The Land Use Appeal Authority

Under Utah Statute and Case Law

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The Utah Land Use Appeal Authority

Contents

NOTE: Citations to the state code are simplified with a sequence of numbers, such as 10-9a-101, instead of the more formal and complete citation to that same section such as "Utah Code Ann. § 10-9a-101".

Any statements here that are not cited to authority, either in code or case law, are the opinions of the author. This material is his alone.

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Any discussion of land use law is subject to a continual need to update the information provided as new legislation and court decisions are provided. Please be sure that you have the most recent version of these materials as you review them, and that recent changes in the statutes, local ordinances, and appellate opinions are considered.

Definition of Important Terms

Before embarking on more discussion of the legal issues and protocols, it will be helpful to review a few terms that are used repeatedly in Utah land use regulation:

Legislative Acts. Legislative acts and decisions are always performed by the city council. These include adopting and amending the general plan, amending the land use ordinances, changing the zoning map, and annexing land. These decisions are not appealed to the appeal authority. Sometimes an ordinance may include some land use issues that are administrative mixed with some that appear legislative. It can be challenging to figure out which is which, and the Utah Supreme Court has recently wrestled with the issue in some high profile cases. In such cases, a mixed administrative/legislative decision by a county council would likely be considered as a legislative decision. *Suarez v. Grand County*, 2012 UT 72.

Administrative Acts. Administrative acts do not create new law but rather apply existing law to specific conditions. They may be performed by the city council or others in most forms of local government. They are usually not performed by a city council in the dozen or so cities where the municipality has adopted the Mayor-Council form of government.[1] The appeal authority only hears appeals from administrative decisions and never legislative decisions. 10-9a-703(1) refers to the appeal authority only hearing appeals from a land use authority, as defined below.

Land Use Authority. A land use authority is an entity that is appointed under the land use regulations to make an administrative land use decision. The city council may be a land use authority, but only when it performs an administrative act. 10-9a-103(28). The entity that responds ultimately to a subdivision application, a conditional use permit, or another similar application is the land use authority for that application.

Land Use Decision. A land use decision is an administrative act by a land use authority, often in response to a land use application, a land use permit, or the enforcement of a land use regulation, land use permit, or development agreement. 10-9a-103(29). Approval of a subdivision or conditional use permit is a land use decision. Approval of a zone change or general plan amendment

[1] This includes Salt Lake City, Ogden, Provo, Sandy, Logan, Murray, South Salt Lake, Saratoga, Taylorsville, Marriott-Slaterville, Hooper, Laketown, and Tooele. It also includes Salt Lake and Cache County.

is not a land use decision, but an action taken on a land use regulation. Only a land use decision may be appealed to the appeal authority. 10-9a-701.

Land Use Regulation. The city's land use regulations include the zoning map, the general plan, the land use ordinance or the land use development standards adopted by ordinance. To adopt or amend one of these or to annex land into the city is a legislative act to approve a land use regulation. 10-9a-103(31). The resulting action is not a "land use decision" so it is not appealable to the appeal authority. Legislative decisions related to land use regulations are appealed to the District Court. 10-9a-801.

Why an Appeal Authority?

Land use regulation has been around for more than 100 years in the United States, and it is really quite remarkable how similar the land use administration systems are nationwide. Early in the process of zoning, it was determined that some means should be made available for those who disagreed with a land use decision or who needed some variance from the harsh application of the strict ordinance.

In its earliest forms, the land use appeal authority was known, and still is often referred to, as the Board of Adjustment. In Utah today, we have more options. The appeal authority may be a board like the board of adjustment, even though sometimes it is called the board of appeals or some other variation on those terms. Many communities have chosen to use a single hearing officer instead of a board, which is entirely appropriate under the state law.

The basic goals of the appeals/variance process remain the same, however. An expedited review of a citizen's issues before a person or body without all the formality, costs, and trappings of a court can be a benefit to all involved.

By appointing and supporting a well-trained and capable appeal authority, a municipality can provide a safety valve for public concerns, take a second look at potential errors, and perhaps save itself from legal costs and financial liability for mistakes that need to be corrected. Handled correctly, the process of an appeal can allow for a full airing of issues, diffuse tension, and validate a proper, legal result from a challenge.

The law has deemed the appeal authority so vital to good land use regulation that individuals and companies cannot challenge local administrative land use decisions in court unless they have made a timely appeal to the appeal authority, thus "exhausting" their "local remedies" before litigation. 10-9a-701(2); 10-9a-801(1).

Who May Act as an Appeal Authority?

According to the state code, the local ordinance may provide that a person, board, commission, agency or other body can serve as the appeal authority. 10-9a-103(4). There is no mention of residency requirements, educational background, compensation, qualifications, or other criteria. The local administration simply reaches a consensus as to how to meet the requirement for an appeal authority and then proceeds. Some hearing officers serve several cities and there is no reason that a volunteer board might not serve several communities with representatives from each.

Since the regulations involved with the appointment of the appeal authority are in the local land use code, the planning commission must be involved in making recommendations about how the municipality provides the appeal authority just as they would for any proposed amendment to the code. 10-9a-302(1)(d).

More than one appeal authority may be designated to hear different matters. 10-9a-701(4)(a)-(b). A legislative body may act as an appeal authority unless both the legislative body and the appealing party agree to allow a third party to act as the appeal authority. 10-9a-707(5)(b).

Local ordinance can also provide that specified types of land use decisions, including any and all land use appeals may be taken directly to the district court. 10-9a-701(4)(e). Letting the court handle all appeals is a legitimate way for smaller cities and towns to avoid the complications and technical challenges inherent in appointing an appeal authority. The court could even handle variances if that is the wish of the municipality, but this would seem to impose an undue burden on property owners needing some simple relief from undue hardships imposed by the strict application of the ordinances.

The state code provides an optional separate appeals body and process for issues involving a geologic hazard ordinance 10-9a-703(2) and limits which entities may serve as an appeal authority to review a land use decision related to an inland port. 10-9a-701(3)(a)(ii); 10-9a-708(2).

The Role of an Appeal Authority

First and foremost, an appeal authority serves as the final arbiter of issues involving the interpretation or application of land use ordinances. 10-9a-701(1)(b); 701(3)(a)(ii). Only a decision in which a land use authority has applied a land use regulation to a particular land use application, person, or parcel may be appealed to an appeal authority. 10-9a-707(6).

An appeal authority is also designated by state law as the entity that is to hear variance requests. 10-9a-701(1)(a). More about that later.

A newer assignment for an appeal authority is to hear appeals from the assessment of certain fees for reviewing development plans, processing land use applications, and hooking up utility systems. 10-9a-701(1)(c) and 10-9a-510. Someone who disagrees with what they were charged is now clearly entitled to file an appeal and challenge the fees before the appeal authority. Fees charged by municipalities are subject to this appeal. 10-9a-510. Also, fees charged by non-municipal culinary or secondary water providers can be brought to the appeal authority to justify the fees assessed for hookup charges and other fees. 10-9a-510(7). The fees can reflect only the reasonable estimated cost of regulation, processing an application, issuing a permit, or delivering the service for which the owner paid the fee. 10-9a-510(5)(c).

An appellant cannot be required to pursue duplicate or successive appeals before the same or separate appeal authorities as a condition of exhausting administrative remedies. 10-9a-701(4)(d).

Independence of the Appeal Authority

The American republic was established on the principle of separation of powers, with three distinct branches to our federal government. While this is preserved at the state level, at the local level a strict separation is often quite impractical. But the principle remains as an ideal, with the state law requiring that an appeal authority act in a "quasi-judicial" manner. 10-9a-701(3)(a)(i). The independence of the appeal authority is essential to its credibility and image as a fair, deliberative body.

It is to be remembered that often the municipality is a party to a dispute. For example, if a builder challenges the building permit fee, then the sides are drawn. The builder wants a refund and the city most likely will be reluctant to give it. The appeal authority cannot be perceived as simply doing what the city staff advises or the purpose of the exercise is lost. Both city officials and appeal authority members must carefully keep the required professional distance needed to preserve impartiality and fairness. Much of this is covered in the section on due process, below.

There is nothing rare nor inappropriate about the city staff making recommendations as to how the appeal authority should decide. But the information provided is to play a similar role to the information provided by the person bringing the appeal or variance request and others who may be opposing the appeal or variance. The appeal authority is to weigh the evidence provided, consider the words of the relevant ordinance or law, and make a decision on the merits.

It is also not uncommon for city staff to assist with preparing the minutes, providing notice, and other support functions. Again, this is not inappropriate on its face, but any such assistance must be provided in a neutral manner, preserving the independence of the appeal authority and its control over its meetings, hearings, and decisions.

Conducting Meetings and Hearings

The appeal authority walks a tight path between attempting to accommodate unsophisticated citizens who appear and ensuring that the formalities of due process and impartiality are maintained. Too often, however, artificial and unnecessary structure gets in the way of conducting a conversation where the truth can be discerned and all parties are afforded a fair hearing.

The state code requires the appeal authority to act in a quasi-judicial manner. 10-9a-701(3)(a)(i); 10-9a-707(5)(a). This has more to do with fairness and impartiality than formality.

When the Appeal Authority is a Board

Of course the minimum requirements in the state statute must be respected and followed. Where the appeal authority is a body of individuals, the chair and staff must, under law: (1) Notify each member of any meetings or hearings. (2) Provide each member with the same information and access to municipal resources as any other member, (3) Convene only when a quorum is present, and (4) Act only by majority vote of the convened members. 10-9a-701(5).

As a public body under the Open and Public Meetings Act, 52-4-103(9)(a)(i) an appeals body must also provide public notice – 24 hours in advance or by local ordinance – of any meetings. However, there is a difference between a public meeting where citizens may attend and observe, and a public hearing where they may speak. There is no requirement in state law that an appeal authority hold any public hearing on any subject, so only your local ordinance can provide those rules.

This does not mean, however, that those with a protected interest in the outcome need not be heard. For example, an abutting landowner should be heard in a hearing about the neighbor's request for a reduced setback. The neighbor has a specific personal interest in that matter and a decision may "adversely affect"[2] that interest.

If the local ordinance does require notice to landowners within a certain distance of property which is the subject of an appeal, then they should be

[2] A phrase used often to describe those who are entitled to file a land use appeal (10-9a-701(2)) An adversely affected individual has been particularly prejudiced by a land use decision. That injury makes that person qualified to challenge the decision. Members of the public in general are not usually allowed to challenge an administrative decision without showing that unique prejudice or injury. *Springville Citizens v. Springville*, 1999 UT 25 ¶ 31.

allowed to be heard. To require notice without allowing any input from those receiving the notice makes little sense.

As with any public meeting, meetings of the appeal authority should be audio recorded. Those attending may also record the proceedings under the open meetings act. They do not need permission to do so, so long as the process of recording does not unreasonably disrupt the proceedings.

Minutes are kept of open meetings conducted by public bodies. The city staff will normally provide this service to the appeal authority.

It is to be noted that despite the lack of any provision in the Open Meetings Act saying so, the Utah Supreme Court has ruled that quasi-judicial bodies who wish to deliberate once the evidence and argument are heard may do so in private. Such a deliberation is "exempt from the requirements of the (Open Meetings) Act. *Dairy Products v. Wellsville*, 2000 UT 81 ¶ 60.

When the Appeal Authority is an Individual Hearing Officer

A hearing officer is not a public body under the Open Meetings Act. Therefore, public notice of any meetings or hearings is not required unless such is required by local ordinance. Appeals can be heard in a conference room with the essential parties present unless the ordinance provides otherwise. A "hearing" in this context is a meeting of the decision-maker and the parties. It is not a public meeting.

An individual hearing officer can provide due process in various formats, such as in a telephone conference, a face-to-face meeting, or even an email exchange including all participants in real-time copies of the emails, so long as elements of due process are respected.

For Both Appeals Bodies and Hearing Officers

Much of the discomfort associated with public hearings and meetings is sometimes associated with artificial and unnecessary factors, such as lack of information. It is recommended that the appeal authority explain several things before commencing the discussion of a variance request or appeal.

First, for example, it could be mentioned that the proceedings are being audio recorded and everything said is on the record; that the appeal authority has received no information about the matter other than what has been provided to all parties together via email; that there have been no ex parte communications; and what the order of business will be. Reassure those who have the right to speak that they will be heard. In particularly emotional

settings, it may also be appropriate to declare that no decision will be made at an initial hearing and the record will remain open for comments via email and letter until a specific date. This can greatly diffuse tension and encourage communications.

The applicant/appellant has the burden of proof (more later). As such, our legal tradition usually provides him or her the first and last word. While it does not need to be formal, an optimal procedure may be to let the applicant speak first. Then turn to the city staff, who may have already provided a staff report to all the parties, to comment. At this point turn to third parties and/or the public, if required by local ordinance. Once they have spoken let the applicant respond. Repeat the process if to do so is helpful to assure that all the evidence and argument is heard, but always offer to let the applicant speak last.

To comply with the law does not require excessive formality. Have a conversation with those entitled to speak so long as those involved do so with civility and at least some efficiency. If more formality is required because of poor conduct by those participating, then that should be the exception, not the rule. Those involved in your meeting may only attend one function such as this in a decade. It is vital to our democracy that those who join in the civic dialogue consider their involvement as constructive and worthwhile.

Due Process of Law

An appeal authority works under the provisions of the local ordinance and state law, which together share a common goal of advancing what the lawyers and judges call "due process of law". Therefore, each appeal authority shall conduct each appeal and variance request as provided by local ordinance. 10-9a-706(1).

State law also provides that each appeal authority shall respect the due process rights of each of the participants. 10-9a-706(2). While the term "participants" is a broad word, in the land use context, we can take this to include the applicant who appeals what the land use authority did to his or her application, an abutting neighbor who might be adversely affected by an appeal, persons identified in the ordinance as being entitled to notice of the appeal and proceedings, and city officials and staff who also engage in the process.

A person attending a public meeting which is not a public hearing is not a "participant" unless the person was entitled to particular notice of the meeting or hearing. On the other hand, just because a meeting is not a hearing does not mean that those who are entitled to due process are not allowed to speak. Such individuals clearly should be included in the "participants" entitled to due process.

"Due process is not a technical conception with a fixed content unrelated to time, place, and circumstances. Instead, due process is flexible and, being based on the concept of fairness, should afford the procedural protections that the given situation demands. To be considered a meaningful hearing, the concerns of the affected parties should be heard by an impartial decision maker. In addition, a record is helpful to allow for judicial review, though where not available or complete, the reviewing court must be allowed to determine the facts to ensure due process was given". *Dairy Products v. Wellsville*, 2000 UT 81, ¶ 49 (citations, quotation marks, and punctuation omitted).

In our legal tradition, the elements of due process include: (1) the right to notice of any hearing or discussion on the appeal; (2) the right to be heard in a meaningful way; (3) the right to confront the evidence and respond to it, including the right to "cross examination" although that is a term that is not used here to give anyone the impression this is a courtroom and that the

formalities there are either required nor helpful; and (4) the right to an impartial decision-maker.

A logical part of the right to review and respond to the evidence is that any and all information provided to the appeal authority by anyone, including the city staff, should be provided at the same time to other participants with due process rights. This is fundamental to fair dealing when the city itself is an opposite party to the applicant. It is improper for the staff or city attorney to provide any information or advice to the appeal authority or any member of the appeal authority related to any matter that the appeal authority will hear outside the presence of the public or other parties.

As to the impartiality of the decision-maker, there are some basic rules that must be followed to ensure due process. There must be no solicitation of any ex-parte communications which do not involve all those who are entitled to participate in the appeal. No side bar or off site conversations with city staff and no individual conversations between the members of the appeal authority either before or during the evidence gathering phase of the process. It is highly inappropriate to close the comment period available to the applicant and others, only to raise new issues and evidence that those entitled to due process cannot respond to. Once the door is slammed shut on the evidence to be considered in the record, that is the end of new information from anyone, including the members of the appeal authority.

Providing the applicant/appellant the right to be heard last is an easy way to ensure that he or she has had a chance to confront the evidence. Simple devices like this can avoid significant flaws in procedure which open up an otherwise solid decision to criticism and litigation.

As to an impartial decision maker, there is often confusion in the minds of public office holders as to what constitutes a conflict of interest sufficient to disqualify them from serving in a quasi-judicial capacity to review a matter. This is a real concern, but it is more practical and personal than legal. The rules of what constitutes a conflict of interest under relevant Utah law are not strict. The strict reading of the law requires that a local official not use or attempt to use their official position to substantially further his or her personal economic interest, including to receive gifts, special privileges or benefits. 10-3-1304. There may be conflicts of interest not covered in the narrow provisions of the Municipal Officers' and Employees' Ethics Act which may prompt a recusal from participation in a matter to be heard by the appeal authority of which a person is a member, but this is a judgment call for the board member

or hearing officer to weigh. Such justification should likely be personal or related to an immediate family member.

A proper practice is to disclose any conflicts which might be a concern, discuss them with the participants who have due process rights, and then take their comments into consideration. It is up to the appeal authority, not the parties, as to who recuses themselves. That said, it is foolish to proceed when there are obvious conflicts of interest because the result is subject to challenge and the process would be frustrating to all involved.

Other considerations along the lines of due process include suggestions that the city council never serve as an appeal authority. The quasi-judicial role and the political/legislative role are simply too different to reconcile. The appeal authority is to look dispassionately and objectively at the facts and law alone, and not be swayed by public opinion and emotion. It is simply too much to ask for elected officials to take on this role. The code does allow it, however, if the appellant/applicant and the city council do not agree to having a third party hear the matter. 10-9a-707(5)(b).

SMALL CITY SURVIVES DUE PROCESS CHALLENGE

DAIRY PRODUCTS v. WELLSVILLE
UTAH SUPREME COURT, 2000 UT 81
Read the full case here.

ISSUES: What are the essential elements of due process?
What notice must be provided to meet due process?
What constitutes inappropriate bias by a decision-maker?
Can a quasi-judicial body deliberate in private?

While not a land use case, this decision is informative on several issues important to land use processes. The matter involves a dairy processing facility (circled in the attached photo) that generated odors sufficient to give

rise to nuisance complaints from Wellsville citizens. The business licensing ordinances allowed for a review of such matters at the time of renewal.

After some seven years of operations and back-and-forth negotiations between the city and the plan operator to deal with the odors, the Wellsville City Council held hearings in 1996 to consider a refusal to renew the company's business license and to force it to close operations. After hearings and negotiations, the city took action to shut the business down. Dairy Products appealed to the courts. The district court ruled for the city.

On appeal, the Utah Supreme Court upheld the city's denial and validated the ability of cities to abate nuisances. The Court also handled several issues raised by the business, including that it was denied due process rights at the hearings.

Said the Court: Due process is not a technical conception with a fixed content unrelated to time, place, and circumstances. Instead, due process is flexible and, being based on the concept of fairness, should afford the procedural protections that the given situation demands. The minimum requirements are adequate notice and an opportunity to be heard in a meaningful manner.

Where defendants have had notice of hearing before a council and judicial review of its action, they have had all that they are entitled to procedurally with respect to an ordinance declaring their property to be a nuisance and ordering the removal of the same. In this case, a two-week notice that cited the applicable ordinances, presented a history of the issue, and advised the property owner that it had a right to appear, be represented by counsel, hear evidence against it, cross-examine witnesses, and present evidence in its own behalf was adequate.

To be considered a meaningful hearing, the concerns of the affected parties should be heard by an impartial decision maker. The Court reviewed categories of biasing influences:

(1) A prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is not, without more, a disqualification.
(2) Similarly, a prejudgment about legislative facts that help answer a question of law or policy is not, without more, a disqualification.
(3) Advance knowledge of adjudicative facts that are in issue is not alone a disqualification for finding those facts, but a prior commitment may be.
(4) A personal bias or personal prejudice, that is an attitude toward a person, as distinguished from an attitude about an issue, is a disqualification when it is strong enough and when the bias has an unofficial source.
(5) One who stands to gain or lose by a decision either way has an interest that may disqualify if the gain or loss to the decisionmaker flows fairly directly from her decision.

In this case, the company claimed in an affidavit that the members of the city council "appeared biased in their gestures, mannerisms, facial expressions, and comments." The Court held this to be the company's unsubstantiated opinions and conclusions – inadequate to establish bias.

The Court also held that quasi-judicial bodies such as appeal authorities may, despite the requirements of the Open and Public Meetings Act, (Utah Code Ann. § 52-4-101 et seq) deliberate in private before making a final decision.

"It is clear that the legislature intended that any official meeting of the [public body], wherein it performs the "information obtaining" phase of its activities, should not be held in private or in secret, but should be open to the public. However, once the "information obtaining" procedure has been completed, it is essential that during the "decision making" or judicial phase, those charged with that duty have the opportunity of discussing and thinking about the matter in private, free from any clamor or pressure, so they can calmly analyze and deliberate upon questions of fact, upon the applicable law, and upon

considerations of policy, which bear upon the problems with which they are confronted."

Despite its being a small community with limited resources, Wellsville conducted a process that survived an intensive challenge all the way to the Supreme Court and prevailed on all issues raised by the company. The photo here is the Wellsville City Hall.

Who May Appeal?

The person who brings an appeal to the appeal authority must be entitled to bring that appeal. In other words, they must have "standing" to appeal. The applicant for a land use appeal has standing to appeal a decision that deals with the application. He or she may appeal a denial or some aspect of an approval. 10-9a-703(1).

A board or officer of the municipality may appeal a decision by its land use authorities. 10-9a-703(1). A member of the public or a neighbor may bring an appeal if he or she is "adversely affected" by the decision 10-9a-703(1), which means that the person appealing was uniquely "prejudiced" by the decision. *Springville Citizens v. Springville*, 1999 UT 25 ¶ 31. The alleged injury must be different from the public in general. *Specht v. Big Water Town*, 2017 UT App 75 ¶ 52. The person appealing must demonstrate a "reasonable likelihood" that any legal defect in the decision-making process changed the outcome of the proceeding. *Potter v. South Salt Lake City*, 2018 UT 21

The use of the words "adversely affected" is unfortunate in some respects because anyone who wants to bring an appeal from a land use decision considers themselves to be adversely affected or they would not care about the decision. These words are legal "terms of art" and only mean what the courts have said they mean.

To be adversely affected means that the person is uniquely prejudiced in a manner that differs from the impact of the decision on the community as a whole. Those who generally disagree with an administrative decision, but which suffer no peculiar injury by it, are generally not entitled to bring an appeal. *Specht v. Big Water Town*, 2017 UT App 75 ¶ 54.

This analysis can be complicated and not by any means intuitive. If a serious challenge is made to some party's standing, and the rules do not clearly resolve the matter, then the best practice is for the local appeal authority to note the objection for the record and then hear the appeal so everyone can move on with the process. Those who challenge the standing of someone bringing an appeal can thus preserve the issue during the local process and have the district court sort it out in a much more sophisticated setting.

The clear intent of the standing rule and most practical local result is that the appeal authority can, if the issue is properly raised, eliminate appeals by those who clearly do not suffer some special injury from a land use decision but wish

to manipulate the process for purposes of delay or frustration. If people from outside the city with no property or residence in the city wish to file an appeal to a local application for political or personal reasons, they often will be found to simply have no standing to do so. The appeal authority can save the time needed to resolve the matter if the person bringing the appeal has no standing.

Jurisdiction Issues for an Appeal Authority

Essential to the initiation of any appeal is the question of whether or not the appeal authority has jurisdiction to hear the appeal.

Subject Matter Jurisdiction.

One part of this is what the lawyers call "subject matter" jurisdiction. The appeal authority does not hear appeals of legislative acts. 10-9a-707(6). These include any action by the city council involving ordinance amendments, zoning map changes, general plan amendments, and annexations. There are some limited types of decisions that are hard to classify, particularly when they involve large development plans which are approved under less-specific criteria. Those situations are relatively rare in number but can be quite prominent in scale. Good legal advice will be essential in those limited situations. See *Baker v. Carlson*, 2018 UT 59, where the approval of a development plan was held to be a legislative act and approval of a development agreement was held to be an administrative act.

The appeal authority only hears appeals from a decision in which a land use authority has applied a land use regulation to a particular land use application, person, or parcel. 10-9a-707(6). Not only can these issues be appealed to the appeal authority, but they can only be appealed there. A party to a dispute over an administrative decision must exhaust local remedies before going to court. This means going to the appeal authority for a review. 10-9a-801(1).

Topics for appeal are provided by local ordinance and state statute.

Procedural and Technical Jurisdiction

Finality. First, any decision to be appealed from must normally be a written final decision. 10-9a-704(1). It must be reduced to writing and must be a final decision made by the appropriate land use authority which was assigned to make such a decision under the land use ordinance. A comment by the building inspector or even a city councilmember is not necessarily a land use decision. If some decision is made that restricts or affect property or rights, it is only fair that it be reduced to writing by the appropriate land use authority so a proper appeal can be brought.

Timeliness. The application for an appeal must be filed in a timely manner. If it was not, the appeal authority has no jurisdiction. 10-9a-701(2); 10-9a-704.

The time allowed for an appeal after a written decision is issued by a typical land use authority cannot be less than ten days. 10-9a-704(1). The default time is ten days if the ordinance does not provide for a deadline. 10-9a-704(2). The time allowed to appeal a decision by a historic preservation authority regarding a land use application is 30 days after the written decision. 10-9a-704(3).

It doesn't matter if someone told the applicant or appellant that he or she did not need to file the appeal, even if that someone was acting in their capacity as a city official. If no timely appeal is filed, the decision is final and cannot be challenged even if the city itself wants to change it. *Brendle v. Draper*, 937 P.2d 1044 (Utah Ct. App. 1997).

The time begins to run when the administrative decision is reduced to writing. 10-9a-704(1).

TOO LATE IS TOO LATE – MUST APPEAL IN TIME

BRENDLE v. DRAPER
UTAH COURT OF APPEALS, 937 P.2d 1044 (Utah Ct. App. 1997)
Read the full case here.

ISSUES: Can a municipality act on a matter after the appeal deadline has passed?
What is the effect of missing the deadline to appeal?

At the time that the story unfolds, Draper had an ordinance that a lot owner could not build a home on land with more than 30% slopes without permission of the planning commission. The lot owners here applied to build. In response to neighbor objections, the City denied that application and refused use of the lot. According to the opinion, the lot owners, with the subdivider who had platted the lots, decided to try again.

They went back to the planning commission a second time, which they could do without advising the neighbors of their renewed efforts. They advised the commission that the neighbors no longer objected. The commission then gave approval to build. Anyone who wished to appeal that decision had 14 days to do so.

After expiration of the time to appeal, the lot owners then proceeded to pour the foundations for a home. Neighboring landowners were upset to see this, as they were actually unaware of the most recent hearing. They went to the City and challenged the decision, eventually getting the City Council to order the work stopped after a third round of hearings. On appeal, the trial court agreed and ruled against the lot owners, ordering the work stopped.

The Utah Court of Appeals noted that the ordinance does not require notice to neighbors of an application to build on a steep slope. Notice to the public was provided as required for the second hearing, and the deadline to appeal had passed before reconsideration the third time. The City argued here that the filing deadline is merely advisory and subject to equity considerations. But the Court noted that the City had used the word "shall" in its ordinance, thus making the appeal deadline mandatory.

Said the Court: If Draper wants to set the time limits for appeals with some flexibility it is free to do so. The City may also require notice to neighbors as it chooses. But if it so wishes, it must state the rules and cannot change them halfway through the game. The Court held that neither the planning commission nor the city council had jurisdiction to rehear an administrative decision after the appeal period had passed.

The lot owners prevailed, and the home was built. It is one of the homes shown in the photo attached.

Burden of Proof

Without regard of whether the issue involves an appeal or a variance request, the applicant/appellant bears the responsibility to provide evidence and argument to support the variance or appeal. 10-9a-705; 10-9a-702(3). If the burden is not met, the appeal authority cannot grant the request. If it attempts to do so, the decision of the appeal authority will not be supported by substantial evidence in the record.

This is not to say that an unsophisticated applicant cannot be coached or helped to meet the requirements. If there is evidence to support the application or appeal, the law allows it to be granted, and there is no opposition to the request, then the necessary evidence and argument can be reviewed and assembled to build a record to support a favorable decision.

But if the matter is opposed, as most appeals are, then there are limits to what an impartial decision maker can do to assist one side in meeting a burden to oppose the other. It is not the appeal authority's job to make up for lack of preparation or sophistication on the part of a party to a dispute.

In the past, there has also been a duty imposed by the case law upon those who seek to overturn an administrative decision that they "marshal the evidence" that supports the decision they are opposing. In recent years, the courts have reversed this requirement, but cautioned that those who oppose an administrative decision must be prepared to address the evidence and reasoning that support it or they will likely fail in that attempt. *State v. Nielsen*, 2014 UT 10, ¶¶ 40-41.

As noted elsewhere, since the applicant/appellant bears the burden of proof, it is normally good practice to allow him or her to speak first and last in presenting evidence and argument as well as responding to it.

Scope of Review

The lawyers' term "standard of review" identifies what the appeal authority is to be looking for as it considers an appeal. There are two alternative sets of guidelines, each of which may apply in a given situation. The local ordinance typically outlines this for the appeal authority to follow, as the state statute advises that it do. 10-9a-707(1).

De Novo Review. This option has the appeal authority consider the appeal as if there had been no previous decision made on the matter, hence the use of the Latin words "de novo" which mean "anew". According to state statute, this is the scope of the review unless the ordinance provides otherwise. The appeal authority decides what facts to believe without deference to the land use authority's determination. 10-9a-707(2).

Record Review. Here the appeal authority is to determine whether the record established by the land use authority that made the decision appealed from includes substantial evidence for each essential finding of fact. 10-9a-707(3). If the land use authority had the facts to support its decision, even if the appeal authority would have decided the issues differently, the appeal authority is to support the land use authority's original decision.

Remand. If the standard of review is on the record, and there is not sufficient record supporting the decision, then the appeal authority grants the appeal, the decision is reversed, and the matter is remanded back to the appeal authority for further consideration. The appeal authority, in a record review, does not substitute a new decision for the one reversed. This is so because 10-9a-801(3)(d)(i) provides that a court shall remand the matter back to the land use authority and the assumption is that the appeal authority acts in lieu of a court to reach the same result that a court would. This rule of remand was recently restated by the Utah Supreme Court in *McElhaney v. Moab*, 2017 UT 65. Note, however, that some local ordinances may specifically call upon the appeal authority to remake the decision or to gather evidence and hear the matter if there is no record. Check your local ordinance to be certain.

Issues of Law. Under either standard, the appeal authority shall determine the correctness of the land use authority's interpretation and application of the plain meaning of the land use regulations. 10-9a-707(4). In this aspect, the appeal authority may substitute its interpretation of the law for that of the land use authority under either standard of review.

Determining Facts – Substantial Evidence

When hearing an appeal or variance, there are two roles for the appeal authority – to determine the facts and to interpret the law.

When facts are contested, these issues can require a judgment call by the appeal authority. A long tradition in the law provides that the appeal authority's conclusions about the facts are entitled to deference because those who serve there are on the front lines. They can observe witnesses, review documents, and visit the property involved in a dispute firsthand. All things being equal, what the appeal authority resolves about the facts should be respected and conclusive.

But it is essential that the appeal authority understand that when finding the facts the process is to be transparent and the appeal authority must "show its work". The record of the variance or appeal process must include all the evidence that the appeal authority relied upon to make its factual findings. Not only the state statute, but the case law repeats the oft-stated phrase that it must make its decisions based on "substantial evidence in the record." The appeal authority must identify the facts it relies on and provide a road map to its ultimate decision if its conclusions are to survive (or avoid) review by the district court.

Substantial evidence is both relevant to the issue at hand and sufficiently credible to convince a reasonable mind of its truth. Relevant evidence relates directly to the appeal or variance. For example, when an applicant claims that his or her request for a front yard setback variance hinges on the steep hillside across the back yard, the details of the slope are relevant. The price paid for the lot is not.

Evidence must also be credible. What is believable to a reasonable mind? An appeal authority will consider many comments as it completes its work, and our experience is that when matters are contested the information provided to the appeal authority can be irrelevant, incredible, and emotional – all at the same time. Those who give input should understand that their role is to provide substantial evidence to support their position – not to argue about the wisdom of the language in the land use ordinance or the problems caused by concerns that have nothing to do with the applicant's request.

Relevant evidence relates to the specific findings that are required by the type of question that the appeal authority is dealing with. For example, when a

variance is requested there must be a showing of an unreasonable hardship and a conclusion about a significant property right. The appeal authority must explain in its findings why the hardship identified is unreasonable and why the property right involved is significant. The descriptions of the details do not need to be complicated or lengthy, but they do need to be clear.

For example, in our backyard slope issue, the findings of fact could include statements that the city engineer has stated that the slope in the rear yard of the proposed homesite is more than 30%; that the code prohibits any construction on that slope; that this leaves only forty feet of yard space between the toe of the slope and the front property line; that other houses in the area were built with fifteen foot front yards before the setback rules were enacted; that 25 feet is a typical depth for a single family home in the area; and that the right to build a single family residence on a single family lot in a single family zone is a substantial property right as it is pretty much the only use allowed for a lot in that zone.

The findings in the record of a decision do not need to repeat the details of every bit of evidence but can refer to evidence included in the record.

One particular issue has to do with individuals who appear before the appeal authority and make statements of fact that they intend the appeal authority to believe and act upon. Very often, the type of statements made would require the opinion of experts, not lay persons, to be credible. For example, if a person states that a given hillside is unstable this claim can be very damaging to the person who owns the property. The issue is very significant – but the appeal authority cannot simply strip all the development rights from a property owner because a lay person makes that accusation. The appeal authority will need an expert geologic engineer's statement on the subject in order for the information to constitute substantial evidence. The opinion of a lay person is simply not enough to rely upon in this context.

Other common claims by lay persons relate to the loss of property values, danger from traffic and fire hazards, potential crime, and other emotional topics. The appeal authority should have available to it the services of the local law enforcement officials, fire marshal, and real estate professionals, if (and this is a BIG IF) the information is relevant to the application.

Evidence provided by the property owner/applicant/appellant can certainly be considered as substantial given his or her knowledge of the details of the matter but there can certainly be room for questions. It is the burden of the applicant to establish the required facts. If the appeal authority is simply not

convinced of the true of the alleged facts, it can call for more reliable evidence. The matter can be continued. It can also be denied. The appeal authority can simply conclude that the applicant has not met the burden of proof. The appeal authority can explain in its decision why it found that there was not substantial evidence to support any finding that the ordinance allows and deny the application or appeal.

Fact-finding is driven by the language of the ordinance. If the ordinance does not provide that the appeal authority is to consider the property values, traffic issues, fire hazards and crime associated with a use then the appeal authority simply cannot make that call. It has already been made by the planning commission and the city council when the ordinance was drafted.

For example, the ordinance may provide that multi-family housing is a permitted use in the local R-3 zone. That decision is already made. When the appeal authority hears an appeal from neighbors protesting the granting of a conditional use permit for a four plex in that zone, the only substantial evidence to be considered by the appeal authority in that context is what the narrow language in the conditional use provisions of the ordinance call for. If the issues in the ordinance relate to landscaping and fencing buffers between the new housing complex and neighbors, then that is what the appeal authority deals with. The appeal authority does not consider the larger issue of whether or not the fourplex is in the right location because the city council has already decided that it is.

PUBLIC CLAMOR IS NOT SUBSTANTIAL EVIDENCE:

DAVIS COUNTY V. CLEARFIELD CITY
UTAH COURT OF APPEALS – 756 p.2D 704 (Utah App 1988).
Read the full case here.

ISSUES: What is substantial evidence in the record?
What is the role of public clamor?

The case begins in 1984. Davis County, which already operated an addiction recovery center ("ARC") on South State Street in Clearfield, applied for a conditional use permit for a residential treatment center. The center would serve adolescents and adults in an old home which was located next door to the first facility. Both properties were across State Street from the North Davis Junior High School.

The Clearfield Planning Commission heard the request first, and a number of citizens attended and raised concerns about parking, crime, and property values, as well as compatibility issues between the proposed treatment center and nearby neighborhoods. The commission asked those present to vote on the application. Only one person voted for it. The commission denied the CUP application on a 3:1 vote without stating any reason for the denial. Davis County appealed to the Clearfield City Council, which was to hear the matter, assuming the role of an appeal authority.

The City Council had a "premeeting" on the matter two days before a public hearing and reviewed information not presented to the public, including an analysis of neighboring land uses which claimed that there were already four social services facilities within a mile of the proposed fifth.

There were no minutes kept nor was there any official record of the “premeeting”. At the public hearing two days later, the Council voted to deny the permit. Davis County appealed to the District Court.

The District Court soon found in favor of Davis County and ordered the City to issue the permit, stating that there was no reasonable basis to deny it.

Although the court carefully reviewed the verbatim transcript of the public meetings provided by Davis County, it found that "nowhere in the transcripts . . . is there believable information or evidence on which the Clearfield City Council could have rationally believed that the proposed mental health facility would pose any special threat to Clearfield City's legitimate interest."

The Court of Appeals opinion states that in its findings, the district court reviewed the reasons suggested at trial for the council's denial of the permit and found that none were supported by the evidence. In response to the concern that the proposed facility would create a danger or nuisance because of its proximity to the junior high school, neither the Davis County School District nor the junior high administrators appeared at the public hearings to oppose the proposed facility. Similarly, the police department made a presentation suggesting that crime would not increase in the area if the facility were permitted.

The opinion also states that with regard to the concern over real estate values, no studies were made and no opinions were given by professional real estate appraisers nor was any credible evidence of reduced property values produced at the hearings. In a similar vein, two professional planners were employed by the city but neither voiced any objection to granting the application.

The Court of Appeals held that decisions do not have factual support in the “vague reservations expressed by either the single-family homeowners or the

commission members" even though "they would have been legally sufficient had the record demonstrated a factual basis for them."[3]

Public clamor is not a legally sufficient basis to deny a permit. "Indeed, there is almost uniform public clamor when any mental health facility, halfway house, or jail or prison is proposed. The public realizes the need for such facilities, but they should always be located somewhere else . . . Citizen opposition is a consideration which must be weighed but cannot be the sole basis for the decision to deny."

The court further states that "the consent of neighboring landowners may not be made a criterion for the issuance or denial of a conditional use permit." "The opposition of neighbors is not one of the considerations to be taken into account" when determining whether to issue a development permit.

The Court of Appeals ruled that the denial of the CUP was invalid. Davis County then opened its treatment facility and operated it at the location for some time. All of the buildings shown in the photographs here have since been demolished, as of this writing in 2019.

NOTE: The law related to conditional uses has been significantly modified since 1988. The language of the statute, at Utah Code Ann. § 10-9a-507, as well as recent applications of the federal Fair Housing Act, would have made the denial of the Davis County treatment center CUP extremely problematic. In the context of a CUP application, the statement in this opinion that the reasons stated "would have been sufficient to deny the application if they had been supported by substantial evidence" would no longer be valid.

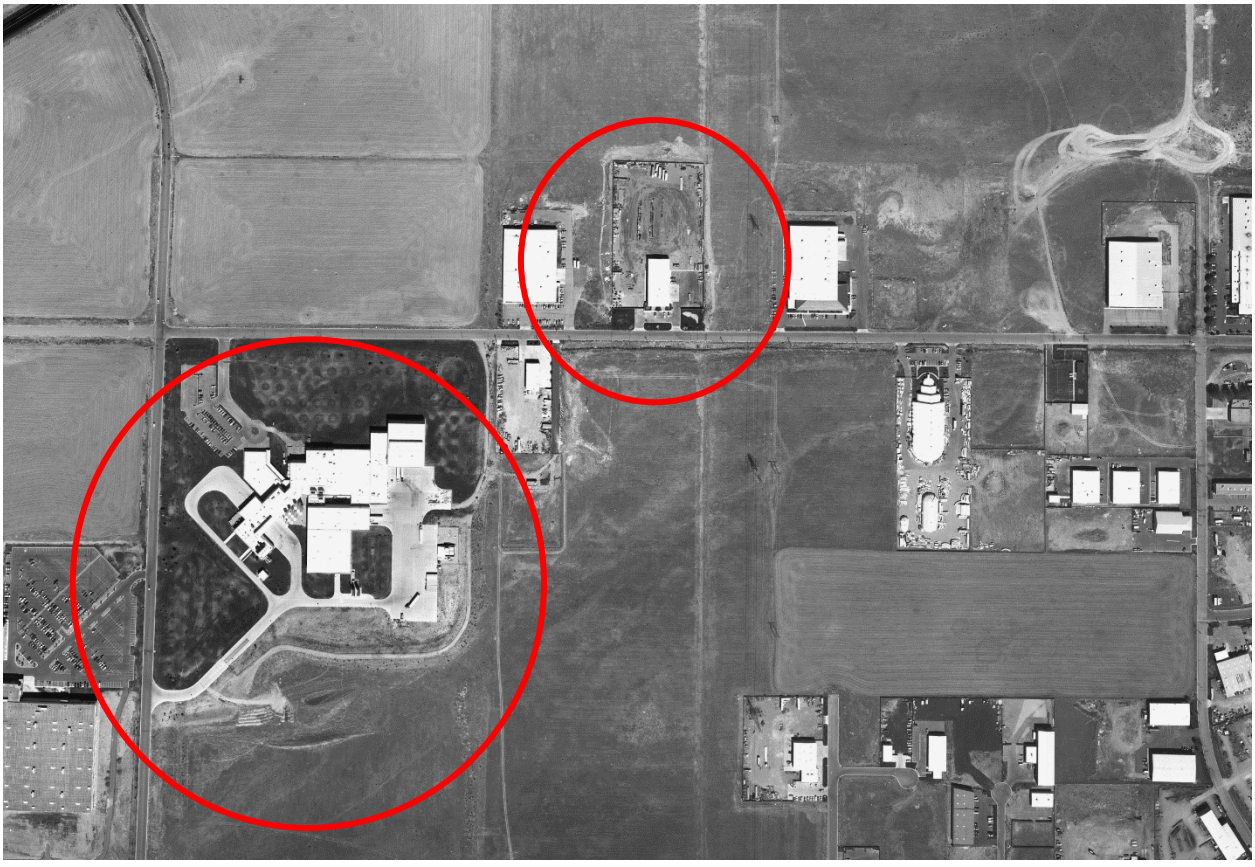
[3] Probably not a statement that the court would make today, as the law related to conditional use permits has changed dramatically. See Utah Code Ann. 10-9a-507.

FINDINGS MUST BE BASED ON EVIDENCE, NOT CONJECTURE

WADSWORTH COUNSTRUCTION v. WEST JORDAN
UTAH COURT OF APPEALS, 2000 UT App 49
Read the full case here.

ISSUES: What is substantial evidence in the record?
What is the role of public clamor?

This case involves an application for a conditional use permit by Ralph L. Wadsworth Construction to use industrial land for an outdoor construction storage facility in West Jordan. The five-acre parcel (smaller circle in image below) was zoned M-1 which allowed for light manufacturing and industrial land uses. The ordinance provides that open storage is a conditional use in the zone.



At the initial hearing before the Planning Commission, a representative of Dannon Foods (larger circle in image) appeared and expressed a concern about "rodent traffic." Other neighbors raised issues with dust. After some staff work the Commission denied the application. Wadsworth appealed to the City Council which acted as the appeal authority as allowed by local ordinance.

The West Jordan City ordinance permitted outdoor storage in M1 zones if the "storage is (1) located behind the front . . . and the street side building line . . . (2) is screened from the street with an . . . [adequate] fence . . . as determined by the Planning Commission" and, (3) is not "deemed by the Planning Commission or City Council to be a nuisance."

In this case, the City Council made no finding that appellants were unable or unwilling to comply with the ordinance. Instead, the City Council chose to deny appellants' application for the following reasons:

(1) The city has made a significant investment in bringing Dannon to the area and the attributes which attracted Dannon to the area need to be maintained. Outdoor storage is detrimental to the area, making the area less attractive and injurious to the goals of the city.

(2) Outdoor storage may be considered to be a nuisance to neighboring property owners.

(3) Outdoor storage would encompass the majority of the parcel. The area and intensity of outdoor storage is much different than that of neighboring properties.

(4) Outdoor storage is detrimental to existing and future businesses in the area and is not harmonious with the goals of the city.

The City Council, which is a legislative body, chose to act in an administrative capacity in this instance. As such, its decisions are only valid if supported by substantial evidence in the record. The Court of Appeals determined that it was not:

“In denying appellants' application, the City Council relied on its finding that "the city has made a significant investment in bringing Dannon to the area and. . . . outdoor storage is detrimental to the area . . . and injurious to the goals of the city." However, the only evidence in the record supporting this finding are the concerns expressed by neighboring landowners. The record does not reveal whether the Commission's staff actually investigated the concerns raised at the public hearing or why they concluded that outdoor storage on appellants' property--which is located in an M-1 zone--would be adverse to the city's goals.

“Because the decision to deny an application for a conditional use permit may not be based solely on adverse public comment, we conclude this finding is insufficient to support the City Council's denial of appellants' application.

“Similarly, the sole evidence supporting the City Council's determination that appellants' outdoor storage "may be considered . . . a nuisance" are the concerns raised by the neighboring property owners regarding potential increases in "rodent traffic" and dust. Although [the ordinance] allows the City Council to deny appellants' application if it was "deemed . . . a nuisance," the City Council did not find that appellants' storage would actually constitute a nuisance.

“Thus, this finding was also insufficient to justify denial of appellants' conditional use application. Also, there is insufficient evidence to support the City Council's finding that appellants' proposed storage "is much different than that of neighboring properties" and would be "detrimental to existing and future business in the area." To the contrary, the evidence shows there are several other parcels near appellants' property which have outdoor storage areas similar to that proposed by appellants.

“We fail to see how allowing appellants to engage in outdoor storage in an M-1 zone would be detrimental to other businesses in the area that also use their land for outdoor storage.

“In light of the foregoing, we conclude the City Council's decision to deny appellants' conditional use application was not supported by the evidence and was therefore arbitrary and capricious.”

The Court of Appeals ordered that the conditional use permit be issued by the City. The completed facility is shown in the photo above.

Interpretation and Application of the Relevant Law

As a law professor once said, "an ordinance is an ordinance is an ordinance". State law was recently clarified to require that local appeal authorities apply the "plain language" of the land use regulations. 10-9a-707(4)(b).

When an appeal authority hears an appeal, a pivotal question is usually what the proper interpretation and application of the relevant law should be.

The job of the appeal authority in the statute is to determine the correctness of the land use authority's interpretation and application of the plain meaning of the land use regulations. 10-9a-707(4)(a). Whether the standard of review is de novo or on the record, the role of the appeal authority is the same with regard to the relevant law. The appeal authority may substitute its judgment for that of the land use authority about what the law should be, but before doing so the courts have suggested offering some level of "non-binding" deference to the land use authority's interpretation of the law where appropriate. *M&S Cox Inv. v. Provo City*, 2007 UT App 315, citing *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 28.

The courts and the legislature have provided some guidelines for close cases, but again the first thing to do is simply apply the plain language of the code. If the code says that the use is prohibited or allowed, then prohibit or allow it. If the code says that auto mechanic shops are allowed but the application is for an auto body shop, and uses not specifically allowed are prohibited by the code, then don't allow the body shop. If the code says that bakeries are allowed and the application is for a cupcake shop, the appeal authority is entitled to determine if that use is close enough.

Another important point. State law directs the appeal authority specifically to interpret and apply a land use regulation to favor a land use application unless the land use regulation plainly restricts the land use application. 10-9a-707(4)(b). This statute codifies what the Utah Court of Appeals has repeated several times in recent cases:

> "Because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner." *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App.

1995), cited in *Brown v. Sandy City Bd. of Adj*, 957 P.2d 207(Utah Ct. App. 1998).

Other guidelines from the courts include that the appeal authority should effectuate legislative intent, and that intent is most readily ascertainable by looking to the plain language of the ordinance. *Ferre v. Salt Lake City*, 2019 UT App. 94, ¶ 14. Read the plain language of the ordinance as a whole and interpret its provisions in harmony with other ordinances in the same chapter or related chapters. It is axiomatic that an ordinance should be given a reasonable and sensible construction and that the legislative body did not intend an absurd or unreasonable result. (Paraphrased into the local context from *Bd. of Educ. v. Sandy City Corp.*, 2004 UT 37, ¶ 9).

It is essential that members of an appeal authority keep in mind that their role in the local government is not to set policy – that is the city council's job. The appeal authority cannot read into the ordinance what it does not say, nor may it ignore the provisions that are clearly there.

One essential aspect of the appeal authority's duty to interpret and apply the relevant law is that even the city itself must follow its own ordinances. Where the ordinance requires or prohibits a specific act, the ordinance should be enforced as it is written. "Substantial compliance" is not sufficient where the requirements are clear and specific. According to the Utah Supreme Court "While substantial compliance with matters in which a municipality has discretion may indeed suffice, it does not when the municipality itself has legislatively removed any such discretion. The fundamental consideration in interpreting legislation, whether at the state or local level, is legislative intent. Application of the substantial compliance doctrine where the ordinances at issue are explicitly mandatory contravenes the unmistakable intent of those ordinances. *Springville Citizens v. Springville*, 1999 UT 25, ¶ 29

The Court continues: "Municipal zoning authorities are bound by the terms and standards of applicable zoning ordinances and are not at liberty to make land use decisions in derogation thereof. . . .Stated simply, the City cannot "change the rules halfway through the game." *Springville Citizens*, ¶ 30.

ONE TWO-LETTER WORD SAVES AN AUTO WRECKING YARD NON-CONFORMING USE

CASTER V. WEST VALLEY CITY
UTAH COURT OF APPEALS – 2001 UT App 220
Read the full case here.

ISSUES: How is the specific wording of an ordinance to be interpreted and applied?

Charles Caster bought an existing auto wrecking yard and renamed it Back Yard Auto in 1997. The business use had been confirmed as a non-conforming but legal in 1980 and had kept a current business license since then. Caster's license was revoked not long after he purchased the property because the City found "outside storage violations (junk autos)." The City then proceeded to attempt to close down the storage of five or six old cars on the premises.

Caster lost two appeals to the Board of Adjustments and two to the district court on the basis that he had not disassembled or sold cars or parts for more than a year. He then appealed to the Court of Appeals.

It is understood that in order to preserve a non-conforming use, it must be continued without interruption for any period of one year or more. The undisputed facts of the case were that Caster and his predecessors had stored or kept a few cars on the property without interruption.

The ordinance defines a junk yard use as the "sale, storage, keeping, or disassembling of junk or discarded or salvage material". Similar language describes automobile graveyards in state code. The Court of Appeals held that since the word "or" is used in the relevant law instead of the word "and" the use is preserved if any of the four activities are conducted. So even though Caster may not have sold or disassembled cars, if he kept or stored them without interruption he could also sell or disassemble them at any time he chose.

The essence of this case is that every word in an ordinance counts. As provided in current Utah statute[4], ordinances are to be interpreted to favor the use of land, even if the use is as unfavored as an auto wrecking yard.

[4] Utah Code Ann. 10-9a-707(4)(b).

ORDINANCE INTEPRETED TO FAVOR THE USE OF PROPERTY

BROWN V. SANDY CITY BD OF ADJ
UTAH COURT OF APPEALS – 957 P.2d 207(UT Ct. App. 1998)
Read the full case here.

ISSUES: Should an appeal authority defer to the city's interpretation of the relevant law?
How should the language of an ordinance be interpreted?

Three property owners were involved in this dispute. Each owned a home in Sandy and rented it out for several days at a time, long before the era of Air B&B. The Sandy City planning staff told the owners that it was illegal to rent a home in Sandy for less than thirty days at a time.

Both the Board of Adjustment and the district court upheld the City's interpretation of the ordinance, although the language cited as prohibiting the rentals simply stated that the relevant single family zones contemplate the establishment of "a residential environment . . that is characterized by moderate densities . . a minimum of vehicular traffic and quiet residential neighborhoods favorable for family life."

The code also provided that no use was allowed except those listed as permitted or conditional uses in the district. Since overnight rentals were not specifically allowed, the staff, Board of Adjustment, and district court determined that they must be prohibited.

The Court of Appeals did not agree. First of all, the Court ruled, the Board of Adjustment owed no deference to the staff's interpretation of the law. Rather than determine if there was some reasonable justification for the interpretation by the staff, the Board was to apply the correct interpretation of the law without deference to the staff's conclusions.

As to how the code should be applied in this instance, the Court stated that "because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner."

While the Court concluded that Sandy could have enacted a transient ordinance if it wished to, no such ordinance existed. Since the ordinance is to be interpreted strictly against the City. "We will not find a violation of law

simply because the permitted use may appear inconsistent with the general intent statement . . . when the use is in compliance with the substantive provisions of the ordinance."

So since the Browns and others were renting to families in a family home in a family neighborhood, their use did not violate the provisions of the ordinance which promoted family occupancies. Until Sandy specifically prohibits the use, it may continue. Of course at that time the Browns' use would become non-conforming since the ordinance would not be retroactively applied to them.

DEMOLITION OF SHOPPING CENTER ORDERED BECAUSE ORDINANCE NOT FOLLOWED; ATTORNEY FEES AWARDED AGAINST COUNTY

JOHNSON v. HERMES ASSOC.
UTAH SUPREME COURT – 2005 UT 82
Read the full case here.

ISSUE: What is the remedy for a knowing violation of the ordinance? Can remedies be imposed against a developer as well as the local government itself?

The photos on the next page show a "before and after" view of the same property in Salt Lake County (now Midvale) at about 1000 East and 7000 South. This area is now locally known as the "Shops at Fort Union" but was originally referred to as the Family Shopping Center. The phase of the project involved here was initiated by a private developer in 1991 over the objection of a family which owned a home on property abutting the project location. The Utah appellate courts wrote three separate opinions[5] on the matter before it was finally resolved.

The Croxford family (including family members with Culbertson, Johnson, and Meibos surnames) had owned its land next to the development for more than 100 years. (Their home is highlighted in the aerial photographs on the next page.) They were the "holdouts". Although all the neighboring landowners sold to the developer, the Croxford Family did not.

[5] Culbertson v. Board of County Comm'r, 2001 UT 108; Johnson v. Hermes Assoc., 2005 UT 82; Culbertson v. Board of County Comm'r, 2008 UT App 22

In response, Hermes Associates, the developer, built portions of the shopping center on three sides of the home

Salt Lake County amended its ordinances to facilitate the development, granted a conditional use permit, and vacated half the county street that ran between the Croxfords and the development.

This appears to have been done to allow Hermes to build the rear wall of the center on part of the former right-of-way which was once North Union Avenue. (see photo). It can be safely assumed that the anticipated sales taxes to be paid to the County as well as the other advantages of such a large-scale economic development were the prime motivators in those decisions.

When Hermes started blocking off and tearing out portions of the street, the Croxfords notified both Hermes and the County that the project encroached on the streets, and restricted private access as well as public services such as garbage removal, emergency access, and snow plowing. The property owners also sought a temporary restraining order to halt

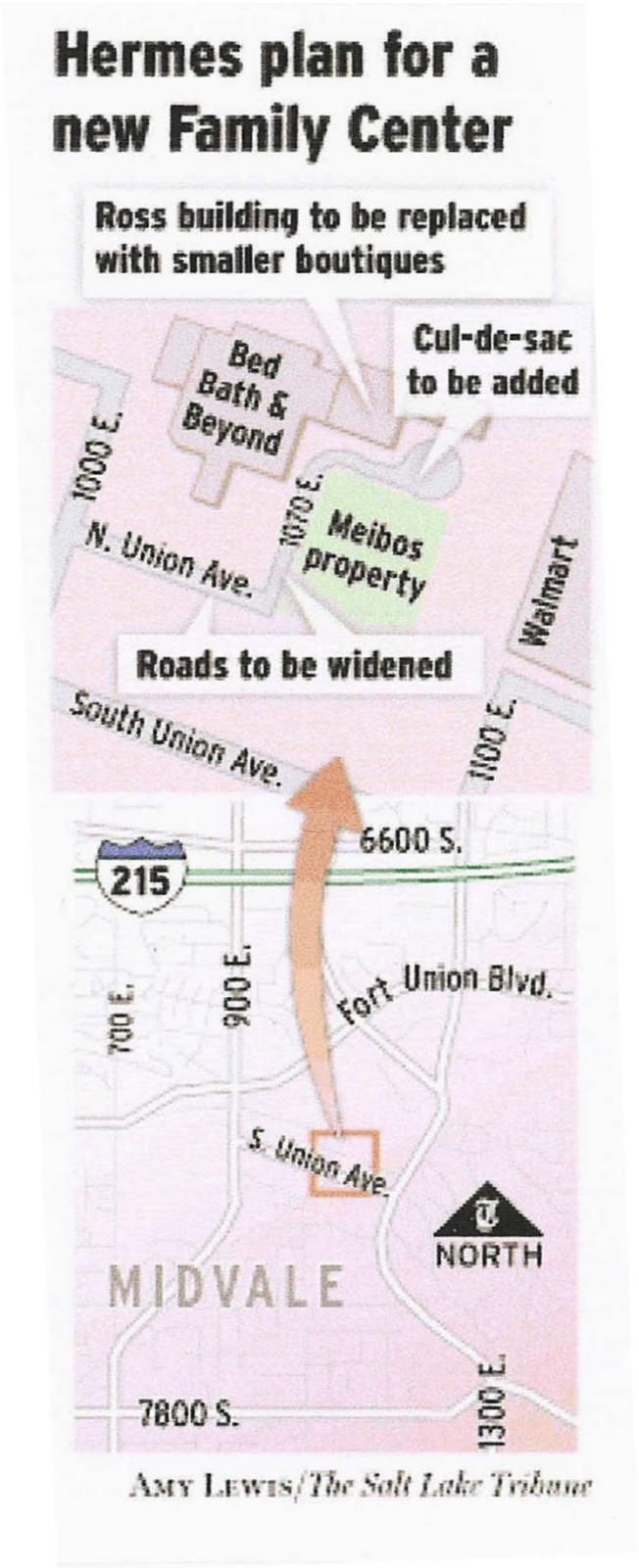
the violations, which was not granted. Hermes knew, however, that it was proceeding at its own risk, and was on notice that the Croxfords claimed that their project was illegal in several respects.

While the matter proceeded to the Supreme Court, Hermes built the project.

The first decision by the courts held that the County violated its own codes in granting exceptions to the development. The County had also illegally allowed alterations to the streets involved that did not comply with the County's own road standards, which would have required a cul-de-sac under the circumstances sufficient to allow an emergency vehicle or garbage truck to turn around. It was also ruled that the conditional use permit as written required landscaping, curb and gutter, and a setback wherever the development abutted a public street, which included North Union Avenue.

The District Court then considered motions and ruled that Hermes must (1) demolish parts of the buildings (2) reconfigure the roadways with landscape, gutter, sidewalks; and (3) reconfigure and reconstruct the streets. A second Supreme Court decision upheld the order.

Noting that Hermes acted "willfully and deliberately when it constructed its building after the property owners put both Hermes and the County on notice that the proposed construction would violate county ordinances", the Court dismissed Hermes' arguments seeking some balancing of the relative hardships endured by the Croxfords and the company. Such an approach only is appropriate when both parties are innocent, the Court ruled. Since Hermes was on notice, "equity may require the property's



restoration, without regard for the relative inconveniences or hardships which may result from its removal." In preparation for the demolition, several retail tenants relocated to other locations within the shopping center. Perhaps because family circumstances had changed so much in the 17 years between the original submittal of the plans and the final decision by the Court of Appeals, the family later agreed to an unknown settlement and the demolition was thus averted. As of today, their home has been removed.

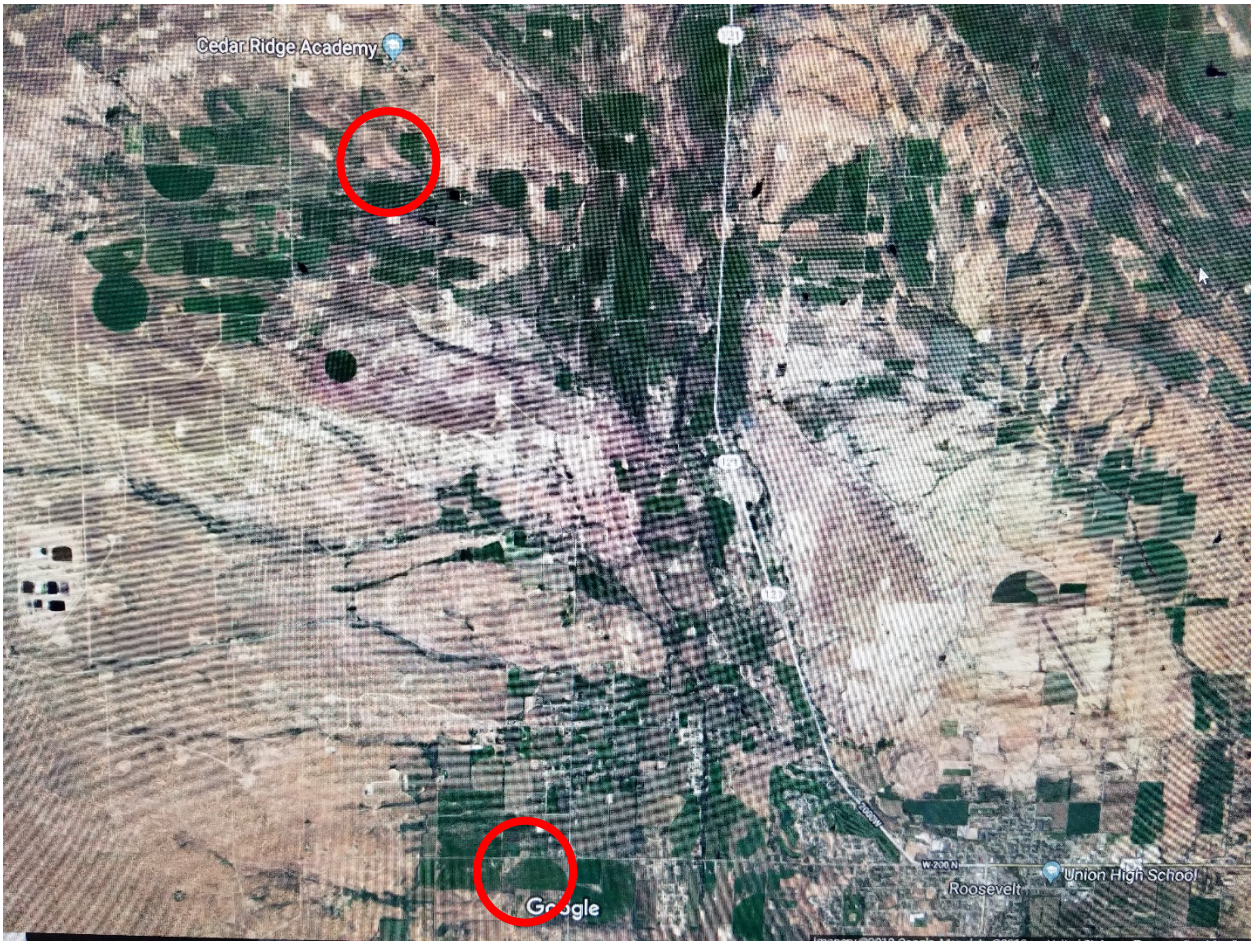
The Court of Appeals ruled in the third and last appellate case that Salt Lake County was obligated to pay the Croxford's legal fees under the doctrine of "Private Attorney General". In its next following session, that basis for attorney fees was eliminated by the State Legislature. It is no longer available to property owners.

DENIAL OF CONDITIONAL USE HELD TO BE ILLEGAL – THE DECISION WAS INCONSISTENT AND NOT BASED ON RELEVANT CRITERIA

UINTAH MOUNTAIN RTC v. DUCHESNE COUNTY
UTAH COURT OF APPEALS – 2005 UT App 565
Read the full case here.

ISSUE: Must land use decisions be consistent between applicants?
What criteria may be used to deny a conditional use permit?

The plan by the Hancock family from Duchesne County near Roosevelt was to buy five acres next door to their farm (lower circle on the aerial view) and there house and treat young men between the ages of twelve and seventeen for low



self-esteem, obesity, depression, attention deficit hyperactivity disorder, lackluster academic performance and breakdowns in familial relationships. They would also counsel those who had experimented with drugs and alcohol. They were remodeling an existing structure on the property to house the facility, which required a conditional use permit from the planning commission as a "Group Home".

The planning commission reviewed the proposal and granted the permit after a hearing where neighbors of the proposed facility appeared and opposed the permit. The required findings in the ordinance were made on the record. Conditions were imposed on the permit, including that no more than ten young men could reside at the facility at a time. Other conditions were imposed related to safety, relations with neighbors, criminal background checks for those living there, liability insurance and compliance with other rules and regulations.

The Hancocks did not like the ten-boy limit and the neighbors did not like the permit – so all involved appealed the decision to the Duchesne County Commission. The Commission found the limit of ten boys to be reasonable, but concluded that issuing the permit was in error. The County Commission disagreed with the planning commission on the issues of traffic, safety and compatibility and also held that the project was not viable because the Hancocks stated that they could not break even with just ten boys in the facility. They needed between sixteen and fifty residents for the group home to be economically viable.

Although the trial court upheld the County's action, the Court of Appeals reversed. First of all, said the Court, the County could not consider financial viability when that was not a criteria in the ordinance. As to compatibility, the County's characterization was deemed inconsistent with its decision to allow a group home a few miles away from the Hancock farm just six years before. (see higher circle on the aerial photo) Under what the Court determined were almost identical circumstances, the County had approved the earlier group home for a larger number of young men. The other concerns the County Commission relied upon to deny the application were found to be without merit and based on public clamor.

The Court then reinstated the conditional use permit, with the ten-boy limit, thus sustaining the fully justified action by the planning commission of a relatively small rural county.

It is of interest that this case appears in a recently published national law school case book as an excellent example of the kind of analysis required for "special uses", "conditional uses", and "special exceptions".[6]

Please note that subsequent to this case the Utah Legislature amended the conditional use provisions of the state statutes. The amendment provides that conditional use permits shall be approved "if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards." Utah Code Ann. § 10-9a-507. While this change would not have necessarily altered the outcome in the Uintah Mountain case, it is to be noted that denial of a conditional use permit would be even more difficult to sustain under the revised law.

A full discussion of the ramifications of the County's decision under the Federal Fair Housing Act is beyond the scope of this discussion, but also a significant aspect of this case. News reports indicate that more than $3.5 million plus legal fees was awarded to the Hancocks as a result of this and other Duchesne County actions in denying their efforts to build group homes for troubled young men.

[6] Land Use Regulation Cases and Materials, Selmi, Kushner, Ziegler Dimento and Echeverria, 5th Edition. Published by Wolters Kluwer Law & Business, 2017.

Handling Variance Requests

State law does not define a variance, but a long tradition of land use practice does. A variance is a well-deserved variation from the overly harsh application of the land use regulations to a given parcel of land. Variances are discouraged and should not be common. Where there are a number of hardships, the city council should amend the ordinance and not expect the appeal authority to hand out variances on a wholesale basis.

The specific category of variance prohibited by state statute is a variance allowing a use which is not otherwise provided for in the code. 10-9a-702(5). Typical variance requests involve setbacks and other similar rules that may work a hardship on a particular lot but not generally apply to the great majority.

Variances are requested by a person who owns, leases, or holds some other beneficial interest in property. 10-9a-702(1). All of the criteria in the code must be met. Evidence supporting each finding must be provided in the record or the decision is not legal. *Wells v. Salt Lake City Bd. of Adj.*, 936 P.2d 1102, 1104-1105, (UT App 1997).

The burden is on the person seeking the variance to provide substantial evidence supporting each criteria and prove that all the conditions justifying a variance have been met. 10-9a-702(3).

The criteria to consider in reviewing a variance request are provided for in state statute at 10-9a-702(2). Consult your local ordinance for additional requirements. Where there is a conflict, the state statute would prevail. The state criteria:

1. Literal enforcement of the ordinance causes unreasonable hardship which is not necessary to carry out the general purpose of the land use ordinances. 10-9a-702(2)(a). The hardship must be located on or associated with the property for which the variance is sought 10-9a-702(2)(b)(i)(A), not self-imposed by current or previous property owner, and not primarily economic. 10-9a-702(2)(b)(ii).
2. There are special circumstances attached to the property that do not generally apply to other properties in the same zone. 10-9a-702(2)(a)(ii). Note the use of the word “attached”. The special circumstances are to involve the property and are not based on the preferences of the property owner or his or her special circumstances that are not tied to the land.

The circumstances must relate to the hardship complained of and must deprive the property of privileges granted to other properties in the same zone. 10-9a-702(2)(c)(i) and (ii). The circumstances must also be peculiar to the property and not involve conditions that are general to the neighborhood. 10-9a-702(2)(b)(i)(B).

3. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone. 10-9a-702(2)(a)(iii). Note the use of the word "substantial". The appeal authority must determine whether the issue claimed in the variance request is a substantial property right.
4. The variance will not substantially affect the general plan and will not be contrary to the public interest; and 10-9a-702(2)(a)(iv).
5. The spirit of the land use ordinance is observed and substantial justice done. 10-9a-702(2)(a)(v).

In granting a variance, the appeal authority may impose additional requirements on the applicant that will mitigate any harmful effects of the variance 10-9a-702(6)(a) or serve the purpose of the standard or requirement that is waived or modified. 10-9a-702(6)(b).

Variances run with the land. 10-9a-702(4). That is, they are not invalidated when one property owner sells the property to another property owner.

VARIANCE RULED VOID – REQUIRED FINDINGS NOT FOUND IN THE RECORD

WELLS V. SALT LAKE CITY BOARD OF ADJUSTMENT
UTAH SUPREME COURT – 2005 UT 82
Read the full case here.

ISSUE: What is the result when the appeal authority does not make the required findings when granting a variance request?

The Market Street Broiler on 1300 East in Salt Lake City was, when it existed at that location, considered an excellent food service establishment. It was located in an historic building which was once a fire station, an adaptive use for the structure encouraged by the city's landmarks ordinances at the time.

In order to use the landmark, however, a commercial occupant was required by the ordinance to create a minimum ten-food buffer strip of landscaping in a rear yard that abuts neighboring residences. That was no problem when the restaurant began operations, but business became so good that two dumpsters were required that were emptied once a day. The dumpsters were moved into the rear yard and neighbors complained that this eliminated the required buffer.

The ready solution was for the Salt Lake Board of Adjustment to grant a variance from the strict application of the ordinance, which it did after a hearing, stating only that "the neighborhood would be better served by addressing the garbage issue". The trial court then supported the variance on appeal. The Court of Appeals,

however, reversed, deeming the action of the Board of Adjustments to be illegal, and therefore null and void.

The Court simply pointed out that the code requires five separate findings to grant a variance and "vests no discretion for the board to grant variances for any other reason." It is not the courts' rule to "glean" or "divine" from the record that the Board properly considered the required criteria. With no substantial evidence in the record to support the required findings, the variance was therefore vacated.

The Board was therefore required to meet again, hear the variance request a second time, and provide the proper findings to support their decision. This appears to have been done, as the trash containers continue to be located behind the structure as shown in the attached photographs.

Reviewing Fee Appeals

This function by the appeal authority has been authorized by state law for a number of years but has received little attention in the land use community. The only guidance available for the appeal authority is provided in a few words of the statute. There is no case law on the subject.

The statute provides at 10-9a-510(c) that a municipality shall establish a fee appeal process subject to an appeal authority. The section of the state code that refers to the appeal authority also mentions this function at 10-9a-701.

The fees that may be challenged before the appeal authority include plan review fees 10-9a-510(1) and (2); hookup fees for utilities 10-9a-510(3) and 10-9a-103(18); and land use application fees 10-9a-510(4). This list does not include building permit fees for more than these listed items, but the building code itself may provide for appeals from decisions interpreting and applying the building code to another appeals body. Check the building code for more details.

A private provider of culinary or secondary water that commits to provide water service to land use development is subject to the appeal process for its hook-up fees just as the municipality would be. 10-9a-510(7). It is also subject to a challenge involving whether a fee charged to development is proportionate to the cost that the water provider bears as a result of that development. See 10-9a-510(7)(b) which refers to the exactions statute at 10-9a-508.

The fee appeal process involves determining whether a fee, if challenged, reflects only the reasonable estimated cost of regulation; processing an application; issuing a permit; or delivering the service for which the applicant or owner paid the fee. Some more detail on those issues is provided in the statute at 10-9a-510. Your local ordinance may provide other requirements as well, so be sure to check that.

Preparing Final Decisions

Must be in Writing. An oral pronouncement at a hearing is not a decision that can be appealed or considered final. To be final, the decision must be in writing, signed, and dated. The date of a written document is the date of the decision unless otherwise provided by the local ordinance. 10-9a-708(1).

A written notice of the decision provided by the appeal authority or the staff can sometimes serve as a sufficient writing to establish the date of the decision for purposes of appeal, even if the detailed findings of fact and conclusions of law are not included in that notice.

The minutes of a meeting can also serve as the written decision and provide the needed detail to support a decision made at an earlier meeting. This can work a hardship, however, on those who need to appeal the decision because of the delays involved. Sometimes when a summary notice is provided, the deadline to file an appeal passes before the person seeking to appeal has been provided the basis for the appeal. The better practice is to either provide the written notice and the findings and conclusions at the same time in a complete decision. This can be done whether the appeal authority announced its decision at a hearing or took the matter under advisement and issued the decision at a later time.

Must Include The essential concern is that the written decision be complete. First, it must include evidence to support each and every finding required by the ordinance. *Wells v. Salt Lake City Bd. of Adj.*, 936 P.2d 1102, 1104-1105, (UT App 1997). In *Wells*, the Salt Lake City Board of Adjustment did not address each of the five findings required (see above) to grant a variance. A neighbor challenged the decision in court and the Court of Appeals threw out the variance, stating that the Board was required to enter on the record adequate statements of fact and law to support each required finding that is required to justify a variance. Without that, the variance was invalid.

Under recent case law, *McElhaney v. Moab*, 2017 UT 65, the Utah Supreme Court reinforced this with emphasis, stated that administrative decisions must be in writing and supported by substantial evidence contained in a written record. The Court cited the United States Supreme Court which reasoned that when the legislature used the term "substantial evidence," it invoked appellate courts' recognition that the orderly functioning of the process of substantial-

evidence review requires that the grounds upon which the administrative agency acted be clearly disclosed, and that courts cannot exercise their duty of substantial-evidence review unless they are advised of the considerations underlying the action under review. *McElhaney* at ¶ 34 (citations and quotation marks omitted).

The Court continues to state that "although neither we, nor the court of appeals, have availed ourselves of prior opportunities to label substantial-evidence review a term of art, our cases have similarly reasoned that an administrative agency must 'make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review. . . On appeal, a court can perform its duty only if the council has created findings revealing the evidence upon which it relies, the law upon which it relies, and its interpretation of the law.'" *McElhaney* at ¶ 35 (citations and quotation marks omitted).

Thus a decision by the appeal authority can only be upheld if the district court can follow how the decision was made. This means that some written material associated with the decision must include adequate findings of fact and conclusions of law based on the record that was before the appeal authority and is preserved for the appeal. This requirement can be met by including findings and conclusions in a more formal separate written decision or by including them in the appeal authority's formally adopted minutes. The decision does not need to be lengthy and can summarize evidence and analysis and refer to more specific parts of the record without restating them verbatim.

WITH NO FINDINGS OR EVIDENCE TO SUPPORT IT, A CUP DECISION IS REVERSED AND REMANDED BACK TO THE CITY COUNCIL

MCELHANEY V. MOAB CITY
UTAH SUPREME COURT, 2017 UT 65
Read the full case here.

ISSUES: Are Findings and Analysis Essential to a Valid Decision?
What is substantial evidence in the record?
Will the court create a record where there is none?
If an administrative decision is invalid, what then?

This case involves an application for a conditional use permit for a bed-and-breakfast, which is allowed in the R-2 zone where their property is located.

The proposed facility would be the only bed-and-breakfast on a cul-de-sac of single-family residences. At a planning commission hearing, neighbors spoke of concerns about traffic, noise, parking, lighting, storm water drainage and general incompatibility with the neighborhood. The commission directed the staff to investigate and the McElhaneys addressed the concerns in a letter. The staff concluded that the B&B would generate less traffic than a single-family residence and that the proposed off-street parking met the requirements of the ordinance. The planning commission recommended approval, with conditions, and found that the McElhaneys could mitigate the negative impact of the B&B by abiding with those conditions.

The city council, as the land use authority, then heard the application. Again, the public which attended expressed concern with noise, traffic, tourists with loud Jeeps, UTV's, and ATV's. Nearly everyone who spoke worried about motorcycles or ATV's driving up and down past their homes multiple times. Also expressed were concerns with the safety of neighborhood children, the presence of commercial property in cul-de-sac, light pollution, decreased property values and possible road deterioration. The council denied the application on a 3:1 vote.

The council did not make explicit findings on whether the proposal met the requirements of the code. The record only included comments by each council member who explained their vote. For example: the proposed use did not meet the criteria that it be "consistent with the city of Moab general plan"; that it was "not an appropriate use"; and that "the tourism trade is just taking over and there's less and less space that belongs to locals." Another council member stated that "the clear intent of the [code language] was to listen to the people in the neighborhood and do what the neighborhoods wished."

At the district court, the judge expressed dismay at the council's failure to articulate the basis for its decision, that in the council's assumed role as fact finder, it didn't "actually find facts". The district court overturned the council's decision, stating that speculative evidence did not support a finding of undue increase in traffic. Concerns about increased noise constituted "mere speculation." Conditions proposed by the planning commission would have dealt with some of the concerns but were not considered. "The city has a responsibility to articulate what those negative effects are likely to be" and failed to do so. The McElhaneys had met the specified requirements to obtain a CUP. The only contrary evidence was not substantial, but speculative only and based on the expressed fears of neighbors. Moab appealed to the Supreme Court.

The Court reviewed the relevant state statute, which states that "conditional uses shall be approved if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards." Utah Code Ann. 10-9a-507(2). The opinion of the Court states that no councilmember spoke to the real issue before them: what were the reasonably anticipated detrimental effects and how were they to be mitigated?

The Court clarified what is required of local land use authorities and appeal authorities when making land use decisions. The "substantial evidence" standard for administrative review means that the decision-maker must "make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review." On appeal, a court can only perform its duty if the council has created "findings revealing the evidence upon which it relies, the law upon which it relies, and its interpretation of the law." The Court also held that the district court erred in attempting to divine the basis for the council's denial, stating that "it was the council's responsibility to define the basis for the decision, not the district court's."

The Supreme Court then sent the issue back to the city council, explaining that without further explanation by the council, "it is difficult to see how

placing a bed and breakfast in an area zoned R-2 – which specifically permits bed and breakfasts – is inconsistent with Moab's general plan." The council must provide for the record the required analysis of law and fact that would support the denial or issue the conditional use permit with suitable conditions.

There is today a bed and breakfast at the location of the property involved in this case. Details of the facility can be found here.

Appeals to the District Court

Once the appeal authority has completed its work, those involved have a 30-day deadline to file an appeal of the decision with the district court. 10-9a-801(2)(a); 10-9a-801(4), (5) and (6). There is an exception to the time limit for appeals related to constitutional takings questions which are the subject of arbitration with the property rights ombudsman. 10-9a-801(2)(b)(i).

Another exception applies where the statutory notice provisions related to the appeal authority's hearings process were not complied with and a third-party person brings a later challenge in the court. If that third party did not receive notice of a pending decision, either formally or informally, and the appeal authority did not comply with the LUDMA notice requirements in Section 2 of the state statute at 10-9a-201 et seq, then the 30-day period does not begin to run. This only applies if the third party is adversely affected by the decision. 10-9a-801(4). (See discussion of "adversely affected" under the Who Can Appeal section of these materials, above). The exception does not apply to the applicant or city officials – only to third parties. The third-party person's duty to challenge the decision arises at the time that they get either actual notice of the decision or "constructive notice" which generally means that they should have known about the notice. They duty to appeal and expires thirty days after that actual or constructive notice. *Fox v. Park City* 2008 UT 85 ¶¶ 35, 42.

If there is an appeal to the district court, the appeal authority must transmit to the reviewing court the record of its proceedings, including its minutes, findings, orders, and, if available, a true and correct transcript of its proceedings, which would normally be a transcription of the recording made. 10-9a-801(7)(a). The court will only review the record provided by the appeal authority. No new evidence will be admitted to the court unless the appeal authority refused to hear evidence which was offered to it and improperly excluded the evidence. 10-9a-801(8)(a).

On its face, the statute provides that if there is no record, the court may call witnesses and take evidence. 10-9a-801(8)(b). However, recent appellant court decisions have held that where there are insufficient findings and conclusions to support a decision, the matter should be instead remanded back to the local land use authority or the appeal authority for rehearing. *McElhaney v. Moab*, 2017 UT 65. The code was amended in 2019 to provide for that remand, at 10-9a-801(3)(d)(i), a provision that seems to conflict with 10-9a-801(8)(b).

The decision of the appeal authority is not stayed because it is challenged in court. 10-9a-801(9). A person who is planning to file in court or for arbitration with the ombudsman may request that the appeal authority stay its decision if that request is provided to the appeal authority before the litigation or arbitration request is filed. 10-9a-801(9)(b)(i). In that event, the appeal authority may order the decision stayed pending district court review if the appeal authority finds it to be in the best interest of the municipality. 10-9a-801(9)(b)(ii). There is no explanation in the code as to why the interests of the municipality are the only consideration for this, but that is what the law says. The person filing in court or with the ombudsman may also seek an injunction from the court to stay the decision of the appeal authority. 10-9a-801(9)(b)(iii).

When reviewing the decision of the appeal authority, the district court shall assume that a final decision by an appeal authority is valid, 10-9a-801(3)(b)(i), and uphold the decision unless the decision is arbitrary and capricious or illegal. 10-9a-801(3)(b)(ii).

A decision is arbitrary and capricious if it is not supported by substantial evidence in the record. 10-9a-801(3)(c)(i). A decision is illegal if the decision is based on an incorrect interpretation of a land use regulation or contrary to law. 10-9a-801(3)(c)(ii).

The district court may either reverse or affirm the decision of the land use authority, 10-9a-801(3)(d)(i), stepping into the role of the appeal authority to reconsider the matter under the standards above. If the decision below was flawed, the court may remand the matter back to the land use authority with instructions to issue a decision consistent with the court's ruling. 10-9a-801(3)(d)(ii). Note that the matter does not come back to the appeal authority.

The court may award attorney fees against a party that initiates or pursues a challenge to a land use decision on a land use application in bad faith. 10-9a-801(10). This recent addition to the code appears to be a clear signal to third parties who wish to frustrate development by litigation that they do so at their peril. They may be required to pay the costs involved for those who were entitled to land use approvals and received them properly if the third-party litigation was filed for purposes of unreasonable harassment and delay.

1. **Ordinances Applicable to an Application.** An applicant who has filed a complete land use application, including the payment of all application fees, is entitled to substantive land use review of the land use application under the land use laws in effect on the date that the application is complete. Such an application is not subject to later changes in the ordinances. 10-9a-509.
2. **Specifications.** The land use laws related to a complete application include a municipal specification for public improvements applicable to a subdivision or development. 10-9a-509 (1)(a)(ii).
3. **Entitlement to Approval.** An applicant is entitled to approval of a land use application if the application conforms to the requirements of the municipality's land use maps, zoning map, a municipal specification for public improvements applicable to a subdivision or development, and an applicable land use ordinance in effect when a complete application is submitted and all application fees have been paid. 10-9a-509. *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980)
4. **Exceptions.** The applicant of a complete application is not entitled to approval, even though the application conforms to the applicable ordinances, if:
   a. the land use authority, on the record, finds that a compelling, countervailing public interest would be jeopardized by approving the application, or
   b. in the manner provided by local ordinance and before the application is submitted, the municipality has formally initiated proceedings to amend its ordinances in a manner that would prohibit approval of the application as submitted. 10-9a-509(1)(a)(ii). *Western Land Equities v. Logan,* 617 P.2d 388 (Utah 1980)
5. **Approval Requirements.** A municipality may not impose on an applicant who has submitted a complete application for preliminary subdivision approval a requirement that is not expressed in the state LUDMA, a municipal ordinance; or a municipal specification for public improvements

applicable to a subdivision or development that is in effect on the date that the applicant submits an application.

1. **Structure.** "Noncomplying structure" means a structure that:
   a. Legally existed before its current land use designation; and
   b. Because of one or more subsequent land use ordinance changes, does not conform to the setback, height restrictions, or other regulations, excluding those regulations, which govern the use of land. 10-9a-103(41)
2. **Use.** "Nonconforming use" means a use of land that:
   a. Legally existed before its current land use designation;
   b. Has been maintained continuously since the time the land use ordinance governing the land changed; and
   c. Because of one or more subsequent land use ordinance changes, does not conform to the regulations that now govern the use of the land. 10-9a-103(42)
3. **Vested Rights.** Uses and structures may be continued, except as provided by 10-9a-511 of LUDMA. The present or a future property owner may continue the use or structure. 10-9a-511(1)(a)
4. **Regulations.** Local ordinances may regulate these aspects of nonconforming uses:
   a. Establishment;
   b. Restoration;
   c. Reconstruction;
   d. Extension;
   e. Alteration;
   f. Expansion;
   g. Substitution;
   h. Termination through amortization: 10-9a-511(2)(a)
      i. Must provide a formula;
      ii. Formula must allow the owner to recover his investment;

iii. Over a reasonable time;

iv. May not terminate billboards through amortization;

i. Termination through abandonment. 10-9a-511(2)

j. A municipality may not require physical changes to install an egress or emergency escape window in an existing bedroom if

(1) it complied with the state construction code in place when the bedroom was finished;

(2) the dwelling is owner-occupied, a detached 1-4 family dwelling, or a townhome and the window in the existing bedroom is smaller than required by the current codes; and

(3) the change would compromise the structural integrity of the structure or could not be completed in accordance with current building code, including set-back and window well requirements.

Municipalities may regulate the style of window that is allowed in a bedroom; require that an existing window be openable; and require that the existing window not be reduced in size.

5. **Extension Throughout Structure.** A nonconforming use may be extended through the same building unless the extension involves a structural alteration. 10-9a-511(1)(b)

6. **Casualty.** The right to continue a nonconforming use or structure is not terminated by fire or other calamity:

   a. That destroys a structure in whole or part;

   b. Unless intentionally destroyed; or

   c. Unless abandoned. 10-9a-511(3)(a); *Rock Manor Trust v. State Road Comm.*, 550 P.2d 205 (Utah 1976)

7. **Deterioration.** If the structure involved is allowed to deteriorate and rendered uninhabitable, the nonconforming use or noncomplying structure status may be terminated by the municipality if:

   a. The structure is not restored within six months;

   b. After written notice;

   c. To the property owner;

d. That the structure is uninhabitable; and

e. That the nonconforming use or noncomplying structure status will be lost;

f. If not repaired or restored within six months. 10-9a-511(3)(b)(i)

8. **Demolition.** A nonconforming structure, or nonconforming use of a nonconforming structure, can be terminated if the owner has voluntarily demolished more than 50% of the nonconforming structure or the building that houses the nonconforming use. 10-9a-511(3)(b)(ii)

9. **Burden.** The property owner has the burden of establishing legal existence unless the municipality has enacted an ordinance allowing a presumption of existence. Once established, the person claiming abandonment has the burden to prove abandonment. 10-9a-511(4)(a) and (b)

10. **Abandonment.** Abandonment of a nonconforming use may be presumed if:

a. A majority of the primary structure associated with the use has been voluntarily demolished without written prior agreement with the municipality to extend the use; or

b. The use has been discontinued for a minimum of a year; or

c. The primary structure associated with the use remains vacant for a year; 10-9a-511(4)(c)

d. A presumption of abandonment under 511(4)(c) may be rebutted by the owner who shall bear the burden of establishing that abandonment has not occurred; 10-9a-511(4)(d)

e. If the abandonment occurs because of the passage of time, one year minimum, even if the cessation of the use is involuntarily, the use is terminated, based upon local ordinance. 10-9a-511(4)(c)(ii); *Rogers v. West Valley City*, 2006 UT App 302 (WVC statute said that after discontinuance of one year the use "shall" be considered abandoned)

11. **Schools.** A municipality may terminate a school use or structure if:

a. The property or structure is abandoned for a period established by local ordinance; and

b. The school is operated by a school district or charter school. 10-9a-511(5)

Conditional Uses

1. **Optional.** A municipality may allow for conditional uses by ordinance. 10-9a-507(1)
2. **Standards.** If conditional uses are allowed, the ordinance must require compliance with standards set forth in the ordinance. A conditional use permit application may not be denied unless the denial is based on standards in the ordinance. 10-9a-507(2)(a); *Uintah Mtn. RTC v. Duchesne County*, 2005 UT App 565, ¶ 21.
3. **Review.** Conditional uses shall be approved if:
   a. Reasonable conditions can be imposed to mitigate the reasonably anticipated detrimental effects of the proposed use;
   b. In accordance with applicable standards. 10-9a-507(2)(a)
   c. A decision related to a conditional use must be based on substantial evidence in the record. It cannot be based on "vague reservations" expressed by members of the land use authority or members of the public. Public clamor cannot be the basis for a decision related to a conditional use application. *Davis County v. Clearfield*, 756 P.2d 704, 711-712 (Utah 1988); *Wadsworth v. West Jordan*, 2000 UT App 49, ¶ 17-18.
4. **Denial.** Conditional uses may be denied only if the reasonably anticipated detrimental effects of the proposed use cannot be substantially mitigated by reasonable conditions imposed in accordance with applicable standards. 10-9a-507(2)(b)
5. **Expiration.** A conditional use permit is extinguished if the conditions are not met before conditions change so that the approved use cannot be effected. *Keith v. Mountain Resorts Dev.* 2014 UT 32.

Exactions

1. **Definition.** Exactions are conditions imposed by governmental entities on applicants for the issuance of a building permit, subdivision plat approval, or other land use application. *B.A.M. Dev., L.L.C., v. Salt Lake County*, 2006 UT 2, ¶ 4.
   a. Exactions may take the form of:
      i. Mandatory dedication of land for roads, schools, or parks as a condition to plat approval;
      ii. Fees-in-lieu of mandatory dedication;
      iii. Water or sewage connection fees;
      iv. Impact fees; *B.A.M. Dev., L.L.C., v. Salt Lake County*, 2006 UT 2, ¶ 34.
      v. In-kind exactions; *B.A.M. Dev., L.L.C., v. Salt Lake County*, 2004 UT App 34, ¶ 14.
   b. An "exaction" may be legal or illegal. The term "exaction" may be used for both appropriate and inappropriate conditions imposed on development. *Dolan v. City of Tigard*, 512 US 374 (1994): *Nollan v. California Coastal Commission*, 483 US 825.
2. **Allowed.** A municipality may impose exactions. 10-9a-508
3. **Necessary Formality.** Since a land use application is entitled to approval if it complies with the relevant ordinances, an application cannot be denied if an exaction is refused unless that exaction is authorized by an ordinance or building standard adopted by ordinance. 10-9a-509(1)
4. **Valid Purpose.** An exaction may only be imposed if the exaction involves a legitimate use of municipal power. 10-9a-508(1)
5. **Related to Project Burdens.** Each exaction can only be imposed in response to some burden created by the development. 10-9a-508(1)(b); *B.A.M. Dev., L.L.C., v. Salt Lake County*, 2008 UT 45, ¶13
6. **Burden on the Municipality.** The burden that is to be offset by exactions imposed by a municipality must be a burden that the municipality would otherwise bear. A municipality may only impose and exaction for another

governmental entity if that other entity requests it and the exaction is transferred to that entity. 10-9a-508(2).

7. **Equivalence.** The burden created by the exaction must be roughly equivalent to the burden created by the development. 10-9a-508(1)(b) In other words, the cost to the applicant to comply with exactions imposed on the development must be roughly equivalent to the cost that the public would bear if the burdens created by the development absent the exactions. *B.A.M. Dev. L.L.C. v. Salt Lake County*, 2008 UT 45 par 13

8. **Resale of Property.** A municipality may not dispose of property acquired through an exaction within fifteen years of receiving the property without first offering to reconvey the property back to the person who conveyed it to the municipality as provided for in 10-9a-508(3).

6. **Post-Approval Requirements.** A municipality may not impose on a holder of an issued land use permit or a final, unexpired subdivision plat a requirement that is not expressed in a land use permit, on the subdivision plat, in a document on which the land use permit or subdivision plat is based, in the written record evidencing approval of the land use permit or subdivision plat, in the state LUDMA, or in a municipal ordinance.

Checklist | Appeals from Decisions Applying the Land Use Ordinance

- ☐ 1. Determine that a final land use decision has been rendered by a land use authority.
- ☐ 2. Determine that the request for appeal was filed in a timely manner. State law allows the local ordinance to set a deadline to appeal. If no deadline is set by ordinance, the person bringing the appeal has ten days calendar days after the land use decision has been rendered in writing. If the appeal was not timely made, the appeal authority has no jurisdiction and may not hear the matter.
- ☐ 3. Determine that the request for appeal is sufficiently complete for consideration. If it is incomplete, tell the appellant, specifically, how the appeal is deficient.
- ☐ 4. Determine that all appeal fees have been paid.
- ☐ 5. Place the item on an agenda for the appeal authority, if the appeal authority is composed of a board or commission that includes more than one person.
- ☐ 6. Provide the required notice of the meeting to consider the application. A public hearing is not required by state law but may be required by local ordinance.
- ☐ 7. Provide the appellant with the staff report or other municipal documents to be relied upon 3 days prior to the meeting or hearing.
- ☐ 8. Review standards in the local land use ordinance and state law that apply to the consideration of the appeal.
- ☐ 9. Verify that the appeal authority is impartial and free of bias from conflicts of interest with regard to the matter before it.
- ☐ 10. Conduct the meeting, and, if a hearing is required by local ordinance as part of the consideration of an appeal application, a hearing. A hearing is not required by state law.
- ☐ 11. Act in a quasi-judicial manner and gather evidence impartially. Afford the applicant and the appellant due process, which includes the rights of notice, to be heard, to confront witnesses, and to respond to evidence submitted by others. Note: To act in a quasi-judicial manner includes the restriction of ex-parte communications between any member of the appeal authority and any individual wishing to discuss the appeal outside of a hearing. All information must be made available to all members of the appeal authority as well as both the appellant and appellee. This allows both sides the opportunity to confront witnesses and respond to evidence submitted by others.
- ☐ 12. If there is no standard of review provided for in the local land use ordinance, consider the appeal "de novo," which means that the appeal authority may look at the issue as a new issue, as if the matter had not been decided before. The appeal authority, if acting "de novo," does not need to defer to the prior decision of the land use authority. If the ordinance provides for a different standard of review, follow the local ordinance.

☐ 13. Allow the person bringing the appeal to present evidence supporting his or her appeal. The person bringing the appeal has the burden to show that the previous decision was in error. If the person does not meet this burden, dismiss the appeal.

☐ 14. If a person appears in opposition to the appeal and will be adversely affected if the appeal is granted, allow him or her to present evidence supporting his or her point of view. While the procedure need not be overly formal, allow each side to respond to the evidence presented by the other side.

☐ 15. Deliberate. Since an appeal authority is a quasi-judicial body, its deliberations may be conducted in private. Consider evidence that is before the appeal authority that is both relevant and credible related to the issue on appeal. Neither party to the appeal may join in the private deliberations, including the planning staff if they are defending the city's decision and are therefore a party. After considering the standards and the evidence, determine which view of the matter is correct.

☐ 16. In interpreting the law or ordinance, look to its plain language. If the ordinance has been interpreted in the past, be consistent with prior interpretation. If the ordinance is ambiguous, interpret ambiguities in a light favorable to the use of property. If it is not ambiguous, give effect to the intent of the legislative body that enacted the law or ordinance. Harmonize conflicting provisions so that they can be reconciled. Do not impose an absurd or unreasonable result.

☐ 17. If, in the opinion of the appeal authority:

- ☐ a. The appellant has provided substantial evidence in the record to support his or her point of view, and there is no substantial evidence to the contrary, approve the appeal.
- ☐ b. The appellant has failed to provide substantial evidence in the record to support his or her point of view, deny the appeal.

☐ 18. Support the action of the appeal authority with evidence in the record, identifying the evidence that the appeal authority relied upon in its decision. The decision must be supported by substantial evidence in the record and not solely by public clamor. The appeal authority may be assisted by professional staff.

☐ 19. Preserve the record of the proceedings to document the law and evidence that was considered by the appeal authority before it made a decision related to the application.

Notes and Practice Tips

The action taken by an appeal authority is legal only if it is supported by substantial evidence in the record. “Substantial evidence” is evidence that is relevant and credible. To be relevant, it must relate to the standards in the ordinance and state law related to the review of applications for variances. To be credible, it must be objective and independent.

Public clamor is not substantial evidence. Evidence is independent—it stands on its own and is not based on public opinion. For the average person, either participating in a land use decision as a member of the appeal authority or as a citizen, his opinion is not evidence. Evidence is the justification—the facts—that are the basis for the opinion.

The professional opinions of planners, real estate appraisers, engineers and other experts is considered substantial evidence and may be relied upon in the process of fact-finding if the appeal authority considers the information to be credible and relevant. The opinion of these expert witnesses who are found to be qualified to testify in their field of expertise can be substantial evidence if proper information is provided supporting the qualifications of the persons expressing the opinions.

Checklist | Variances

☐ 1. Determine that a variance from the strict application of the land use ordinance could be appropriate for the physical circumstances involved with a potential application. Use variances are not allowed.

☐ 2. Determine that the variance application is sufficiently complete for consideration.

☐ 3. Determine that the variance fee has been paid.

☐ 4. Place the item on an agenda for the appeal authority.

☐ 5. Provide the required notice of a meeting to consider the application. A public hearing is not required by state law, but may be required by local ordinance. If the appeal authority is composed of a board or commission that includes more than one person, then notify the members of the appeal authority of the meeting.

☐ 6. Review standards in the local land use ordinance and state law (Utah Code Ann. §10-9a-702) that apply to the consideration of a variance. They are stated in item 10 of this checklist.

☐ 7. Verify that the appeal authority is impartial and free of bias from conflicts of interest with regard to the matter before it.

☐ 8. Conduct the meeting, or a public hearing if required by local ordinance as part of the consideration of the variance application. A public hearing is not required by state law.

☐ 9. Act in a quasi-judicial manner and gather evidence impartially. Afford the applicant due process, which includes the rights of notice, to be heard, to confront witnesses, and to respond to evidence submitted by others. This includes the restriction of ex-parte communications between any member of the appeal authority and any individual wishing to discuss the appeal. All information must be made available to all members of the appeal authority as well as both the appellant and appellee. This allows both sides the opportunity to confront witnesses and respond to evidence submitted by others.

☐ 10. Deliberate. Since an appeal authority is a quasi-judicial body, its deliberations may be conducted in private. Consider evidence that is before the appeal authority that is both relevant and credible related to the proposed variance. After considering the standards and the evidence, determine if the applicant has met his or her burden to establish by substantial evidence each of the required findings:

- ☐ a. Literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances. An unreasonable hardship can only be found when the alleged hardship:
  - ☐ i. Is located on or associated with the property and not from conditions that are general to the neighborhood;

☐ ii. Comes from circumstances peculiar to the property, and not from conditions that are general to the neighborhood;

☐ iii. Is not self-imposed;

☐ iv. Is not primarily economic, although there may be an economic loss tied to the special circumstances of the property; and

☐ b. There are special circumstances attached to the property that do not generally apply to other properties in the same zone. The appeal authority may find that special circumstances exist only if the special circumstances:

☐ i. Relate to the hardship complained of; conditions that are general to the neighborhood;

☐ ii. Deprive the property owner of privileges granted to other properties in the same zone; and conditions that are general to the neighborhood;

☐ iii. Are not simply common differences between the property and others in the area.

☐ c. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone; and

☐ d. The variance will not substantially affect the general plan and will not be contrary to the public interest; and

☐ e. The spirit of the land use ordinance is observed and substantial justice done.

☐ 11. If, in the opinion of the appeal authority:

☐ a. The applicant has provided substantial evidence in the record to support all five of the required findings, and there is no substantial evidence to the contrary, approve the variance.

☐ b. The applicant has failed to provide substantial evidence in the record to support any one of the five required findings, deny the variance.

☐ 12. Support the action of the appeal authority with evidence in the record, identifying the evidence that the appeal authority relied upon in its decision. The decision must be supported by substantial evidence in the record and not solely by public clamor.

☐ 13. Preserve the record of the proceedings to document the law and evidence that was considered by the appeal authority before it made a decision related to the application. Remember, any appeal of the decision is to district court.

Notes and Practice Tips

The action taken by an appeal authority is legal only if it is supported by substantial evidence in the record. "Substantial evidence" is evidence that is relevant and credible. To be relevant, it must relate to the standards in the ordinance and state law related to the review of applications for variances. To be credible, it must be objective and independent.

Public clamor is not substantial evidence. Evidence is independent—it stands on its own and is not based on public opinion. For the average person, either participating in a land use decision as a member of the appeal authority or as a citizen, his opinion is not evidence. Evidence is the justification—the facts—that are the basis for the opinion.

The professional opinions of planners, real estate appraisers, engineers and other experts is considered substantial evidence and may be relied upon in the process of fact-finding if the appeal authority considers the information to be credible and relevant. The opinion of these expert witnesses who are found to be qualified to testify in their field of expertise can be substantial evidence if proper information is provided supporting the qualifications of the persons expressing the opinions.