v. Sandy*, where citizens were successful in getting on the ballot the issue of whether a former gravel pit should be commercially developed. Obliquely admitting the problem, the Court said "[t]he [referendum] statutory scheme appears simple at first blush. . . . However, the history underlying the development of the statutory scheme, and our case law interpreting that development, complicate our state's facially facile local referendum procedure." The Court decided that "the approach outlined in *Marakis* has continuing applicability when it is necessary to determine whether a zoning action taken by a governing body empowered with both administrative and legislative authority is best categorized as administrative or legislative." However, the Court said that in a council-mayor city like Sandy, which divides government power into separate and independent legislative and administrative branches, "all acts" taken by the city council "are necessarily legislative and subject to referenda."

Thus the degree to which citizens have a referendum right, a right established by the Utah Constitution, apparently depends on the form of government that decides the question. If the Gibby rezoning had been decided in Sandy City the matter would have been referable. But having been decided in Mapleton, it apparently depends on the *Marakis* analysis.

Kanab City v. Popowich, 194 P.3d 198 (Utah App. 2008), rejected a claim that a Kanab ordinance regulating kennels was unconstitutionally vague. To succeed on such a claim a defendant must prove the ordinance (i) does not enable an ordinary person to understand what conduct is prohibited or (ii) encourages arbitrary and discriminatory enforcement. If the regulation is sufficiently explicit to inform an ordinary reader what conduct is prohibited, it is not unconstitutionally vague. After reviewing the kennel ordinance language, the Court concluded an ordinary person could understand it. The Court also found nothing in the ordinance that would encourage arbitrary or discriminatory enforcement because it clearly identified the prohibited conduct.

To read the opinion see: http://www.utcourts.gov/opinions/appopin/popowich091808.pdf

Sevier Power Company, LLC, v. Sevier County, 196 P.3d 583 (Utah 2008), struck down amendments to Section 20A-7-401 of the Utah Code which limited the power of the people to initiate a land use ordinance. The amendment was enacted in the last session of the Legislature by Senate Bill 53, sponsored by Rep. Goodfellow. SB 53's prohibition on land use initiatives was thought to be simply reflective of a fifty-year-old Utah case, *Dewey v. Doxey-Layton Realty Co.*, 277 P.2d 805 (Utah 1954). That case held that rezoning by initiative was not possible because it would bypass procedural due process notice and hearing requirements contained in the then-existing enabling statute. Those requirements are still included in the current versions of the municipal and county Land Use, Development and Management Acts.

This case involved a request to build a coal-fired power generation plant in Sevier County. Project opponents prepared a legally sufficient initiative petition to require (i) voter approval of any conditional use permit for such a power plant and (ii) revocation of a conditional use permit issued after the initiative petition was filed. Under the Utah Constitution legislative power is vested in the Legislature and the people of the state. While the Legislature may enact laws establishing the conditions, manner and time within which the initiative power may be exercised, it may not directly prohibit an initiative which meets procedural requirements. Pursuant to a challenge by Sevier Power, the district court ruled that SB 53's statutory ban on initiating a land use ordinance did not conflict with the people's initiative right. The Supreme Court disagreed and held that because the people have constitutionally reserved the right to initiate any desired legislation for approval or rejection by the voters, an initiative may address "any substantive topic and any legislative act, unless forbidden by the Constitution." The Court found the amendment enacted by SB 53 to be unconstitutional because it effectively allowed the Legislature to foreclose the people's initiative right.

While the Court did not address the holding in the *Doxey* case, it seems to have implicitly overruled it. Similarly, the Court did not address the question of whether a conditional use permit, as an administrative matter, can be subject to voter approval. It did say that "matters presented as initiative measures which address administrative actions are not suitable for legislative action by the people through initiative, but are more properly left to officers of government." The Court also observed that "when an initiative seeks to undo an accomplished action taken pursuant to assisting law, it most likely falls within the administrative action category."

The essential message of this case is the people plainly have the right to initiate any new law. Whether such a law will eventually pass legal muster is an issue for another day. This case raises a number of very interesting and important questions which will likely be addressed in future litigation.

To read the opinion see: http://www.utcourts.gov/opinions/supopin/SevierPower101708.pdf

Fox v. Park City, 2008 UT 85, held that an appeal period begins to run from the date when an aggrieved party has actual or constructive notice of permit issuance and not from the date of permit issuance. Following Park City's approval of a building permit on July 14, 2005 the developer began construction of the project several months later in the fall of 2005. In January 2006, Bret and

Tawnya Fox filed an appeal claiming that one of the buildings was taller than allowed under the City's code. The Foxes' appeal was rejected by the City and the district court as untimely because it was not filed within ten days after permit issuance as required by the City code.

After examining the language of the City code, the Supreme Court determined that in light of other language in the code, the planning director's decision to issue a building permit was not a "final action." Moreover, the code did not provide for any appeal from a decision by the planning director. As a result the Court relied on the Municipal Land Use, Management and Development Act (MLUDMA) to fill the gap. MLUDMA requires municipalities to enact an ordinance establishing a reasonable appeal period of not less than ten days. In the absence of such an ordinance, MLUDMA provides for an appeal period of ten days.

However, MLUDMA does not include any language indicating the triggering event that commences the ten-day period. After reviewing a similar New Jersey case, the Court held that "the interests of both the permit holder and the neighboring landowners are best balanced by the rule that the appeal period begins when the aggrieved party has actual or constructive knowledge of the issuance of the permit." A right to appeal is meaningless without actual or constructive notice of the decision, particularly building permit decisions. A permit holder could simply wait eleven days after permit issuance before beginning construction and thereby completely elude review unless potentially aggrieved parties regularly checked municipal records, which would be an unfair burden.

The Court qualified the rule by clarifying that having knowledge of a decision must also include knowledge of the facts that form the basis for the decision. If those facts can be ascertained by reviewing a permit application, then when a person has actual or constructive notice of a permit its underlying facts are chargeable to that person. On the other hand, if a permit application does not include those facts, then the appeal period does not begin to run until the person receives knowledge of those facts from some other source.

Here, the Foxes had knowledge of the permit because once they became aware of the potential height problem in the fall of 2005, Mr. Fox reviewed development plans on file with Park City. Accordingly, the Foxes were charged with notice of the permit's issuance at that time. Because their appeal was not filed until January 19, 2006, it was rejected as untimely.

Permit applicants can protect themselves by devising some method to inform potentially aggrieved parties that a permit has been issued, such as "posting a visible and informative sign on the property prior to construction." Of course, that assumes the permit application materials on file at city hall are adequate to show the basis for the decision.

To read the opinion see: http://www.utcourts.gov/opinions/supopin/Fox3121608.pdf